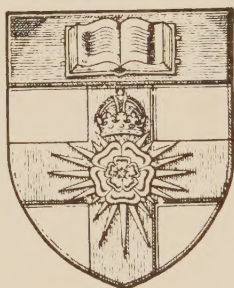


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| <i>To proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers</i> .. .. . | 516, 1105 |
| <i>Unjust or oppressive or too severe a punishment to return the fugitive</i> .. .. .                                    | 283       |
| <i>Unlawful sub-letting</i> .. .. .                                                                                      | 627       |
| <i>Until vivisection shall be made a punishable offence</i> .. .. .                                                      | 689       |
| <i>Unusual danger</i> .. .. .                                                                                            | 180       |
| <i>Wilful obstruction</i> .. .. .                                                                                        | 1016      |
| <i>Willing and able to purchase</i> .. .. .                                                                              | 91, 856   |

# CORRIGENDA

- [1948] Vol. 2.  
P. 914. DENNIS REED, LTD. v. NICHOLLS. Line F.1: for "introduction to the purchaser" read "introduction to the vendor."  
P. 1065. HUNT v. MORGAN. Case Referred to: for "[1942]" read "[1947]."  
[1949] Vol. 1.  
P. 975. MALLETT v. DUNN. Line E.6: for "a tort done by his wife" read "a tort done to his wife."  
[1949] Vol. 2.  
P. 871. WELCH v. NAGY. Lines C.1 and 2: for "the present landlord" read "the present tenant."  
[1950] Vol. 1.  
P. 71. JONES v. WHITEHILL. Counsel: read "*Blennerhassett* for the landlord. *C. G. Heron* for the niece of the deceased tenant's wife" instead of as printed. P. 72. Solicitors: read "*Sharpe, Pritchard & Co.*, agents for *Bailey, Cox, Bosworth & Co.*, Birmingham (for the landlord); *Underwood & Co.*, agents for *J. Foley Egginton & Co.*, Sutton Coldfield (for the niece)" instead of as printed.  
P. 264. R. v. SOMERSET, JJ. Lines A.3, E.6, H.1: for "Town and Country Planning Act, 1944," read "Town and Country Planning Act, 1947, s. 23."  
P. 428. HARRIES v. ASHFORD. Counsel: for "*H. W. Springer*" read "*T. Springer*."  
P. 922. DENNIS REED, LTD. v. GOODY. Line C.2: for "plaintiffs" read "defendants."  
P. 1099. *Re* MORGAN'S WILL TRUSTS. Solicitors: after "*Ravenscroft, Woodward & Co.*" read "agents for *Woolcombe & Yonge*, Plymouth." After "*Gibson & Weldon*" read "agents for *Edwin Broad & Spencer*, Devonport."





# THE ALL ENGLAND LAW REPORTS

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## INLAND REVENUE COMMISSIONERS *v.* JOHN DOW STUART, LTD.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), October 18, 19, December 14, 1949.]

*Income Tax—Deduction—Excess profits tax—Adjustment of excess profits tax over five years—Right of taxpayer to deduct excess profits tax payable in each year and not merely the adjusted figure—Finance (No. 2) Act, 1939 (c. 109), s. 15 (2), s. 18 (1).*

The Finance (No. 2) Act, 1939, by which excess profits tax was imposed, provides by s. 15 : “(2) Where a deficiency of profits occurs in any chargeable accounting period in any trade or business, the profits chargeable with excess profits tax arising from the trade or business shall be deemed to be reduced, and relief shall be granted in accordance with the following provisions :—(a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency, and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly, and the relief necessary to give effect to the reduction shall be given by repayment or otherwise ; (b) where the amount of the deficiency exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, the balance of the deficiency shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and, if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period, and so on.” By s. 18 : “(1) The amount of the excess profits tax payable in respect of a trade or business for any chargeable accounting period shall, in computing for the purposes of income tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period : Provided that where, under the provisions of this Act relating to deficiencies of profits, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under this section shall not be altered but the amount repayable shall be taken into account in computing the profits and gains of the trade or business for the purposes of income tax as if it were a profit of the trade or business accruing in the chargeable accounting period in which the deficiency occurs.”

The amounts of the profits of a company chargeable to income tax before making adjustments in respect of excess profits tax payable and repayable were : in 1940, a profit of £4,838 ; in 1941, profit and interest £2,477 ; in 1942, a profit of £5,783 ; in 1943, a loss of £7,645 ; and in 1944, a profit of £550. There were deficiencies of profits in 1943 and 1944. In 1943 the company made a payment of £1,000 on account of excess profits tax, and, as its total net liability over the whole period for which the tax was imposed was found to be £517, in 1946 £483 was repaid. In arriving at the adjust-

ments to be made in respect of excess profits tax for the purposes of income tax, the company claimed to deduct as an expense incurred in each year the amount of excess profits tax finally agreed to be payable in respect of that year, notwithstanding that the aggregate amount of profits were deemed to be reduced by subsequent deficiencies under s. 15 (2). The Revenue contended that the effect of s. 15 (2) was to cause deficiencies to be deemed to be set off year by year against the excess profits which would otherwise be chargeable to tax, and that, when the aggregate amount of the profits chargeable for the previous accounting periods had been so deemed to be reduced under s. 15 (2), the amounts of excess profits tax agreed in respect of those periods were not "payable" within s. 18 (1) and so not deductible as expenses. A

HELD (LORD MORTON OF HENRYTON dissenting) : there was no indication in s. 15 (2) that the computation of excess profits for any chargeable accounting period before that in which the deficiency occurred was to be re-opened, and the reduction which, under that sub-section, was to be deemed to be made was to be against "the aggregate amount of the profits . . . for the previous chargeable accounting periods." In the first part of s. 18 (1), on the other hand, each chargeable accounting period was treated as a separate entity, and the actual figures were under consideration and not those deemed to exist for the purpose of deficiency deductions. This view was supported by the proviso to s. 18 (1), the effect of which was that, though the amount of a subsequent deficiency might reduce the previous excess profits, the reduction was to affect the total sum of those profits, and was not to be regarded as altering the actual periodic profits of any previous chargeable accounting period, and, therefore (LORD MACDERMOTT dissenting as to the years 1943 and 1944) the company's method of arriving at the adjustments to be made was the right one. B  
C  
D

[FOR THE FINANCE (No. 2) Act, 1939, s. 15 (2) and s. 18 (1), see HALSBURY'S STATUTES, Vol. 32, pp. 1199, 1203, 1204.]

Case referred to :

- (1) *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C. 647 ; 66 L.J.Ch. 726 ; 77 L.T. 284 ; 61 J.P. 820 ; *affg.*, S.C. *sub nom.*, *West Derby Union Guardians v. Metropolitan Life Assurance Society*, *West Derby Union Guardians v. Priestman*, [1897] 1 Ch. 335 ; 42 Digest 659, 680. E

APPEAL by the Crown against an interlocutor pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland on a Case Stated under the Income Tax Act, 1918, s. 149. F

The respondents, a limited company, were assessed to income tax under sched. D to the Income Tax Act, 1918, for the years 1941 to 1946 in certain sums, and they appealed against those assessments to the General Commissioners of Income Tax for the Lower Ward of Lanarkshire. They contended that they were entitled, on the true construction of the Finance (No. 2) Act, 1939, s. 18 (1), to deduct as an expense for income tax purposes the amount of the excess profits tax agreed to be payable in respect of the relevant chargeable accounting period, notwithstanding the fact that, by reason of subsequent deficiencies of profits, that amount was, by virtue of s. 15 (2) of that Act, deemed to be reduced. The General Commissioners accepted the submission of the company, and the First Division affirmed their decision. The House of Lords, by a majority, now dismissed the Crown's appeal. The facts appear in the opinion of LORD MORTON OF HENRYTON. G  
H

*The Solicitor-General (Sir Frank Soskice, K.C.), the Solicitor-General for Scotland (Douglas Johnston, K.C.), H. A. Shewan, K.C. (of the Scottish Bar), and R. P. Hills for the Crown.*

*R. P. Morison, K.C., and J. G. Wilson (of the Scottish Bar) for the company.*

The House took time for consideration.

Dec. 14. **LORD PORTER** : My Lords, this is an appeal from a decision of the First Division of the Court of Session upon a Case Stated under the Income Tax Act, 1918, s. 149. It is concerned with the proper method of ascertaining what the liability to income tax is where there has been a reduction and repayment of excess profits tax. The facts are succinctly stated in the Special Case, have been set out by **LORD MORTON OF HENRYTON**, and need not be repeated. As appears from the case, two opposing methods have been suggested for computing the profit of the respondents for income tax purposes where repayment or deduction of excess profits tax comes into question. One is that adopted by the subject and the other that adopted by the Crown. The commissioners accepted that put forward by the subject and asked whether they were right in so doing. The Court of Session upheld their view and the Crown now appeal from that decision.

In substance, the solution of this controversy depends upon the true construction of the terms of the Finance (No. 2) Act, 1939, s. 15 and s. 18. Excess profits tax is imposed by s. 12 of that Act; under s. 14 the profits of the standard period or of any chargeable accounting period are to be separately computed; and s. 21 makes excess profits tax payable one month after assessment; but these provisions have at best only an indirect bearing on the point at issue. Your Lordships are concerned not with profits themselves, but with the method by which relief is given to the taxpayer where profits and excess profits have been earned in one or more years and a deficiency of profit has occurred in a later year or years. Section 15 (1) merely provides the method by which the amount of a deficiency is to be ascertained. Sub-section (2) is concerned with the manner in which that deficiency is to be treated. It begins by asserting that in case of deficiency in any chargeable accounting period the profits chargeable with excess profits tax shall be deemed to be reduced. Read without any further explanatory words, I should myself understand that statement to mean that the totality of that portion of the profits which is so chargeable and has been earned before a deficiency occurs is to be diminished by the amount of the deficiency occurring in any subsequent chargeable accounting period, not that any particular accounting period was to suffer such reduction. This view is supported by the statement in para. (a) of that sub-section which provides that the *aggregate* of profits so chargeable for the previous accounting periods is to be deemed to be reduced, and as a consequence the amount of excess profits tax payable is to be reduced accordingly. It is the aggregate of the excess profits of previous accounting periods which is to be reduced, not those of each separate period; and this expression must, I think, mean that whereas each deficiency is to be written off against previous excess profits as it occurs, the excess profits are not to be divided into their constituent parts but treated as a lump sum regardless of when they have been obtained. Therefore, no provision is made in the sub-section for attributing the deficiency to any particular past year—the whole deficiency is to be written off against the totality of excess profits previously made. It may wipe them completely out, it may only reduce them in part. It may however happen that the deficiency exceeds the excess profits earned in former years, and this last case is dealt with in s. 15 (2) (b) which enacts that if the deficiency exceeds the aggregate amount of the profits chargeable to excess profits tax, the balance is to be applied in reduction of such profits in future years, the profits of each year in turn being reduced by the amount of the deficiency remaining unrelieved until the whole of the deficiency has been made up. It is not unnatural that, where there has first been the incidence of excess profits and then a deficiency, those profits should be added together and the deficiency treated as a reduction of the aggregated sum. But this method of procedure gives no ground for implying that the deficiency is to be written off each year's excess profits as a separate entity, starting with the first and



continuing year after year until the whole has been wiped out. Where the law adopts the last-mentioned method it can say so in plain terms and does so in s. 15 (2) (b) where future years are being dealt with.

I find nothing in these provisions to say that the whole accounts are to be re-opened for the purpose of calculating to what sum profits, whether subject to excess profits tax or not, amount or what sum is deductible from the excess profits of any particular period, nor do I see any reason why the true figures should not continue to prevail. The actual profits and the actual sums chargeable with excess profits tax for each period remain constant and can be accurately set out, and those figures are unaffected by the circumstance that the aggregate sum due for excess profits tax may have to be reduced. Section 15 is not concerned with individual chargeable accounting periods where the past is concerned. It aggregates past gains until there is a deficiency, and then deducts this deficiency from the aggregate sum. When this has been done, the section provides that relief shall be given by repayment or otherwise, and this must, I think, mean that it can be given either by a cash payment or in any other way in which a debt can be discharged, *e.g.*, by set off against a debt due to the Crown.

Section 18 deals with a different question. By reason of its terms and by them alone, excess profits due in respect of any chargeable accounting period are deductible from the total profits earned for the purpose of ascertaining the profits chargeable to income tax for that period. The first portion of that section is not to my mind confined to cases where a deduction is claimable. It is applicable to all cases and primarily to a case where there has been no deficiency. Moreover, it treats each chargeable accounting period as a separate entity, and, *prima facie* at any rate, has under consideration the actual figures, not those deemed to exist for the purpose of deficiency deductions. In my opinion, the proviso which follows supports this view. As I read it, though the amount of a subsequent deficiency may reduce the previous excess profits in whole or in part, the reduction is to, or is to be deemed to, affect the total sum of those profits, and is not to be regarded as altering the actual periodic profits of any previous chargeable accounting period which have already been or may thereafter be ascertained. The amount of the deduction allowed to be subtracted from profits because they were subject to payment of excess profits tax, is not to be altered, but the sum deducted is to be attributed as a profit to the chargeable accounting period in which the deficiency occurs. For myself I find it difficult to understand what "the deduction allowed under this section shall not be altered" means, or what deduction is referred to, unless it refers to the deduction given after ascertaining what the actual profits were for the relevant period and what the consequent sum originally subjected to excess profits tax amounts to. I do not know why it should be contemplated that the reduced sum on which excess profits tax is imposed should be subsequently altered, or what state of facts would make it desirable to alter it. The section is concerned with the question of excess profits tax payable over the whole period during which the Act is in force, and is not meant to alter the income tax already assessed or assessable in respect of each separate accounting period. The aggregate amount of excess profits tax alone is to be diminished. Indeed that is all with which the opening words of s. 15 (2) (a) deal. In my opinion, this construction provides a coherent and comprehensive scheme requiring as little alteration as possible in figures already ascertained, and is in accordance with the provision in s. 21 which contemplates an ascertainment of the excess profits tax due in respect of each period and its payment one month after assessment.

The Crown, however, say that such a construction gives the go by to two vital considerations, and neglects the express wording of the sections. In the first place they contend that s. 15 and s. 18 appear in the same *fasciculus* of the Act, and each must be read in the light of the other. Section 15 (2), they say, provides that profits shall be deemed to be reduced by the amount of the

deficiency, and that result cannot be attained without also reducing to that extent the sums chargeable with excess profits tax in each chargeable accounting period, and it is this latter sum so reduced which is ultimately to be deducted from the total profits attributable to each accounting period. If, then, the sum chargeable with excess profits tax be reduced by the amount of the deficiencies, and the result is to reduce it to nothing, there is no excess profits tax payable and therefore none deductible under s. 18 (1). It is, they maintain, the ultimate sum on which excess profits tax is payable which is deductible from the profits liable to pay income tax, not the provisional sum which is arrived at by taking account of an individual year's working. I doubt if this interpretation gives enough weight to the use of the word "deemed" or to the fact that the relief granted is confined to a reduction in the aggregate amount of profits over all the years. Both seem to me to point to an inference that the deduction is to give relief in respect of overpaid or over-payable excess profits tax, and nothing more, but any doubt which might exist is, in my opinion, set at rest by the enactment in the proviso to s. 18 (1) that the amount of the deduction allowed under the section shall not be altered. The Revenue representatives meet this argument by contending that the words "the amount of excess profits tax payable" in s. 15 (2) and s. 18 (1) must be read as meaning ultimately payable, *i.e.*, the sum payable after the appropriate deduction for deficiency has been made. Even, however, in s. 15 (2), "payable" appears to me to refer to the actual and not the reduced figure. The sum payable remains what it previously was, but it is to be deemed to be reduced for the purpose of giving relief, and for that purpose only. Nor do I see any reason for construing the wording of s. 18 (1) as meaning ultimately payable. The phraseology might indeed be capable of meaning either the excess profits tax payable on the actual figures appertaining to the particular period, or the reduced amount after deducting the permissible deficiencies. The provision that the deduction allowed is of the excess profits tax payable in respect of any chargeable accounting period might of itself tend to cause a preference for the earlier version, but, as I have already indicated, the provision against alteration of the amount of the deduction allowed is in my view decisive.

In the second place, the appellants contend that, even if the conclusion indicated is to be preferred, nevertheless the proviso to s. 18 (1) is only applicable to a case where, and to the extent to which, actual payment and repayment have been made. Had the respondents paid the excess profits tax in full on the figures agreed before any deduction for later deficiencies, then, in their submission, relief would have been claimable, the proviso would apply and the amount of the deduction already allowed could not be altered. In the present instance, however, only £1,000 has been paid, and for that sum credit has been given. Apart from the payment of the £1,000 and repayment of £483 found to have been overpaid when the final liability was ascertained, no sum was paid or repaid in respect of excess profits tax. Repayment, it is said, is used in that section in its strict sense of a cash payment; where anything other than cash payment is intended the Act is explicit in its term. "Relief" says s. 15 (2) (a) "shall be given by repayment or otherwise." The appellants, therefore, maintain that, in such a case as this, the amount of the deduction originally allowed under the section is to be altered, and the ultimate amount of excess profits tax due after the relevant deductions for deficiencies have been made is alone to be taken from the profits of the year. As in fact no excess profits tax is payable for the relevant accounting period, no sum is to be allowed to be deducted in arriving at the profits.

My Lords, whatever force the last observation may have, it is not open to this House to consider what might be an appropriate solution of such events as are now being dealt with. The question is not what might have been done, but what the Act provides. The argument, as I see it, depends on the distinction to be drawn between the words "repayment or otherwise" in s. 15 and "repay-

ment" in s. 18. Repayment is not, nor, indeed, is payment, a term of art. It can be effected in any way which puts an end to the indebtedness between one person and another. Set off is payment as much as the tender of cash. Where the Crown is engaged in settling accounts with the subject, it is natural and desirable that a repayment in cash should be authorised if the return of money paid is contemplated, and, if this authority is given, it is again natural that the method of relief shall not be confined to a cash payment, and that the words "or otherwise" should be inserted to make this clear. But where no question of the authority of the Crown to make a cash payment is involved, the generic term repayment may well be used to cover any kind of repayment such as a set off of indebtedness on the part of the subject. The omission of the words "or otherwise" in s. 18 seems to me altogether inadequate as a foundation for the argument presented, and it would be an odd result if, as was conceded by the Crown's advisers, the appellants' calculations should be right if they had paid or tendered each sum due for excess profits tax, or, indeed, paid the whole sum due and then received back the overplus, whereas, if they waited until accounts could be conveniently settled, their indebtedness should be calculated on a totally different basis. It is, as the Lord President (COOPER) points out (1948, Sc. L.T., 524, 525), the amount of any excess profits payable which is to be deducted—not, as the Act of 1916 provided, those paid, and, as he says, the change may well be significant. The general scheme of the Act, in my opinion, deals with the matter on the basis that past accurate computations should not be interfered with, but the matter should be adjusted by adding the sum deducted to profits in the year of deficiency. No doubt the appellant gained by not having to pay the excess profits tax originally charged, but, on the other hand, he is deprived of the right to set off his loss against future profits. In these circumstances I cannot say that the Court of Session was wrong—indeed I think its conclusion was right and would dismiss the appeal.

**LORD NORMAND :** My Lords, I agree with the opinion of my noble and learned friend on the Woolsack. The question in the appeal turns on the construction of the Finance (No. 2) Act, 1939, s. 15 and s. 18. Section 15 (1) provides for the ascertainment of a deficiency of profits in any chargeable accounting period. Section 15 (2) enacts that when a deficiency occurs in any chargeable accounting period, the profits chargeable with excess profits tax shall be deemed to be reduced, and it then goes on to deal with the consequential relief. Under para. (a) the aggregate of the profits chargeable for the previous chargeable accounting periods is to be deemed to be reduced by the amount of the deficiency, and the amount of excess profits tax payable in respect of the aggregate is to be deemed to be reduced accordingly. The relief necessary to give effect to the reductions is to be given by repayment or otherwise. Paragraph (b) deals with the case where the amount of the deficiency exceeds the aggregate amount of the profits chargeable for the previous chargeable accounting periods. In that event the balance is to be applied in reducing any profits chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of these profits, any profits chargeable for the next subsequent chargeable accounting period, and so on. Pausing there, I think that there is not much doubt about what is intended. Section 15 (2) is designed to secure that if excess profits have been earned in one or more chargeable accounting periods but a deficiency has occurred in a subsequent chargeable accounting period, the taxpayer shall pay excess profits tax only on the net aggregate. In the first part of the section I think "the profits chargeable with excess profits tax" means the total chargeable profits whenever earned and irrespective of the particular chargeable accounting period in which they were earned. There are two significant differences between para. (a) and para. (b). Under para. (a), the deficiency is set against the aggregate of past profits, which is to be deemed to be reduced by the amount of the deficiency. Under para. (b), the excess profits



chargeable for the subsequent chargeable accounting period are to be actually reduced. I agree with my noble and learned friend on the Woolsack that there is no indication that the computation of excess profits for any chargeable accounting period before the chargeable accounting period in which the deficiency occurred is to be re-opened. The words "shall be deemed to be reduced" occur three times in s. 15 (2), and I think that they cannot be ignored or treated as negligible. One must ask for what purposes the total profits chargeable with excess profits tax, or the aggregate amount of the profits so chargeable for the chargeable accounting periods previous to the chargeable accounting period in which the deficiency occurred, or the amount of excess profits tax payable in respect of this aggregate, are to be deemed to be reduced. The answer supplied by the context is that it is for the purposes of giving the relief from excess profits tax made necessary by the occurrence of a deficiency of profits. The words "shall be deemed" appear also in s. 15 (1), and there they are qualified by the words "for the purposes of this Part of this Act," because it is intended that the event which has been deemed to occur should affect not only the computation of excess profits tax, but also the computation of income tax. The omission of the words "for the purposes of this Part of this Act" in s. 15 (2) seems to me to be significant.

If that is the meaning of s. 15 (2), its provisions seem to have no bearing on the problem dealt with in s. 18. Section 18 deals with the computation of profits for the purposes of income tax, and the first part of s. 18 (1) provides that the amount of the excess profits tax payable for any chargeable accounting period shall be deductible as an expense in computing profits for income tax purposes for the period. "The amount of the excess profits tax payable for any chargeable accounting period" must, it seems to me, mean the amount of excess profits tax arrived at for each several accounting period. When no deficiency has occurred, or when payment of excess profits tax has been made in each year before a deficiency occurred that is admittedly the meaning of the words. I think it must also be their meaning where a deficiency has occurred after a year, or a succession of years, in which excess profits have been earned and where the provisions for aggregating the past excess profits and deeming them to be reduced by the amount of the deficiency fall to be applied before any payment of excess profits tax has been made. The Crown, however, relied on the proviso to s. 18 (1) as well as on s. 15 (2). The proviso deals with the case where relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which a deficiency occurs. I think that it is intended to cover all those cases to which the method of aggregation and deduction is applied by s. 15 (2) (a). In those cases the proviso says that "the amount of the deduction allowed under this section shall not be altered." Unless these words mean that the deduction of the amount of the excess profits tax payable in respect of each particular chargeable accounting period is to stand, I do not know what they can mean. And if that is their meaning the method of aggregation and deduction and its results provided for by s. 15 (2) (a), in which the particular chargeable accounting periods are disregarded, are expressly excluded from having any place in the calculation of profits for the purposes of income tax.

My Lords, I am aware that the meaning which I have put on the relevant sections does not avoid all the difficulties of construction. I appreciate that the words "relief is given by way of repayment," which in themselves are appropriate to cover both those cases in which relief is given by a cash repayment and those cases in which relief is given by set off, nevertheless throw the mind back to the words "relief . . . given by way of repayment or otherwise" in s. 15 (2) (a) and may reasonably lead to the inference that the proviso to s. 18 (1) is limited to the case where relief is given by a cash payment. I will add that, on the Crown's construction, it might result that the liability of the taxpayer for income tax would be heavier if, instead of paying excess profits tax year by year, he

postponed payment till the deficiency had occurred and the provisions of s. 15 (2) had come into operation, but I do not rely on the comparative equity of the rival contentions of parties. I prefer the construction submitted by the respondents, and it is enough to say with my noble and learned friend on the Woolsack that it has not been shown that the interlocutor under appeal is erroneous.

**LORD MORTON OF HENRYTON :** My Lords, this is an appeal against an interlocutor pronounced by the First Division of the Court of Session, as the Court of Exchequer in Scotland, on a Case Stated under the Income Tax Act, 1918, s. 149. The facts giving rise to the appeal are fully set out in the Case Stated, but I must repeat some of them in order to state the contentions of the parties and my views on these contentions. The question raised in the Case is whether the General Commissioners of Income Tax for the Lower Ward of Lanarkshire adopted the correct method of dealing with excess profits tax in arriving at the profits of the respondents for the purpose of income tax. The matter depends on the deductions allowable, in arriving at such profits, on account of liability in respect of excess profits tax.

The respondents, a limited company carrying on business in Scotland as building contractors, were assessed to income tax under sched. D of the Income Tax Act, 1918, for 1941-42 to 1945-46 inclusive, as follows :—1941-42 on £2,338 less wear and tear £80 ; 1942-43 on £5,000 ; 1943-44 on £5,000 ; 1944-45 on £500 ; 1945-46 on £500. The respondents appealed against these assessments, and their appeal was heard by the General Commissioners of Income Tax for the Lower Ward of Lanarkshire on Feb. 3, 1947. It was then stated to the commissioners that on Sept. 13, 1946, the parties had finally agreed to the figures of profits and of excess profits tax for all chargeable accounting periods up to that ending on July 31, 1944. The net balance of excess profits tax payable on an accounting in respect of all the chargeable accounting periods up to and including the twelve months ending July 31, 1944, had been agreed to be £517. The details of the finally agreed computations were as follows :

| Chargeable accounting period.             | Excess profits tax payable.                                                                       | Amounts repayable or to be set off in respect of excess profits tax deficiencies. |
|-------------------------------------------|---------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| 4 months to July 31, 1939                 |                                                                                                   | £97 16 0<br>(Set off against excess for twelve months to July, 31, 1940)          |
| 12 months to July 31, 1940                | £3,548 (after allowance of deficiency of £97 16s. for the period of four months to July 31, 1939) |                                                                                   |
| 12 months to July 31, 1941                | £1,384                                                                                            |                                                                                   |
| 12 months to July 31, 1942                | £4,636                                                                                            |                                                                                   |
| 12 months to July 31, 1943                |                                                                                                   | £8,465                                                                            |
| 12 months to July 31, 1944                |                                                                                                   | £586                                                                              |
|                                           | £9,568                                                                                            | £9,051                                                                            |
| Deduct deficiencies                       | £9,051                                                                                            |                                                                                   |
| Net balance of excess profits tax payable | £517                                                                                              |                                                                                   |

The respondents had paid £1,000 in September, 1943, as a payment on account of excess profits tax, and the appellants had credited this sum against the assessment for the year to July 31, 1940. In 1946 the appellants, after satisfying the net balance of excess profits tax payable of £517, repaid the balance of £483 to the respondents. The amounts of the profits chargeable to income tax before making adjustments in respect of excess profits tax payable and repayable were also agreed by both parties in the following amounts :—

|   |                       |          |         |
|---|-----------------------|----------|---------|
| A | Year to July 31, 1940 | Profit   | £4,838. |
|   | Year to July 31, 1941 | Profit   | £2,456. |
|   |                       | Interest | £21.    |
|   | Year to July 31, 1942 | Profit   | £5,783. |
|   | Year to July 31, 1943 | Loss     | £7,645. |
| B | Year to July 31, 1944 | Profit   | £550.   |

The parties, however, did not agree the adjustments to be made for income tax purposes in respect of the excess profits tax liabilities payable and the amounts of excess profits tax repayable for deficiencies.

It is convenient at this point to set out s. 12 (1), s. 15, s. 18 and s. 21 (1) of the Finance (No. 2) Act, 1939, to which I shall refer hereafter as "the Act of 1939."

C These four sections are part of a *fasciculus* of sections headed "Excess profits tax."

"12.—(1) Where the profits arising in any chargeable accounting period from any trade or business to which this section applies exceed the standard profits, there shall, subject to the provisions of this Part of this Act, be charged on the excess a tax (to be called the excess profits tax) equal to three-fifths of the excess.

D

15.—(1) For the purposes of this Part of this Act a deficiency of profits shall be deemed to have occurred in a trade or business in any chargeable accounting period if the profits arising from the trade or business in that period are less than the standard profits, or if a loss is sustained in the trade or business in that period ; and the amount of the deficiency occurring in any such period shall be taken to be—(a) where profits have been made in the period, the amount by which those profits fall short of the standard profits ; (b) where a loss has been sustained in the period, the amount of the loss added to the amount of the standard profits. (2) Where a deficiency of profits occurs in any chargeable accounting period in any trade or business, the profits chargeable with excess profits tax arising from the trade or business shall be deemed to be reduced, and relief shall be granted in accordance with the following provisions :—(a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency, and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly, and the relief necessary to give effect to the reduction shall be given by repayment or otherwise ; (b) where the amount of the deficiency exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, the balance of the deficiency shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and, if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period, and so on.

H

18.—(1) The amount of the excess profits tax payable in respect of a trade or business for any chargeable accounting period shall, in computing for the purposes of income tax the profits and gains arising from that trade or business, be allowed to be deducted as an expense incurred in that period : Provided that where, under the provisions of this Act relating to deficiencies of profits, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which



the deficiency occurs, the amount of the deduction allowed under this section shall not be altered but the amount repayable shall be taken into account in computing the profits and gains of the trade or business for the purposes of income tax as if it were a profit of the trade or business accruing in the chargeable accounting period in which the deficiency occurs. (2) The provisions of this section do not apply to the computation of the profits of a trade or business for the purposes of the national defence contribution.

A

21.—(1) Excess profits tax shall be assessed and collected by the commissioners, and shall be due and payable at the expiration of one month from the date of assessment, and shall be recoverable as a debt due to His Majesty from the person on whom it is assessed."

B

The contest between the parties as to the construction and effect of these sections is conveniently illustrated by certain tables which have been put before the commissioners and relied on before your Lordships' House. Table A shows the respondents' computation, and is as follows :—

*A. The Company's Computation.*

|                       |                                                           |        | Net profit for<br>income tax | C |
|-----------------------|-----------------------------------------------------------|--------|------------------------------|---|
| Year to July 31, 1940 | Agreed profit ... ..                                      | £4,838 |                              |   |
|                       | Less excess profits tax payable as finally agreed ...     | £3,548 |                              |   |
|                       |                                                           |        | £1,290                       |   |
| Year to July 31, 1941 | Agreed profit ... ..                                      | £2,456 |                              | D |
|                       | Interest ... ..                                           | 21     |                              |   |
|                       | Less excess profits tax payable as finally agreed ...     | £1,384 |                              |   |
|                       |                                                           |        | £1,093                       |   |
| Year to July 31, 1942 | Agreed profit ... ..                                      | £5,783 |                              |   |
|                       | Less excess profits tax payable as finally agreed ...     | £4,636 |                              | E |
|                       |                                                           |        | £1,147                       |   |
| Year to July 31, 1943 | Agreed loss ... ..                                        | £7,645 |                              |   |
|                       | Credit for excess profits tax repayable as finally agreed | £8,465 |                              |   |
|                       |                                                           |        | £820                         | F |
| Year to July 31, 1944 | Agreed profit ... ..                                      | £550   |                              |   |
|                       | Credit for excess profits tax repayable as finally agreed | £586   |                              |   |
|                       |                                                           |        | £1,136                       |   |

Table B was put in on behalf of the appellants, by the inspector of taxes who appeared before the General Commissioners, and is as follows :—

G

*B. The Inspector's Computation.*

|                       |                                             |        | Net profit for<br>income tax |   |
|-----------------------|---------------------------------------------|--------|------------------------------|---|
| Year to July 31, 1940 | Agreed profit ... ..                        | £4,838 |                              |   |
|                       | Less excess profits tax actually paid... .. | £1,000 |                              | H |
|                       |                                             |        | £3,838                       |   |
| Year to July 31, 1941 | Agreed profit ... ..                        | £2,456 |                              |   |
|                       | Interest ... ..                             | 21     |                              |   |
|                       | Excess profits tax actually paid ... ..     | Nil.   |                              |   |
|                       |                                             |        | £2,477                       |   |

Table B (*continued.*)

|   |                       |                                  |     |     |        |             |
|---|-----------------------|----------------------------------|-----|-----|--------|-------------|
| A | Year to July 31, 1942 | Agreed profit                    | ... | ... | £5,783 |             |
|   |                       | Excess profits tax actually paid | ... | ... | Nil.   |             |
|   |                       |                                  |     |     |        | £5,783      |
|   | Year to July 31, 1943 | Agreed loss                      | ... | ... | £7,645 |             |
| B |                       | Excess profits tax actually paid | ... | ... | Nil.   |             |
|   |                       |                                  |     |     |        | Loss £7,645 |
|   | Year to July 31, 1944 | Agreed profit                    | ... | ... | £550   |             |
|   |                       | Add excess profits tax repaid    |     |     | £483   |             |
|   |                       |                                  |     |     |        | £1,033      |

The General Commissioners accepted the respondents' computation as shown in Table A and their decision was affirmed on appeal by the First Division of the Court of Session.

In the concluding paragraph of the Case Stated, the General Commissioners set out the question of law as follows :—

"The question of law for the opinion of the court is whether we adopted the correct method of dealing with excess profits tax in arriving at the profits of the company for the purpose of income tax."

Now the method adopted by the General Commissioners was the method adopted by the respondents in their Table A, and, consequently, the only question before your Lordships' House is whether the method adopted in Table A is right or wrong. Counsel for the respondents explains and seeks to justify this method as follows. In the first place, he says, you must look at s. 18 of the Act of 1939. That is the section under which payments of excess profits tax can be deducted as an expense. Following the words of that section, and taking the first of the five relevant chargeable accounting periods, you find that £3,548 is "the amount of excess profits tax payable in respect of" the appellants' business for that chargeable accounting period. That sum is therefore deductible, under s. 18, "as an expense incurred in that period." The scheme of the Act of 1939 is to treat each chargeable accounting period separately, and once you have found out what are the excess profits in respect of a particular chargeable accounting period, and what is the excess profits tax payable in respect thereof, you have arrived at an allowable deduction which cannot subsequently be disturbed.

If there is a subsequent "deficiency of profits," as defined in s. 15, the proviso to s. 18 comes into operation and the words "where . . . relief is given by way of repayment" are not limited to the case of a repayment in cash. Consequently, in Table A the respondents rightly deducted the "excess profits tax payable as finally agreed" in each of the first three chargeable accounting periods, and as it was found that there was a "deficiency of profits" amounting to £8,465 in the fourth period, they rightly did not disturb the deductions already made in each of the first three periods, and the deficiency of £8,465 was correctly taken into account "as if it were a profit of the trade or business occurring in the chargeable accounting period in which the deficiency occurs," in accordance with the concluding words of the proviso to s. 18, and the same observation applies to the subsequent "deficiency" of £586. Thus Table A is correct throughout. My Lords, it may at once be observed that the argument just summarised, if correct, leads to remarkable results. Taking the year to July 31, 1941, as an example, the respondents' method of calculation would allow them to deduct, "as an expense incurred in that period," within the meaning of s. 18, a sum of £1,384 in respect of excess profits tax which never was paid and never will be paid by them.

Before considering the respondents' argument in more detail, it is desirable that I should state my views on the meaning of the word "payable" in the

first line of s. 18. The learned judges of the First Division appear to have thought that the Crown's argument involved reading this word as meaning "actually paid" and the wording of Table B would seem to indicate that the Crown might desire so to contend. No such argument was advanced before this House. I would add that although the wording of Table B is ill-chosen, it may well be that the ill-chosen wording conceals a perfectly correct line of reasoning which arrives at a perfectly correct result. However, the correctness of Table B is not at the moment under consideration, and I turn to the construction of the word "payable" in s. 18. My Lords, in my view, the word "payable" in s. 18 has no strained or artificial meaning. It is used in the same sense as it is used in s. 21 and in s. 15. The amount of the excess profits tax payable in respect of each chargeable accounting period is ascertained in the manner laid down in the Act, and the tax becomes "payable" at the expiration of one month from the date of assessment. That amount the taxpayer is allowed to deduct as an expense incurred in respect of that period. If, however, there is a deficiency of profits in a subsequent chargeable accounting period, s. 15 (2) comes into operation. The aggregate amount of the profits chargeable with excess profits for the previous chargeable accounting periods is to be "deemed to be reduced" by the amount of the deficiency, and the amount of excess profits tax "payable" in respect thereof is to be "deemed to be reduced" accordingly. The relief necessary to give effect to this "deemed" reduction is to be given "by repayment or otherwise." It seems to me that the method of giving relief by repayment can only be adopted when there has been a previous payment, or previous payments, by the taxpayer, and it turns out that, having regard to the "deemed" reduction he has paid too much. The obvious, and possibly the only, way of giving relief, if the taxpayer has paid no excess profits tax, is by way of set off against the debt originally due to the Crown under s. 21. It may be convenient if at this stage I apply the provisions of s. 15 (2) as I understand them, to the figures in Table A, disregarding, as Table A disregards, the payment of £1,000 in 1943 and the repayment of £483 in 1946.

(i) A "deficiency of profits" occurred in a chargeable accounting period, namely, a deficiency of £8,465 in the year ending July 31, 1943. (ii) The aggregate amount of the profits chargeable with excess profits tax for the previous chargeable accounting periods must therefore be "deemed to be reduced" by the sum of £8,465, in accordance with the opening words of s. 15 (2) (a), and the amount of excess profits tax payable in respect thereof must be "deemed to be reduced accordingly." The amount of the profits chargeable with excess profits tax for each of the first three periods is not mentioned in Table A. For the present purpose I shall assume that it was the same as the sum there stated to be "excess profits tax payable as finally agreed," as excess profits tax was at the rate of one hundred per cent. for the whole of the second and third periods and for part of the first period. On this footing, the aggregate amount which must be "deemed to be reduced" was £3,548 plus £1,384 plus £4,636 or a total of £9,568. (iii) Section 15 (2) (a) does not define exactly how this "deemed" reduction is to be applied to the aggregate amount of £9,568, but the most natural way of applying it would seem to be first to reduce the £3,548 to nil, then to reduce the £1,384 to nil and then to reduce the £4,636 to £1,103. In this way effect will have been given to the total "deemed" reduction of £8,465, and the respondents do not seek to contest this method of carrying out the "deemed" reduction if they fail in their contention that the figures of £3,548, £1,384 and £4,636 ought to be left unaffected by the deficiencies of profits in subsequent chargeable accounting periods. (iv) In the year to July 31, 1944, there was again a "deficiency of profits" amounting this time to £586. This will be applied in reducing the £1,103 to £517. Thus there remains a balance of £517 of excess profits tax payable in respect of the year to July 31, 1942, and no further excess profits tax became payable prior to the repeal of that tax in December, 1946.



My Lords, with all respect to those who have thought otherwise, I cannot see that this method of applying the provisions of s. 15 (2) involves giving an artificial meaning to the word "payable" in s. 18, or that it involves giving to that word a twofold or threefold meaning, depending on the events which actually happen. To my mind "payable" always has the same simple meaning as it has in s. 21, but in certain events the amount payable is *deemed* to be reduced. Taking again, as an example, the year to July 31, 1941, the respondents claim to deduct £1,384 as an "expense" under s. 18 (1). They say: "this sum was 'payable' under s. 21 (1) and therefore we can deduct it." To this the appellants reply: "True, it was 'payable' under s. 21 (1) and we do not seek to give any other meaning to the word 'payable' in s. 18 (1). But we do say that it is 'deemed to be reduced' to nil under s. 15 (2) and therefore you can deduct nothing as an expense. If you had paid the £1,384, relief would be given 'by way of repayment' and the proviso to s. 18 (1) would have applied; the £1,384 would have been brought into a later year 'as if it were a profit of the business accruing' in that year, and the figures given in Table A would have been correct. As it is, relief is given 'otherwise,' namely, by way of a set off, and the figures in Table A are wrong." To my mind, this contention of the Crown is unanswerable, and shows that Table A cannot be correct. It is true that I have so far disregarded the payment of £1,000 and the repayment of £483, but I cannot see that any introduction of these figures into Table A can possibly make that table correct, if I am right in my construction of s. 15 (2) and if, as I think, "repayment" in the proviso to s. 18 (1) can only mean repayment in cash. I shall return to consider this proviso, but meanwhile I must consider the payment of £1,000 and the repayment of £483.

As to the £483 no difficulty arises. I have already shown that the total excess profits tax payable in respect of the whole period, after s. 15 (2) has been put into operation, is £517. The respondents have paid £1,000. Therefore £483 is due to them and this sum must be paid in cash, since there is no sum against which it can be set off. Here the proviso to s. 18 (1) comes into play, and the £483 must be

"taken into account in computing the profits and gains of the trade or business for the purposes of income tax as if it were a profit of the trade or business accruing in the chargeable accounting period in which the deficiency occurs."

I am relieved of the task of considering at this point exactly how the £1,000 should be taken into account, by reason of a concession and statement by counsel for the respondents. He conceded that if s. 15 (2) were construed as I construe it, Table A must be incorrect, and he stated that in this event his clients were willing to accept a suggestion of the appellants which appears in Table B, that the £1,000 should be allowed as a deduction, for the purposes of income tax, as an expense incurred in the year ending July 31, 1940, and that the £483 should be brought in as if it were a profit of the business occurring in the year ending July 31, 1944.

I now turn to consider the argument of counsel for the respondents, as already summarised. It will be observed that throughout his argument counsel disregarded, as Table A disregards, the payment of £1,000 in 1943 and the repayment of £483 in 1946. In my view, there are at least two fatal flaws in the argument of counsel for the respondents. In the first place, the method adopted in Table A, and sought to be upheld by counsel, gives no effect at all to the provisions of s. 15 (2). No heed is paid to the "deemed" reduction of excess profits tax for which provision is made in that sub-section. The First Division found it possible to accept the respondents' argument, and the Lord President said (1948, Sc. L.T. 524) in the course of his opinion :

"The argument of the Inland Revenue had to be that, so long as excess profits tax existed (*i.e.*, until December, 1946), assessments to that tax

were merely provisional, and that there was no finality for either excess profits tax liability or income tax liability until the whole six years of the emergency tax had run their course, so that it could be known whether, and to what extent, relief under s. 15 might be claimable."

This argument he found unacceptable. I respectfully agree with the Lord President that the argument gives rise to difficulties, but I think that the wording of s. 15 (2) renders its acceptance inevitable. That sub-section makes it impossible to ascertain the amount of excess profits tax for which a taxpayer may ultimately be liable, in respect of any chargeable accounting period, until excess profits tax ceases to be in force. I would add two observations. First, that excess profits tax was essentially a temporary measure, although, of course, the legislature could not know exactly how long it would last; secondly, that the respondents' argument also gives rise to anomalies. As I have already pointed out, if it were correct it would enable them to deduct, as an expense, large sums on account of excess profits tax which were never paid and were ultimately found not to be payable. In the second place, the latter part of the argument of counsel for the respondents dealing with the event of a subsequent deficiency of profits rests on his contention that the word "repayment" in s. 18 is not limited in its meaning to a repayment in cash but covers every case in which relief is given, including a case in which relief is given by set off. In my judgment, this word can only refer to a repayment in cash. I think that this is its more natural meaning in the context in which it appears, but if there were any doubt on the point it is removed by the words "the relief necessary to give effect to the reduction shall be given by repayment or otherwise" at the end of s. 15 (2) (a). In my view, the word "repayment" must bear the same meaning in s. 18 (1) as it bears in s. 15 (2) (a). In the latter sub-section relief given "by repayment" is contrasted with relief given "otherwise," and I think that "repayment" in this context plainly means repayment in cash, as contrasted with relief given in any other manner. The respondents' argument gives no meaning at all to the words "or otherwise" in s. 15 (2) (a). The words in the proviso to s. 18 (1) "where relief is given by way of repayment" show that the proviso applies only where one particular method of giving relief is adopted and the method referred to can only be, in my view, the method of repayment in cash. In the present case, only £483 was repaid in cash, yet in Table A the respondents treat two sums of £8,465 and £586 as coming within the proviso to s. 18 (1).

My Lords, as I have said, the only question before this House is whether the method adopted in Table A is right or wrong. I have endeavoured to show that it is wrong in two vital respects, *viz.* (a) it gives no effect at all to the provisions of s. 15 (2), and (b) it treats two sums of £8,465 and £586 as coming within the proviso to s. 18 (1), although neither of these sums was the subject of a cash repayment. If Table A does not show the correct method of dealing with excess profits tax in arriving at the profits of the respondents for the purpose of income tax, the question of law must be answered in the negative. It would not be right for me to express a concluded view as to how the respondents' payment of £1,000 should be treated, assuming that my view as to the construction of the Act is correct. This point has not been argued, for the reasons which I have already stated. Nevertheless, I think it is right that I should state one way in which I think it might be treated, because by so doing I shall show, as I hope, that my construction need not lead to any strange result in a case where part, but not all, of the excess profits tax "payable" under s. 21 (1) has been paid before a "deficiency of profits" occurs. I think it is reasonable to treat the £1,000 as a payment on account of the excess profits tax payable for the year to July 31, 1940, and the appellants have so treated it with the assent of the respondents. It follows that when relief has to be given to give effect to a "deemed" reduction of £9,051 (£8,465 + £586) relief can be given by way of

repayment in respect of part of the "aggregate amount" of £9,568 (£3,548+£1,384+£4,636) and relief can be given by way of set off against the remainder. By setting off the £9,051 against the £9,568 the excess profits tax payable is reduced to £517, but, as the respondents have paid £1,000, £483 is due to them as a repayment. As I have already pointed out, the proviso to s. 18 (1) comes into play as respects this repayment in cash. The respondents have already paid £1,000. That sum was part of the excess profits tax "payable" within s. 18 (1), although the sum "payable" was ultimately "deemed to be reduced." Accordingly, if there had been no subsequent "deficiency of profits" the respondents would have been able to deduct it, as an expense, for the purposes of income tax. Following the words of the proviso to s. 18 (1) the amount of the deduction allowed under s. 18 (1) (namely, a deduction of £1,000 in respect of the year ending July 31, 1940) is not altered, but the £483 repayable is taken into account "as if it were a profit of the trade or business accruing in the chargeable accounting period in which the deficiency occurs." I see no difficulty in dealing with the payment and repayment in this way. It may be that in Table B the £483 is brought in as a profit a year too late, but to this the respondents do not object. I think I should add that, if my reasoning is incorrect and the argument for the respondents is to be accepted, it would appear to be necessary to explain how Table A can be correct in disregarding the payment of £1,000 and the repayment of £483, and how these sums shall be treated. I find no light on this point in the respondents' case. Nor does it appear to be dealt with in the opinions delivered in the First Division of the Court of Session. I would allow the appeal and answer the question of law in the negative.

- D LORD MACDERMOTT :** My Lords, if the submission of the Crown is to prevail the words "the amount . . . payable" in the first part of s. 18 (1) of the Finance (No. 2) Act, 1939, must bear a complex and unnatural meaning. They must, as I follow the argument, mean the greater of (a) the amount ultimately payable, *i.e.*, the amount of excess profits tax payable in respect of a particular year as subsequently reduced by way of relief under s. 15, and (b) the amount actually paid as excess profits tax in respect of the same year. It is material to observe that the first part of s. 18 (1) is an enactment of general applicability. It makes excess profits tax deductible as an expense for income tax purposes irrespective of whether or not a right to relief under s. 15 arises ; and if it could be read apart from its proviso and s. 15, the submission of the Crown would clearly be untenable. So read I think there can be no doubt that the words "the amount . . . payable" would connote nothing more or less than the excess profits tax liability as computed for the year in question. They would hold no warrant for looking beyond what could be assessed and levied at the end of such year, and payment would be an irrelevant consideration.

- The first question, then, is whether the effect of s. 15 and the proviso to s. 18 (1) is to expand and modify this *prima facie* meaning so as to accord with the contentions of the Crown. Regarded alone, s. 15 would not justify the view that "the amount . . . payable" may mean, on occasion, not the liability but a different amount measured by the sum actually paid. But it would go some way to justify the view that "payable" means "ultimately payable" if, in sub-s. (2) (a) thereof, the word "deemed" in the direction "and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly" could be construed as meaning "deemed for the purposes of this Part of this Act." Coming, however, to the best conclusion I can on the language of the statute, I do not think that would be the right interpretation. It seems to me that sub-s. (2) is concerned primarily with the granting of relief from liability in respect of a period, which may span several years, rather than with the reopening and adjustment of each of the previous assessments. The machinery of para. (a) starts its work on actual profits and actual liabilities. The first are to be "deemed to be reduced" in the aggregate, but that can only be notional



and for the purpose of sub-s. (2). The second are to be "deemed to be reduced accordingly" and I do not think this reduction can fairly be regarded as intended to fulfil a wider purpose. If that is right, I can find no good reason for reading "payable" in s. 18 (1) as "ultimately payable," for there is nothing in the proviso to that sub-section, taken either alone or in conjunction with s. 15, to support that interpretation. The proviso does not purport to modify what has gone before. On the contrary, it directs, in regard to the only kind of event with which it is concerned, that "the amount of the deduction allowed under this section shall not be altered." Even if the view of s. 15 which I favour is wrong, it does not follow that the Crown case is right. It is not enough for the Crown to say that "payable" means "ultimately payable" and to stop there. To do so would, where relief under s. 15 has been given by way of repayment, lead to an impossible result, for the proviso would then operate to charge the subject, who because he had paid had got a repayment, a second time in respect of the same parcel of profits. It is to avoid the entanglements thus created by the difficult terms of this proviso that the Crown definition of "payable" assumes the form of "ultimately payable or actually paid, whichever amount is the greater." This is not a severable proposition and the first part of it cannot survive alone.

My Lords, I have had the advantage of reading in print the opinions of my noble and learned friends LORD PORTER and LORD REID, and I desire to express my concurrence with the reasons which have led them to reject the construction placed on the word "payable" in s. 18 (1) by the Crown. I need not repeat those reasons; but I would, if I may, add a further ground for the same conclusion which seems to flow from the considerations to which I have just referred. A proviso in a statute must, no doubt, be read and have effect according to its tenor; but its nature is not to be overlooked in the task of interpretation, and in the absence of some compelling context (of which I see no sign in the present case) it is not a legitimate process, in order to resolve some doubt or difficulty arising from a proviso, to use it, so to speak, as a lever to force plain words in the enactment to which it is appended away from their natural meaning. Here, I think, that is what the Crown has endeavoured to do and that is one of the reasons why its contentions should not succeed: see *West Derby Union v. Metropolitan Life Assurance Society* (1). As LORD HERSCHELL there observed ([1897] A.C. 655):

"Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it; but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless, would, as I have said, be in the highest degree dangerous."

The next question is whether the respondents' method of computation complied with the terms of the statute. It is based on a construction of s. 18 (1) which cannot be accepted merely because that of the Crown is rejected, though the case appears to have been presented throughout as a matter of choice between the rival interpretations, and on the basis that if one fell the other stood. The respondents' submission as to the meaning of the words "the amount . . . payable" accords with what I think is the right view. The trouble is with their construction of the proviso. Though it applies only where "relief is given by way of repayment from excess profits tax chargeable" they say that this extends to any relief which may be given under s. 15 (2) (a), and, consequentially, that in the instant case "the amount repayable," which under the proviso is to be brought into account as a profit in the deficiency year, includes all the

excess profits tax liability in respect of which relief has been granted, and is not limited to the actual repayment of £483. This meaning has the virtue of giving the proviso a rational design by making its compensatory provisions adequate to maintain a constant balance against the operation of the words "the amount ... payable" according to their true construction, but it rides so uneasily on the language which the legislature has used that I find myself unable to adopt it. I would not feel the same difficulty if relief under s. 15 had to take the shape either of an actual repayment or of a set off in the sense of applying one obligation to reduce or extinguish another, for "repayment" like "payment" need not always connote the passing of money. It is, however, plain that relief may commonly come to be given under s. 15 merely by virtue of the process of reduction which is deemed to be effected thereunder. That, indeed, has happened in the present case for in it the relief was of that nature save to the extent of the £483. I do not think that kind of relief can reasonably be described as "relief ... by way of repayment." Nor am I able to find in the statute any context to justify such a description of it. No doubt the proviso to s. 18 (1) must be read closely with s. 15 (2), but that, as it seems to me, only adds another difficulty. The kind of relief under discussion either falls within the expression at the end of s. 15 (2) (a)—"repayment or otherwise"—or it does not. If the former, its appropriate place is in the category covered by the words "or otherwise" and not in that covered by "repayment"; and, if the latter, it is no whit nearer being given "by way or repayment." This view, if well founded, means that there has been an unfortunate *casus omissus* in the drafting of the proviso. It may well be that this reflects the stress of events in 1939 when the statute was enacted; but, whatever the reason, the defect is, to my mind, beyond repair by any process of adjudication, however anomalous its results. For these reasons, I think the respondents' computation (Table A) is correct in law for the first three, but not for the last two, of the years under review, and I would answer the question of law accordingly.

**LORD REID:** My Lords, in the present case, a number of profitable years for the respondents, in respect of which they would have had to pay large sums of excess profits tax if those years had stood alone, were succeeded by a year in which a heavy loss was sustained and a year in which the profits fell short of the standard profits. The general scheme of the Act for dealing with such a situation is simple enough. Relief is given so that, at the end of the period for which the tax is in operation, excess profits tax is only due on the amount by which the aggregate of chargeable profits in the good years exceeds the deficiencies in the other years. This result must be reached by way of relief, because, as regards each of the earlier chargeable accounting periods, where the profits exceeded the standard profits tax was immediately chargeable on the excess, assessments could be and were made, and tax was collected before it was known that there would later be a loss. What the Act does in s. 15 (2) is to direct that the profits chargeable with tax in the earlier good years and the tax payable in respect thereof shall be deemed to be reduced by the amount of the subsequent deficiency, and to provide that the relief necessary to give effect to the reduction shall be given by repayment or otherwise. The nature of the relief must depend on whether tax in respect of the earlier years has actually been paid or not. If the sum paid by the taxpayer in respect of the earlier years is larger than his total liability for the whole period as ascertained when the later deficiency of profits is taken into account, then plainly the taxpayer must get something back, and relief will operate by way of repayment. But if the taxpayer, though due to pay large sums in respect of the earlier years, has in fact paid nothing, or has only paid a sum smaller than the total amount of his ultimate liability, there is no room for any repayment and relief can operate by discharging the taxpayer's outstanding liability in respect of the earlier years to such extent as is necessary. I do not think that it is necessary to consider whether relief could

operate in any other way. So far there is no difficulty. The difficulty arises out of the inter-relation of excess profits tax and income tax. Where there is no question of a deficiency of profits in any year, again the scheme is simple enough. For income tax purposes, the amount of excess profits tax payable for any chargeable accounting period (normally a period of one year) is allowed by s. 18 to be deducted as an expense incurred in that period. So long as there is no subsequent deficiency each period can be and is treated as standing by itself, and in effect that part of the profits which exceeds the standard profits is subject to excess profits tax but not to income tax, while the remainder of the profits is subject to income tax. But the simplicity of the scheme breaks down when a subsequent deficiency of profits makes it necessary to re-open the position of the earlier years in order to operate the relief from excess profits tax to which the taxpayer is entitled. The question which arises in this case is : What does the statute direct to be done as regards income tax in that event ?

I start with one direction about which there is no controversy in this case and which appears to me not to be ambiguous. Where the taxpayer has paid more than is ultimately found to be due he gets a repayment, and the latter part of the proviso to s. 18 (1) directs that this repayment shall be treated for income tax purposes as if it were a profit accruing in the period in which the deficiency of profits occurs. The repayment is not in fact a profit, and if it is treated as a profit in one year it must be off set by a corresponding allowance of a deduction in another period. This was not disputed by the Solicitor-General. I think that the position can best be made plain by a simple example. Let me suppose that in one year there is an excess profit of £5,000, and in the next a deficiency of £5,000. The result is that in the end no excess profits tax is due. It may be that the £5,000 of tax due in respect of the first year taken by itself has been paid in full. In that case the whole of that £5,000 is repayable and the statute directs that for income tax purposes it must be taken into account as a profit in the second year when there was a deficiency of £5,000. Let me further suppose that the standard profits were £2,000 in each year so that there was a total profit of £7,000 in the first year and a loss of £3,000 in the second year. The statutory direction to take into account, as a profit in the second year, the £5,000 of excess profits tax which was repayable converts the actual loss of £3,000 in that year into a profit of £2,000 for income tax purposes. If that were the only adjustment, the result would be that income tax would have to be paid on the actual profit of £7,000 for the first year and on the fictitious profit of £2,000 for the second year, in all £9,000 for the two years. But in fact the total profit for the two years taken together was only £4,000, so one would expect to find a provision for a reduction of the first year's profits for income tax purposes from the actual profit of £7,000 to £2,000 so that the total profits for income tax purposes for the two years would correspond with the actual total profit for the two years of £4,000. I turn to the provisions of s. 18 (1) which is the only place where any warrant for a deduction from the £7,000 profit in the first year could be found. I have already said that in a case which is not complicated by any question of deficiency of profits s. 18 (1) is a warrant for treating as a deduction for income tax purposes the sum payable as excess profits tax. In that case, when the tax so payable is paid, it is retained by the Exchequer : in the case I am now supposing, the tax has been paid but has then been repaid to the taxpayer. Does this repayment make any difference to the income tax position for the first year ? The first part of the proviso to s. 18 (1) supplies the answer. It enacts that " the amount of the deduction allowed under this section shall not be altered." That can, I think, only refer in the case I am supposing to the £5,000 which was originally payable and was in fact paid as tax due in respect of the first year but later repaid. A direction that, where relief is given, the amount of the deduction shall not be altered assumes that the amount of the deduction could be and was ascertained before the relief was given. The deduction is the amount of excess profits tax " payable," so " payable " cannot mean ultimately found to be



payable because that can only be ascertained after relief has been given. It must mean originally payable before any question of relief arose.

The Solicitor-General admitted, and I have no doubt rightly admitted, that the first part of the proviso means that where tax has been paid the fact that it has later been repaid makes no difference. It remains deductible as an expense for income tax purposes notwithstanding its later return to the taxpayer. The matter is then put right, not by cancelling the deduction, but by treating the repayment as a profit in a later year. The real difficulty is to determine what has to be done as regards income tax where the excess profits tax payable in respect of an earlier year has not in fact been paid and relief has to be given in respect of a later deficiency by total or partial discharge of the assessment in respect of the earlier year. The proviso appears only to apply where "relief is given by way of repayment" and there is no corresponding provision to deal with relief given otherwise than by repayment. But if in this case one applies the first part of s. 18 (1), giving to it the same meaning as the Solicitor-General admitted it to have and as I have tried to show it must have where the proviso applies, it is impossible I think to reach a reasonable result without invoking the proviso.

Let me revert to the simple example which I took before, with the single difference that I now suppose that £5,000 was assessed and payable as excess profits tax for the first year, but not paid. The deduction allowed by s. 18 (1) for income tax purposes is "the amount of excess profits tax payable" for the chargeable accounting period and there is nothing in the Act to indicate that "payable" must be held to have a different meaning or that the deduction must be calculated in a different way according to what has in fact been paid. So the £5,000 would still be a deduction for income tax purposes just as it was when that sum had first been paid and then repaid, but there would be no proviso to direct that this is to be compensated by adding in £5,000 as a profit in the subsequent deficiency year. The Solicitor-General boldly sought to get over this difficulty by arguing that the word "payable" in s. 18 (1) has different meanings depending on what has actually been paid before the deficiency years are taken into account under s. 15 (2). If the original assessment has been paid in full, then "payable" means payable under that assessment; if nothing has been paid, then "payable" means ultimately found to be payable after subsequent deficiencies have been taken into account; but if a part only has been paid of the amount due under the original assessment and part or all of that payment has to be repaid (as happened in this case) then "payable" has no relation either to the amount payable under the original assessment or to the amount ultimately found to be due after taking subsequent deficiencies into account, but it means the amount actually paid.

My Lords, I find it impossible to construe the phrase "the amount of the excess profits tax payable . . . for any chargeable accounting period" in this way. I do not deny that the word "payable" is ambiguous. A word is ambiguous because a reasonable man using it in the context in which it occurs can be supposed to have intended, in so using it, one of two or more different meanings, and if a word is ambiguous a court is entitled to select one of those meanings as the true meaning. But the fact that a word is ambiguous does not entitle a court to select another meaning which it is plain that no reasonable man could have intended. "Payable" is ambiguous because it might mean originally payable before the subsequent deficiency was known or taken into account, or it might mean ultimately payable after that deficiency had been taken into account. But could it possibly have the complicated threefold meaning for which the Solicitor-General contends? To my mind, the question in this case is whether Parliament can possibly be supposed to have intended the phrase which I have quoted to bear the meaning which I have stated. I cannot bring myself to imagine anyone having such an intention, and therefore I cannot accept the argument for the Crown. It might be that an equitable result, or even a

reasonable result, could only be reached by attributing to a phrase in a statute a meaning which no reasonable man would attach to it, but to attribute such a meaning to a phrase would in effect be legislating and not construing the statute and that is beyond the province of a court of law. If by legitimate processes of construction no meaning can be found which is equitable or even reasonable, then the matter can only be put right by further legislation.

I think it is fairly clear how s. 18 (1) came to assume its present form. There are many similarities between excess profits tax and the old excess profits duty and under the Finance (No. 2) Act, 1915, s. 38 (3), relief was provided to meet the case of a subsequent deficiency of profits after a year for which excess profits duty was payable. But this section was so phrased that it was necessary to pay the duty in respect of the earlier year before relief could be claimed in respect of the subsequent deficiency. Accordingly, the relief could only take the forms of repayment or set off against duty payable in respect of a still later profitable year, and the main difficulty in the present case could not arise. It is not very surprising that, in the circumstances of 1939, it was not observed that the change introduced by which a taxpayer can now get relief without actually paying the tax due for the earlier year necessitated a further provision dealing with deductions for income tax purposes if a proper result were to be reached. But, however that may be, I do not think that it is possible to reach a satisfactory result merely by construing the provisions of the Finance (No. 2) Act, 1939, as they stand, and a court cannot supplement construction by legislation.

There appear to remain two possibilities. I have said that the proviso appears only to apply when relief is given by way of repayment, and not when relief is given otherwise than by way of repayment. If this is taken to be the true meaning of the proviso a reasonable result cannot be reached. In the present matter the taxpayer has throughout presented his case on the footing that the proviso applies not only to the tax which he actually paid and must now be repaid, but also to the further sum originally due which he did not pay, and which he is not now bound to pay because liability to pay it has been discharged by the operation of relief. This construction produces something much nearer to a reasonable and equitable result. In short the two possibilities are that the word "repayment" means what it says or that it is wide enough to include the case when no money passes but a liability is discharged. There are serious objections to the adoption of either of these alternatives, but if I have to choose between them—because there is no other possible construction—I would choose the alternative which has been adopted by the General Commissioners and approved by the First Division in this case. I think therefore that the appeal should be dismissed.

*Appeal dismissed. No order as to costs, an agreement having been made with regard thereto.*

Solicitors : *Solicitor for England of the Board of Inland Revenue and Solicitor for Scotland of the Board of Inland Revenue (for the Crown) ; Kingsley Wood, Williams & Murphy, agents for Downie, Aiton & Co., Glasgow, and D. G. M'Gregor, W.S., Edinburgh (for the company).*

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

## Re STEANE'S (BOURNEMOUTH), LTD.

[CHANCERY DIVISION (Vaisey, J.), November 18, 21, December 5, 1949.]

*Company—Winding-up—Avoidance of disposition of property after commencement of winding-up—Discretion of court—Principles for exercise—Justice in particular circumstances—Special regard to bona fides of applicant—Debenture to secure advances made for payment of debts, to enable company to carry out its contracts—Company and debenture-holder not aware of presentation of petition when debenture issued—Advances made before and after service of petition—Companies Act, 1948 (c. 38), s. 227.*

By the Companies Act, 1948, s. 227 : " In a winding-up by the court, any disposition of the property of the company . . . made after the commencement of the winding-up, shall, unless the court otherwise orders, be void." By s. 229 (2), except where there has been a previous resolution by the company for voluntary winding-up : " . . . the winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up."

The applicant was a director of a private company which was engaged in making and erecting prefabricated houses for local authorities. The company owed £51,017 to its bankers on an unsecured overdraft, and on Mar. 17, 1949, the bank refused to honour cheques issued by the company, in the ordinary course of its business, for sums amounting to £696 9s. 11d., unless funds were provided for the purpose. The applicant thereupon agreed with the company to advance this sum forthwith on the security of a debenture to be issued to him, and to make such further advances, not exceeding in all the sum of £5,000, as might be required to enable the company to continue to carry out its contracts. On Mar. 18 the bank formally demanded payment of the company's overdraft, and on Mar. 22 presented a petition to wind-up the company, but neither the company nor any of the directors knew that a petition had been presented until it was served on the company on Mar. 24, after the debenture had been sealed and issued, the applicant having in the meanwhile advanced to the company two further sums which were urgently required, chiefly for the payment of wages. On Mar. 30, he advanced a fourth sum, partly for wages and partly for other, less urgent, purposes. After the winding-up order was made on Apr. 4, 1949, the applicant applied for an order under s. 227 of the Act of 1948 that his debenture should not be void, but should be treated as valid to the extent of £2,888 16s. 8d. (i.e., the aggregate of the four sums advanced by him and the costs of preparation and registration of the debenture) together with interest, and that the taxed costs of the application should be added to the security.

**HELD :** the legislature, having omitted to indicate any particular principles which should govern the exercise of the discretion vested in the court by s. 227, must be deemed to have left such exercise entirely at large and controlled only by those general principles which applied to every kind of judicial discretion ; in exercising its discretion the court must decide what would be just and fair in the circumstances of each case, having special regard to the question of the good faith and honest intention of the persons concerned ; and, as the applicant had acted throughout in good faith, his object being merely to enable the company to fulfil its contracts, the court would make the order asked for.

*Re Park Ward & Co., Ltd.* ([1926] Ch. 828), *applied*.

[AS TO DISPOSITION OF PROPERTY AFTER COMMENCEMENT OF WINDING-UP, see HALSBURY, Hailsham Edn., 1949, Vol. 5, pp. 714, 715, para. 1156 ; and FOR CASES, see DIGEST, Vol. 10, pp. 864, 865, Nos. 5834-5841.]



FOR THE COMPANIES ACT, 1948, s. 227 and s. 229, see HALSBURY'S STATUTES, 2nd Edn., Vol. 3 ; pp. 646, 647.]

Cases referred to :

(1) *Re Park Ward & Co., Ltd.*, [1926] Ch. 828 ; 95 L.J.Ch. 584 ; 135 L.T. 575 ; Digest Supp.

(2) *Howard (Sunbury), Ltd. (Application of A. J. Newman)*, (1948), unreported.

ADJOURNED SUMMONS applying for an order under the Companies Act, 1948, s. 227, that a disposition made by a company after the commencement of its winding-up should not be void.

Before the petition for winding-up was presented, the applicant, a director of the company, agreed to make advances to the company on the security of a debenture to be issued to him, the advances being required by the company to enable it to carry out its contracts. The debenture was issued after the petition had been presented, but before it was served on the company and before the company or any of its directors had received any intimation in regard to it. Advances were made by the applicant before and after the petition was presented, one advance being made after the petition was served. Finding that the applicant had acted in good faith, VAISEY, J., now made the order asked for. The facts appear in the judgment.

*Lindner* for the applicant.

*C. A. Settle* for the liquidator.

*Cur. adv. vult.*

Dec. 5. VAISEY, J., read the following judgment. This is an application by Mr. Catlow Greenhalgh for an order under the Companies Act, 1948, s. 227, that the disposition made after the commencement of the winding-up of Steane's (Bournemouth), Ltd., by the issue by the company to the applicant, on Mar. 24, 1949, of a debenture to secure the repayment of a present advance of £696 9s. 11d. and future advances up to £5,000, and charging by way of specific charge the real and leasehold property of the company and its goodwill and by way of floating charge all its other assets, should not be void, but should be treated as valid to the extent of £2,888 16s. 8d., together with interest and costs, and that the taxed costs of the applicant of and occasioned by this application should be added to the amount secured by such debenture. The liquidator is the respondent to the application.

Section 227 of the Act is in these words :

"In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

The section reproduces, without variation, s. 173 of the Companies Act, 1929, which was in substantially the identical terms of s. 205 (2) of the Companies (Consolidation) Act, 1908, and s. 153 of the Companies Act, 1862. Except where there has been a previous resolution by the company for a voluntary winding-up, it is provided by s. 229 (2) of the Act of 1948, reproducing s. 175 (2) of the Act of 1929, s. 139 of the Act of 1908 and s. 84 of the Act of 1862, that :

"...the winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up."

In the present case the petition to wind-up the company was presented on Mar. 22, 1949, and the order to wind it up was made on Apr. 4, 1949. The Midland Bank, Ltd. (hereinafter called "the bank") were the petitioners. In support of the present application an affidavit was sworn by the applicant setting out the facts of the case shortly as follows :

"The company was a private company incorporated on Dec. 22, 1945, under the Act of 1929. The applicant, in July 1948, subscribed and paid

for 8,500 shares of £1 each in the company, which was then carrying on a substantial business in making and erecting prefabricated houses for the Bournemouth, Christchurch, and Gosport Corporations."

- That, I suppose, may fairly be regarded as work of national importance. The bank, as the company's bankers, had granted to the company an unsecured overdraft up to £50,000, and had in addition entered into bonds with two at least of these corporations for the due performance by the company of its contracts with them. In the same month of July, 1948, an accountant, Mr. James Cox, subscribed and paid for five hundred of the company's shares, and subsequently increased his holding to 1,500 shares. He and the applicant were appointed directors of the company along with a Mr. Steane, and at a later day two other persons joined the board. Shortly afterwards, *i.e.*, in or about September, 1948, the company was in urgent need of further financial assistance which the bank was at first unwilling to provide on any terms, but it was ultimately arranged that the limit of the existing overdraft of £50,000 should be increased by £2,500 on a guarantee given by the applicant to cover the increase. Towards the end of February, 1949, the directors came to the conclusion that, unless further finance could be obtained, the company would be unable to complete its contracts. The bank was found to be unwilling to help in any way, and at a meeting of the directors of the company held on Mar. 2, 1949, a resolution was passed authorising Mr. Cox, the accountant and director, to borrow money on behalf of the company on the security of a debenture. It is suggested by the liquidator that this was an illegal delegation of the company's borrowing powers, but that seems to me to be far too narrow a view to take of the matter. On or about Mar. 15, 1949, the company, in the ordinary course of its business, issued seven cheques in settlement of accounts owing by the company for sums amounting in all to £696 9s. 11d. Two days later, on Mar. 17, 1949, the applicant was informed by Mr. Cox that the bank would not honour the said seven cheques on presentation unless funds were provided for the purpose, and he, accordingly, agreed with Mr. Cox that he would, on the security of a debenture to be issued to him, advance this sum of £696 9s. 11d. forthwith and would make such further advances, not exceeding in all the sum of £5,000, as might be required to enable the company to continue to carry out its contracts, and on or about the same day the applicant, in pursuance of such agreement, handed to Mr. Cox his cheque for £696 9s. 11d., payable to the company's order. On the following day the applicant and Mr. Cox had an interview with the bank's branch manager. The applicant's cheque for £696 9s. 11d. was credited to the company, and the bank agreed to honour the said seven cheques on presentation. At the same interview the manager handed to the applicant a letter addressed to the company by the bank formally demanding payment of the amount of the company's overdraft, *viz.*, £51,017 0s. 5d. On Mar. 22, 1949 (being the day on which the petition was presented) the company received from the applicant's solicitor the engrossment of a debenture to be sealed and issued to him. A meeting of directors had been arranged for that day, but it was not, in fact, held. There was a meeting on the following day, Mar. 23, but for some reason which it is difficult to discover, and which was certainly never explained to me, the matter was not dealt with at that meeting. However, on the next day, Mar. 24, a further meeting was held at 10 a.m., when a resolution was passed authorising the sealing and issuing of the debenture, which was done then and there. Previously, *i.e.*, on Mar. 23, a further sum of £238 12s., urgently required for payment of wages, was advanced by the applicant to the company for that purpose. The serious consequences of a failure to pay wages to those engaged in a business of this kind are too obvious to need description. Returning to Mar. 24, the following further events occurred on that day. The applicant advanced a further sum of £975, part of which was required for wages. At 2.45 p.m. (after the debenture had been sealed and issued, and after the

applicant's cheque for £975 had been paid to the credit of the company's account at the bank), the bank's petition for winding-up was served on one of the company's directors at the company's registered office. The applicant states, and I accept it as a fact, that no earlier intimation of the presentation of the petition had been received by the company or any of its directors. A further step in the proceedings was taken on Mar. 30, when the applicant advanced a final £950 to the company, partly for wages and partly for other purposes, admittedly less urgent and pressing. His case is obviously less easy with regard to that sum than to those advanced before he knew of the petition.

The result would appear to be as follows. The applicant's four advances amount to the aggregate sum of £2,860 1s. 11d., to which he seeks to add £28 14s. 9d. as the costs of the preparation and registration of the debenture, bringing his total claim to the sum of £2,888 16s. 8d. Under the provision of s. 227 the "disposition" (consisting of the issue of the debenture) is void unless I "otherwise order," and the question is whether or not I ought to do so. The section itself gives me no guidance whatsoever as to the principles on which I should act, nor do I get much assistance from *Re Park Ward & Co., Ltd.* (1), where the facts, though similar, were somewhat different. There, the whole of the advance was made for the payment of wages which would now give preferential rights by subrogation, and the creditor had, at the time he made the advance, full notice of the presentation of the petition. *Howard (Sunbury), Ltd.* (2), an unreported decision of ROXBURGH, J., on May 12, 1948, suggests that a distinction should be drawn between advances made for the purpose of preserving the company's property *in praesenti* and those intended to enhance its value *in futuro*, the applicant in that case, as I understand, being anxious to acquire the company's undertaking from the liquidator and desirous of improving it for his own ultimate benefit. Such an intention, consciously directed to the advantage, not of the company, but of the applicant, might well vitiate a claim such as the present, but no such suggestion could be made here. The applicant gave evidence before me on the liquidator's notice to cross-examine him, and I may say at once that I am completely satisfied as to his good faith and as to the single-minded purpose which actuated him throughout—which was (as he said) to keep the company going or to keep things going. There is no doubt that all the moneys were advanced on the footing that he should be secured, and there is no doubt that they went into the company's coffers. It is only as regards the final £950 that I feel any doubt, and at that point the question (raised, but not resolved, by ROXBURGH, J.) arises whether a disposition can be so severed as to be validated in part only. In such a case as the present I should have thought that each of the four advances could be treated as a separate "disposition," but it may be unnecessary for me to come to any final conclusion on the point to-day. Towards the end of the hearing, counsel for the liquidator appeared to be willing to concede the applicant's point as regards the first three advances and to confine his claim to the fourth advance, *i.e.*, the £950. His case was based on the fact that part of the amount, after it was received by the directors, was used by them for making payments which were in no sense urgent or pressing, or wholly necessary to "keep the company going," in the applicant's phrase, but while that circumstance might give rise to claims by the liquidator against the directors, I fail to see how, in the circumstances of the present case, it can affect the rights *inter se* of the company and the applicant *qua* lender of the money. The applicant was, it is true, one of the directors and must be presumed to have known the purposes for which the money was required and on which it would probably be expended, and I can imagine cases in which a lender, knowing of an intended misapplication of his money, or suspicious of a scheme intended to defeat the rights of the general body of creditors, would fail to obtain any validation of his charge. This is, in my judgment, very far from being such a case. The liquidator took, among others, the point that part



of the money said to have been provided for wages went in fact to the employees, not of the company, but of certain sub-contractors. There is, I think, nothing in this point. He has traced and explained in detail the destination of the moneys advanced by the applicant, and has suggested that the particulars should be analysed and a part, at least, of them treated as not covered by the charge. I think that it was the liquidator's duty to give the fullest information to the court. But the view which I take of my duty under the section (shared, to the best of my belief, by ROXBURGH, J.) is that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.

I have come to the conclusion that I ought in this case to order otherwise, as regards all the advances, and to make the order in the terms asked for by the summons, including the provision for adding the costs of the applicant to his security, following, in this respect, *Re Park Ward & Co., Ltd.* (1). The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion. I have reviewed the facts of the present case somewhat at length because I think that such a review must usually be necessary whenever a case of this nature falls to be decided. The liquidator's costs of the application will be included in the costs of the liquidation.

*Order accordingly.*

Solicitors : *S. A. Bailey & Co.* (for the applicant) ; *Wild, Collins & Crosse* (for the liquidator).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

*Doubted by* DENNING, L.J. *MOLE v.*  
MOLE. [1950] 2 All E.R. 328.

*Not followed.* POOL *v.* POOL. [1951]  
2 All E.R. 563.

## BOSTOCK v. BOSTOCK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Ormerod, J.), November 28, 29, December 2, 1949.]

*Divorce—Evidence—Privilege—Meeting between parties and their solicitors with view to reconciliation—Admissibility of evidence of proceedings at meeting.*

On the hearing of cross-petitions for divorce on the ground of desertion the husband sought to adduce evidence of what had taken place at a meeting between the parties and their solicitors at which a reconciliation was discussed. The wife objected to the evidence being given on the ground that what occurred at the meeting was privileged.

HELD: what took place at such a meeting was not to be taken as being without prejudice, and, consequently, privileged, if it was not specifically stated to be so, and, therefore, the evidence tendered was admissible.

*McTaggart v. McTaggart* ([1948] 2 All E.R. 754), *explained and distinguished.*

[AS TO COMMUNICATIONS "WITHOUT PREJUDICE," see HALSBURY, Hailsham Edn., Vol. 13, pp. 703-705, para. 774 ; and FOR CASES, see DIGEST, Vol. 22, pp. 375-378, Nos. 3836-3860.]

Case referred to :

(1) *McTaggart v. McTaggart*, [1948] 2 All E.R. 754 ; [1949] P. 94 ; [1949] L.J.R. 82.

PETITION by the husband for divorce on the ground of his wife's desertion. The wife by her answer denied that she had deserted the husband and petitioned for a dissolution of the marriage on the ground of the husband's desertion. ORMEROD, J., gave judgment for the wife. The case is reported only on a point relating to the admissibility of evidence of a meeting held to effect a reconciliation between the parties and their solicitors.

*W. Latey* for the husband.

*Roger Ormrod* for the wife.

ORMEROD, J., stated facts which are immaterial to the present report and continued : At the end of November, 1945, there was a meeting between the husband and the wife and their solicitors to discuss a reconciliation. Counsel for the husband tendered evidence of the events which took place at that meeting, but counsel for the wife objected to that evidence being called on the ground that what occurred at the meeting was privileged. In support of his contention he cited *McTaggart v. McTaggart* (1). There a husband and a wife who had been separated arranged to see the probation officer with a view to becoming reconciled. The attempt was not successful and there were proceedings at which evidence was given by the probation officer to corroborate the evidence of one of the spouses regarding what had taken place at the interview. The matter came before the Court of Appeal, who held that in the particular circumstances the evidence of the probation officer was not privileged and that he could give the evidence. It was pointed out, however, that the reason why he could do so was that the privilege did not attach to him personally, but attached to the two spouses, and they, having themselves given evidence as to what had happened at the interview, had clearly waived the privilege. COHEN and DENNING, L.JJ., in the course of their judgments, said that, had the privilege not been waived, clearly there would have been privilege, because a meeting arranged with the probation officer for the purposes of reconciliation must be presumed to be without prejudice.

On the strength of that authority counsel for the wife asked me to say that the interview in the present case between the two parties and their solicitors was without prejudice and, therefore, privileged, as it was clearly arranged for the specific purpose of effecting a reconciliation. I do not think that the learned lords justices in *McTaggart v. McTaggart* (1) ever intended to go so far as to say that a meeting arranged by the parties to a matrimonial dispute to discuss a possible reconciliation must be taken to be without prejudice if it is not specifically stated so to be. It may be that in *McTaggart v. McTaggart* (1) the meeting was without prejudice, but I think that what the learned lords justices were saying there was that that particular meeting, which was not only a meeting to arrange a reconciliation, but one at which a probation officer was present to assist in achieving that purpose, must be taken to be without prejudice because that combination of circumstances compelled that inference\* to be drawn. Otherwise, if the parties discussed their affairs with the probation officer, with the knowledge that afterwards evidence could be given of the conversations in a court, they would be much less likely to be frank with him, and, therefore, his function would be much less likely to be successful. That is the view I take and, therefore, I admit this evidence.

[HIS LORDSHIP then found that the husband was the party in desertion and granted a decree *nisi* to the wife.]

*Decree nisi with costs.*

Solicitors : *Gibson & Weldon*, agents for *Hand, Morgan & Co.*, Stafford (for the husband) ; *Layton & Co.* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

## GOWER v. GOWER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), November 30, 1949.]

*Divorce—Costs—Security for wife's costs—Trial of issue after decree absolute—Jurisdiction of court to order security—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523/L.9), r. 74 (2).*

A

By the Matrimonial Causes Rules, 1947, r. 74 (2) it is provided: "After the registrar's certificate under r. 30 has been granted, or with leave at an earlier stage of the cause, a wife who is petitioner or has filed an answer may apply for security for her costs of the cause up to the hearing and of and incidental to such hearing."

B

In 1941 a wife obtained a decree *nisi* for the dissolution of her marriage on the ground of her husband's adultery. In 1942 the decree was made absolute and a consent order of £130 a year for the wife's maintenance was made. On July 28, 1948, the husband applied to vary the maintenance by decreasing its amount on the ground that the wife was living in adultery, and on July 14, 1949, PILCHER, J., directed that an issue be tried as to the wife's adultery. The wife applied to the registrar for an order for security of the costs of the issue.

C

HELD: the costs for security for which the wife applied could not be said to be "of and incidental to" the hearing of the divorce suit eight years previously within the meaning of r. 74 (2) of the Matrimonial Causes Rules, 1947, and, accordingly, the wife was not entitled to security thereunder, but the rule was not exclusive, the court had an inherent jurisdiction to order security for a wife's costs in a proper case, and, on the facts, the present was a proper case for the exercise of the jurisdiction.

D

[AS TO SECURITY FOR WIFE'S COSTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 724-727, paras. 1107-1115; and FOR CASES, see DIGEST, Vol. 27, pp. 421-424, Nos. 4277-4307.]

E

Cases referred to:

- (1) *Johnstone v. Johnstone*, [1929] P. 165; 98 L.J.P. 76; 140 L.T. 451; Digest Supp.
- (2) *King v. King*, [1943] 2 All E.R. 253; [1943] P. 91; 112 L.J.P. 89; 169 L.T. 251; 2nd Digest Supp.
- (3) *Roberston v. Robertson and Favagrossa*, (1881), 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 27 Digest 472, 4960.
- (4) *Sheppard v. Sheppard*, [1905] P. 185; 74 L.J.P. 102; 93 L.T. 443; 27 Digest 423, 4297.
- (5) *Williams v. Williams*, [1929] P. 114; 98 L.J.P. 40; 140 L.T. 383; Digest Supp.

F

G

APPEAL by the wife from an order of the registrar, refusing an application by her for security for the costs of an issue arising out of maintenance proceedings. BARNARD, J., allowed the appeal and ordered that the matter be referred back to the registrar. The facts appear in the judgment.

*P. M. O'Connor* for the wife.

H

*Crispin and Stuckey* for the husband.

BARNARD, J.: This is an appeal by a wife from an order of the registrar dated Oct. 31, 1949, refusing to order the husband to secure a sum of money for her costs of an issue arising out of maintenance proceedings. On July 18, 1941, the wife obtained a decree *nisi* for the dissolution of her marriage with the husband on the ground of his adultery, together with an order for the custody of the only child of the marriage. The decree was made absolute on May 4, 1942. On Dec. 4, 1942, a consent order was made for the maintenance of the wife at



the rate of £130 per annum less tax, and on Mar. 10, 1948, an interim order for the maintenance of the child was made at the rate of £1 per week as from May 3, 1947. On July 28, 1948, the husband filed a notice of application to vary the maintenance by decreasing its amount on the ground that, *inter alia*, the wife had been and still was living in adultery. On July 14, 1949, PILCHER, J., ordered that an issue be tried as to the adultery of the wife with oral evidence and by a judge alone. The wife, who was the defendant in the issue, then applied to the registrar for an order for security of the costs of such issue, and, as I have stated, the registrar dismissed her application.

Counsel for the wife contended (i) that this application came within the Matrimonial Causes Rules, 1947, r. 74 (2), and (ii) that the court had an inherent jurisdiction to order security in such a case. In support of his first contention he argued that the application was covered by the words "of and incidental to such hearing." I reject this argument. The word used in the rule is "hearing" and not "decree," and I fail to see how an application to vary maintenance some eight years after the hearing of the divorce case can possibly be "of and incidental to such hearing."

As to the second point, I have come to the conclusion that r. 74 is not exclusive and that the court has an inherent jurisdiction to order security for a wife's costs in proper cases. In *Johnstone v. Johnstone* (1) the husband was ordered to give security for his wife's costs of an issue as to domicile and LORD HANWORTH, M.R., stated in the course of his judgment ([1929] P. 172) that :

"The old rules of the ecclesiastical courts were preserved by s. 22 of the Matrimonial Causes Act, 1857, and are now reproduced by s. 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. The result is that the old rule as to the costs of the spouses is still applicable to costs in the Divorce Division, and the husband has to make provision for costs of the wife to enable her to contest the issue."

Although both he and LAWRENCE, L.J., based their decisions on the ground that an issue as to domicile came within the wording of the Matrimonial Causes Rules, 1924, r. 91, the rule then applicable to security for a wife's costs, GREER, L.J., differed from the other members of the court as to the construction to be placed on that rule and stated that he thought that the court had inherent jurisdiction to deal with the costs of an issue of that kind, such jurisdiction being derived from the practice of the ecclesiastical courts, and, therefore, in his opinion, there was jurisdiction in the registrar to make the order which he had refused to make. In *King v. King* (2) the full Court of Appeal held that it had jurisdiction to order a husband to give security for the costs of his wife in an appeal by him against the dismissal by a judge of the Divorce Court of a petition for divorce brought by him against his wife. SCOTT, L.J., in delivering the judgment of the court, stated ([1943] 2 All E.R. 254) that the practice both before and after the Matrimonial Causes Act, 1857, and the Supreme Court of Judicature Act, 1873, had always been only to give the wife security in cases where she had not sufficient estate to pay her own costs and referred with approval to the passage in LORD HANWORTH's judgment in *Johnstone v. Johnstone* (1) which I have already quoted.

It is important to consider the object of security. SIR GEORGE JESSEL, M.R., stated (6 P. 122, 123) in *Robertson v. Robertson* (3) :

"Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate ; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the ecclesiastical court not

only provided for the costs of her defence, but also gave her alimony *pendente lite* so as to provide for her maintenance . . . I have given what I believe to be the true view of the origin of the liability of the husband ; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs, I think that that reason ought to be sufficient to all right-minded men."

The principle enunciated by SIR GEORGE JESSEL was before the Married Women's Property Act, 1882, but none the less remains unaffected by it, for, after the passing of that Act, SIR GORELL BARNES, P., in the course of his judgment in *Sheppard v. Sheppard* (4), said ([1905] P. 190) :

"It is true that the discretion and the way in which it is exercised originates in the fact that a wife has, at common law, a right to pledge her husband's credit for necessities ; but that is only in part the foundation for the way in which this court exercises its discretion in cases such as this, the real point being that it is impossible to do justice if a woman who is attacked cannot put the court in possession of all the facts, and fight her case and deal with it properly, unless she has funds to do it. And this is equally true in a case where the wife wishes to have relief on the ground of her husband's misconduct. That this does not rest solely on common law principles may be illustrated by the fact that it applies in cases where the woman is not really the wife, as, for instance, where it is alleged that there has been a bigamous marriage."

Further, HILL, J., in *Williams v. Williams* (5), no doubt having in mind the effect of the Married Women's Property Act, 1882, stated ([1929] P. 118) :

"The old basis for the rule, namely, that all the wife's property on marriage passes to the husband, and therefore the husband alone can foot the bill, has gone altogether, and now you must consider whether in the circumstances the wife can foot the bill, and it is a very important matter to consider whether the solicitor can conduct the business without something in court to pay him up to setting down and without security."

I am satisfied in the present case that the wife has no means except the £130 per annum less tax to which she is entitled under the consent order for maintenance and the £1 per week she receives in respect of the child, apart from the fact that she may receive benefits, such as board and lodging from the man with whom she is alleged to be living in adultery, but as to this an issue has been directed. Counsel for the husband contends that since the decree absolute she is no longer the wife and the divorce suit has abated. It is true that she is no longer the wife, but for certain purposes, such as maintenance and custody of children, the divorce suit must be treated as in being and the wife as still retaining the status of wife. I, therefore, allow the wife's appeal, and, as I understand that the registrar dismissed her summons because he considered that he had no jurisdiction, the matter must be referred back to him to consider the question of security.

*Appeal allowed with costs.*

Solicitors : *Arthur Robson* (for the wife) ; *Pengelly & Co.* (for the husband).  
[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

*Re* MCGREAVY. *Ex parte* MCGREAVEY *v.* BENFLEET URBAN DISTRICT COUNCIL AND ANOTHER.

[CHANCERY DIVISION (Romer and Harman, JJ.), November 7, 21, December 5, 1949.]

*Bankruptcy*—"Debt"—*Arrears of rates—Arrears as basis for petition—Bankruptcy Act, 1914 (c. 59), s. 4 (1), s. 33 (1).*

M. and R. carried on a business in partnership on certain premises in respect of which they failed to pay to the B. council a large sum due to the council for rates. M. and R. committed an act of bankruptcy within the Bankruptcy Act, 1914, s. 1 (1) (a), by executing a deed of assignment of their property to a trustee for the benefit of their creditors. The council did not assent to the deed, and subsequently presented a bankruptcy petition against M. and R. On Sept. 28, 1949, a receiving order was made against M. and R. M. appealed on the ground that the debt alleged was not a good petitioning creditor's debt in law.

HELD : having regard to s. 33 (1) (a) of the Act of 1914, the sum due for rates was clearly a provable debt and a debt within the meaning of s. 4 (1) of the Act, and, therefore, it was a debt which would support a bankruptcy petition.

*Liverpool Corpn. v. Hope* ([1938] 1 All E.R. 492), explained.

*Dictum of COCKBURN, C.J.*, in *Ex parte Muirhead, Re Muirhead*, (1876), (2 Ch.D. 25), not applied.

*Re North Bucks Furniture Depositories, Ltd.* ([1939] 2 All E.R. 549), considered.

[AS TO NATURE OF PETITIONING CREDITOR'S DEBT, see HALSBURY, Hailsham Edn., Vol. 2, pp. 56-65, para. 69-75 ; and FOR CASES, see DIGEST, Vol. 4, pp. 113-116, Nos. 1025-1049.]

(1) *Re Edgcome, Ex p. Edgcome*, [1902] 2 K.B. 403 ; 71 L.J.K.B. 722 ; 87 L.T. 108 ; 5 Digest 1022, 8340.

(2) *Liverpool Corpn. v. Hope*, [1938] 1 All E.R. 492 ; [1938] 1 K.B. 751 ; 107 L.J.K.B. 694 ; 158 L.T. 215 ; 102 J.P. 205 ; Digest Supp.

(3) *Ex p. Muirhead, Re Muirhead*, (1876), 2 Ch.D. 22 ; 45 L.J.Bey. 65 ; 34 L.T. 303 ; 4 Digest 124, 1127.

(4) *Re Debtor (No. 975 of 1937), Debtor v. Petitioning Creditor and Official Receiver*, [1938] 2 All E.R. 530 ; Digest Supp.

(5) *Re O'Gorman, Ex p. Bale*, [1899] 2 Q.B. 62 ; 68 L.J.Q.B. 650 ; 80 L.T. 501 ; 4 Digest 124, 1128.

(6) *Re Sacker, Ex p. Sacker*, (1888), 22 Q.B.D. 179 ; 58 L.J.Q.B. 4 ; 60 L.T. 344 ; 4 Digest 113, 1019.

(7) *Re Macoun*, [1904] 2 K.B. 700 ; 73 L.J.K.B. 892 ; 91 L.T. 276 ; 4 Digest 112, 1013.

(8) *Ex p. Harris, Re Lewis*, (1876), 2 Ch.D. 423 ; 45 L.J.Bey. 71 ; 34 L.T. 261 ; 4 Digest 87, 789.

(9) *Ex p. Jones, Re Jones*, (1881), 18 Ch.D. 109 ; 50 L.J.Ch. 673 ; 45 L.T. 193 ; 4 Digest 29, 235.

(10) *Re Hunter*, (1879), 3 L.R. Ir. 465 ; 4 Digest 114, 10280.

(11) *Re North Bucks Furniture Depositories, Ltd.*, [1939] 2 All E.R. 549 ; [1939] Ch. 69 ; 108 L.J.Ch. 275 ; 160 L.T. 523 ; 103 J.P. 207 ; Digest Supp.

(12) *Huddersfield Police Authority v. Watson*, [1947] 2 All E.R. 193 ; [1947] K.B. 842 ; [1948] L.J.R. 182 ; 177 L.T. 114 ; 111 J.P. 463 ; 2nd Digest Supp.

(13) *Lloyd v. Heathcote*, (1820), 2 Brod. & Bing 388 ; 5 Moore, C.P. 129 ; 4 Digest 114, 1029.

APPEAL by a debtor from a receiving order made on Sept. 28, 1949, by the registrar of the Southend County Court.



The petition was presented by the Benfleet Urban District Council to whom the debtor (and his business partner, who did not resist the petition, or now appeal against the order) owed a large sum in rates. The debtor in the present appeal argued that unpaid rates were not such a debt as would support a bankruptcy petition. The appeal was dismissed. The facts appear in the judgment of the court.

- A *Aronson, K.C., M. V. S. Hunter and Sabin* for the appellant debtor.  
*Christie, K.C., Caplan and Lloyd-Davies* for the Benfleet Urban District Council.  
*C. W. Chandler* for the Official Receiver.

*Cur. adv. vult.*

- Dec. 5. **HARMAN, J.**, read the following judgment of the court. This is  
 B an appeal from a receiving order made on Sept. 28, 1949, by the registrar of the Southend County Court against Francis Bernard McGreavey and Frederick Leslie Rundle, who are described in the order as "lately trading in co-partnership under the style or firm of McGreavy (*sic.*) & Rundle." The order was made with the consent of the debtor Rundle, and he is no party to this appeal, but McGreavey resisted the petition, though not, apparently, on any grounds now taken, and  
 C he appeals against the order. At the hearing before us both the grounds of appeal stated in his notice of appeal dated Oct. 18, 1949, were abandoned, and application was made to us to allow a new and additional ground to be put forward, to wit, that "the debt alleged in the petition is not a good petitioning creditor's debt in law." These words are taken from a letter from the appellant's solicitors to the Official Receiver of Nov. 1, 1949. We permitted the appeal to  
 D go forward on this ground.

- The petitioner in this case is the Benfleet Urban District Council, and the foundation of the petition is a large sum admittedly due to the council for rates on a stadium where the partnership business was formerly carried on. The act of bankruptcy was the execution by the debtors of an assignment of their property to a trustee for the benefit of their creditors. The council did not assent  
 E to that deed, and there is no doubt that the act of bankruptcy is within the Bankruptcy Act, 1914, s. 1 (1) (a). The point now taken involves a novel issue which may be shortly stated. It is that the only remedy which a local authority has for the recovery of rates is the statutory remedy of distress, and that this is in fact an attempt, and the first attempt made for three hundred years, to enforce payment of rates by means other than the statutory means. The council  
 F retort that there is no doubt that rates are a debt provable in bankruptcy, having, indeed, a certain priority under the Bankruptcy Act, 1914, and they urge that, if a debt (as opposed to a liability) is provable, it will support a petition.

- Rates were first created by the statute 43 Eliz. c. 2 (the Poor Law Relief Act, 1601), which enacts that the churchwardens and householders appointed for the purpose shall raise weekly or otherwise by taxation of every inhabitant,  
 G parson, vicar, and other and every occupier of lands, houses, and so on, in the parish any such competent sum as they think fit, and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind and such others being poor and not able to work. Section 2 of this statute authorises the overseers by warrant from two justices to levy the rates and arrears by distress and sale of the offender's goods. By the Distress for Rates  
 H Act, 1849, s. 2, justices are empowered to issue a warrant of commitment against persons not having goods and chattels on which distress can be levied and to keep such persons in prison for three months. By the Money Payment (Justices Procedure) Act, 1935, s. 10, the power to issue a warrant for commitment is limited to cases where the failure to pay is found to have arisen from the wilful refusal or culpable neglect of the ratepayer, and the justices are empowered, where they decline to issue a warrant, to remit the payment of rates.

Turning now to the bankruptcy legislation, the Act of 1914, which alone is

in force, by s. 1 (1) (a) provides as before mentioned the act of bankruptcy in this case. Section 3 provides who may present a petition, namely, for the present purpose, a creditor. Section 4 limits the nature of the debt, which must, by sub-s. (b), be a liquidated sum payable either immediately or at some certain future time. By s. 30 the debts and liabilities provable in bankruptcy are described, and sub-s. (8), which defines the word "liability," shows that a good many claims may be proved which could not support a petition. Section 33 (1) provides that there shall be paid "in priority to all other debts (a) . . . local rates due from the bankrupt." It is clear, therefore, that rates are a debt within the meaning of the Bankruptcy Act, because the last mentioned section speaks of "other" debts. That, however, it is said, does not conclude the question. We are reminded that under the Bankruptcy Act, 1869, s. 6, a debt, in order to support a petition, must be a debt "due at law or in equity," and it is said that these words must necessarily mean enforceable by action in a court of law or equity. Before the Act of 1869, an equitable debt was provable, but would not support a bankruptcy petition. The reason for this is not apparent. The position was changed by the Act of 1869. After the Judicature Act the words "due at law or in equity" disappeared owing to the fusion of the two systems, but it is said that the law remains the same and that one test of whether a debt will support a petition is whether it can be the subject-matter of an action in court.

The appellant debtor starts with the point that, since 1601, the only remedy ever expressly given for the enforcement of rates has been the remedy of distress, aided possibly by committal, though that has been held to be a punitive remedy and not a method of enforcement : *Re Edgcombe* (1). The debtor cites and relies on *Liverpool Corpn. v. Hope* (2) in the report of which ([1938] 1 K.B. 751) the headnote is in these terms:

"An action by a local authority to recover unpaid arrears of rates will not lie. The proper method of procedure in such a case is by an application for a distress warrant followed by distress. A local authority commenced proceedings in the county court for certain unpaid arrears of rates which they alleged to be due. The county court judge having held that on such a claim an action would lie, the respondent appealed :—*Held* (reversing the decision of the county court judge), that, a rate not being a common law liability but the creature of statute, this method of procedure was wrong, and the only remedy available was that laid down by statute, namely distress."

SLESSER, L.J., giving judgment, says ([1938] 1 All E.R. 494) :

"It is sufficient to say that it is really not suggested, and it could not be suggested, that any statute from the year 1601 down to the Rating and Valuation Act, 1925, or any Act amending that Act, has ever provided the local authority with any remedy for the non-payment of rates other than the remedy by distress. In those circumstances the learned county court judge does not, as I understand it, suggest that there is any remedy at common law by action for the non-payment of rates, but he does suggest that an analogy should be drawn between a rating authority demanding rates and a landlord demanding rent . . . It is elementary that the right of a landlord to sue for his rent arises either out of some express covenant or contract or out of tenure. There is no such relationship, there is no such contract, as between the local authority and the ratepayer, and the whole analogy is unsound."

Earlier he had said (*ibid.*) :

"As to the first ground [of appeal], which appears on the face of it to be an ordinary common law claim for debt, it is clear to my mind that the only remedy which is afforded to a local authority entitled to rates is the remedy of distress."

Now, of course, if that be the whole law on the subject, there is an end of the matter. It seems to us, however, that the lord justice was, in fact, addressing his mind only to the question before him, namely, whether a remedy by action was available, and his decision merely negatives this.

The debtor further relies on *Re Muirhead* (3). That was a case in which the Court of Appeal held that a husband in a divorce suit, in whose favour the Divorce Court had made an order that the damages against the co-respondent should be paid to him on his undertaking to lodge the money recovered in court, could not support a bankruptcy petition. In our judgment, the true *ratio decidendi* of that case rests on the opinion of the court that the money was not due to the petitioner, who was merely a kind of conduit pipe appointed by the court to collect money to which he had no claim himself. That is the view of the decision recently expressed by SIR WILFRID GREENE, M.R., in *Re a Debtor* (No. 975 of 1937) (4) ([1938] 2 All E.R. 533). COCKBURN, C.J., does, however, say in *Muirhead's* case (3) (2 Ch.D. 25) :

“Now in order to constitute a good petitioning creditor's debt, you must have that which may be the immediate subject of an action at law or suit in equity.”

This is clearly an echo of the Act of 1869 then in force. MELLISH, L.J., after referring (*ibid.*, 27) to the same words “debt due either at law or in equity,” founds himself on the view that the debt must be payable to the petitioner. This last view was enough to decide the question, and the statement of COCKBURN, C.J., above quoted was, in our judgment, *obiter dictum*. In *Re O'Gorman* (5), WRIGHT, J., accepted the decision in *Muirhead's* case (3), but held that a sum ordered to be paid to a petitioner in divorce was a good provable debt. That was all he was called on to decide. *Re Sacker* (6) also cited to us, must, having regard to the observations in *Re Macoun* (7) ([1904] 2 K.B. 703), be taken to be authority only for the view that a receiver as such is not a “creditor,” even though there be an order for payment of a balance to him. It follows that, unless he has some other right (*e.g.*, if he be the holder of a bill of exchange entitling him to take action in his own name), he cannot support a bankruptcy petition : *secus* a receiver who has a personal right to sue: *cf. Ex p. Harris* (8).

All these cases, however, still leave us without an example which satisfies us that there can be a provable debt (as opposed to a liability) due to the petitioner, and not merely payable to him on behalf of another, which will not support a bankruptcy petition. As we have said, there are many liabilities provable which will not support a petition, but that is not the same thing. The instance of a statute-barred debt was advanced to us, but that seems to us to be in essence an unenforceable liability rather than a debt. It may, it is true, be used as a shield by way of set off, or give a right of retainer, but it is not a debt in respect of which any active step can be taken. Again, we were referred to infants' debts which will not support a petition (*Ex p. Jones* (9) ), but the reason stated (18 Ch.D. 120) by SIR GEORGE JESSEL, M.R., for that decision was that money owing by an infant was not a legal debt, but only (where the infant has acted fraudulently) a liability in equity to pay a sum of money.

We do not see why, in the face of the express words of the Bankruptcy Act, which show beyond doubt that rates are a provable debt, they will not support a petition merely because they cannot be sued for by action at law. This can only be so if rates are not a “debt” within s. 4 of the Act, and, in our judgment, they must be a “debt” within that section, having regard to the fact that they are manifestly debts within s. 33. To hold otherwise would be to construe one word in two senses in different parts of the same statute. We were referred by counsel for the debtor to an Irish case, *Re Hunter* (10), in which the headnote (3 L.R.Ir. 465) is as follows :

“The statute 12 & 13 Vic., c. 91, providing for the collection of rates



in the city of Dublin, makes the Collector-General a creditor, and empowers him to sue in his own name for arrears of rates as a debt due to and vested in him; and therefore he is entitled to avail himself of the procedure in bankruptcy subsequently provided for the benefit of creditors in general."

Counsel invited us to take the view that it was only because of the terms of the special Act in that case that the Collector-General of Rates in the City of Dublin could present a petition. The case turns on the construction of the Irish Act, but it does no more than show that the collector was a creditor and carries us, we think, no further. A

Counsel for the debtor made the further point that rates could not be the subject of a bankruptcy notice because no judgment could be obtained for them, and that the local authority must, therefore, wait till the debtor committed some act of bankruptcy independent of the volition of the creditor, and argued that this showed that a species of debt of this special kind was not a debt within s. 4. This point may well, in our judgment, explain the absence of precedent for a petition of this sort, but has no further relevance. It was further objected that, as no attempt to levy distress had been made in this case, the debt was not liquidated, because of the justices' power to remit under the Act of 1935, but, in our judgment, there is nothing in this. The local authority is under no obligation to apply for a warrant, and if that step be not taken, the power to remit does not arise. B C

The council relied chiefly on the Bankruptcy Act, 1914, s. 33, already referred to, and on the analogous legislation in the Companies Acts, and a decision under the Companies Act, 1929, of CROSSMAN, J., in *Re North Bucks Furniture Depositories, Ltd.* (11), where he held that a local authority could petition to wind-up a limited company for unpaid rates. The learned judge there founded himself merely on the words of the Companies Act, 1929, s. 170, which provides that a "creditor" may petition. He held that, having regard to the priority section in the Act (s. 264), rates must be a debt, and the person to whom the debt was owed must be a creditor within the meaning of s. 170. This legislation is exactly parallel to the bankruptcy legislation in this respect, and the case is, we think, on all fours with the present, though not binding on us as a Divisional Court: see *per* LORD GODDARD, C.J., in *Police Authority for Huddersfield v. Watson* (12). It would, however, be a lamentable anomaly if it were the law that arrears of rates were a good debt on which to found a petition for winding-up a limited company, but not a good debt to found bankruptcy proceedings if the debtor happened to be an unincorporated association. The council further relied on *Lloyd v. Heathcote* (13), but that case only shows that the court considered rates to be a debt, and the collector a creditor, within the meaning of the bankruptcy law, notwithstanding the fact that the collector could not sue. It is no authority for the proposition that a petition can be founded on a debt for rates, and carries the council no further, for none can deny that a rate now is a debt in bankruptcy so far as proof is concerned. D E F G

For these reasons, while we recognise that this may be a novelty in bankruptcy law, and we have hesitated long, having regard to the Official Receiver's statement to us that there is no record of a petition based on rates in the bankruptcy records, we are of opinion that there is no escape from the language of the Act of 1914, and that this is such a debt as will support a petition in bankruptcy. We, accordingly, dismiss the appeal. H

*Appeal dismissed with costs. Costs of the Official Receiver to be added to his costs, charges and expenses payable out of the estate.*

Solicitors: *Percy Haseldine & Co.* (for the debtor); *Zefferitt, Heard & Morley Lawson*, agents for *Heard & Coleman*, Hadleigh, Essex (for the Benfleet Urban District Council); *Solicitor to the Board of Trade* (for the Official Receiver).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

## HAMBLIN v. HAMBLIN (by her Guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Ormerod, J.), November 22, 1949.]

*Divorce—Insanity—Incurable unsoundness of mind—Period of “care and treatment”—Detention in approved hospital in pursuance of order made under Lunacy Act, 1890—Quarterly returns by medical officer not made within prescribed time—Returns not sent to Board of Control within prescribed time—Effect on detention order—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 176 (d) (as amended by the Matrimonial Causes Act, 1937 (c. 57), s. 2)—Matrimonial Causes Act, 1937 (c. 57), s. 3 (a)—Mental Treatment Rules, 1930 (S.R. & O., 1930, No. 1083), r. 126 (1), (3) (as amended by the Mental Treatment (Emergency Provisions) Rules, 1940 (S.R. & O., 1940, No. 1095)).*

From Apr. 25, 1930, the wife had been detained in an approved hospital under an order made under the Lunacy Act, 1890, s. 24 (3). She had been visited quarterly by the medical officer of the hospital, as required by s. 202 (1) of the Act of 1890, but the medical officer had failed to make his returns within the time prescribed by the Mental Treatment Rules, 1930, r. 126 (1), and the returns were not sent to the Board of Control within the time prescribed by r. 126 (3) (as amended by the Mental Treatment (Emergency Provisions) Rules, 1940). On a petition by the husband for divorce on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment since Apr. 25, 1930, it was contended on behalf of the wife that the neglect to comply with the provisions of the Mental Treatment Rules, 1930, r. 126, brought to an end the order of Apr. 25, 1930, and, therefore, the wife had not been “continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition,” as required by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (d), as amended by the Matrimonial Causes Act, 1937, s. 2.

**HELD :** neglect to comply with the provisions of the Mental Treatment Rules, 1930, r. 126 (1) and (3), did not in any way invalidate or bring to an end the order of Apr. 25, 1930, and, therefore, the wife remained subject to the order and continued to be under “care and treatment,” within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (d), as amended by the Matrimonial Causes Act, 1937, s. 2, and as defined by s. 3 (a) of the Act of 1937, and the husband was entitled to a decree *nisi*.

[AS TO DIVORCE ON GROUND OF INSANITY, see HALSBURY, Hailsham Edn., 1949 Supplement, Divorce, para. 981.]

**PETITION** by the husband for divorce on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment since Apr. 25, 1930.

In 1930 the wife was admitted, under the Lunacy Act, 1890, s. 24, to the Fulham Hospital, and later was transferred to the Tooting Bee Hospital where she remained up to the present time. The necessary formalities were complied with when the admission took place and when the order of detention, under s. 24 (3) of the Act, was made on Apr. 25, 1930, but it was contended by counsel on her behalf that she had not been “continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition,” as required by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (d), as amended by the Matrimonial Causes Act, 1937, s. 2, because the provisions of the Mental Treatment Rules, 1930, r. 126, were not complied with.

By the Matrimonial Causes Act, 1937, s. 3 : “For the purposes of s. 176 of [the Supreme Court of Judicature (Consolidation) Act, 1925], as amended by this

Act, a person of unsound mind shall be deemed to be under care and treatment (a) while he is detained in pursuance of any order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . .” By the Lunacy Act, 1890, s. 202 (1) (as amended by the Mental Treatment Act, 1930, s. 20 (4) and (5) ), every rate-aided person of unsound mind not in an institution for persons of unsound mind “shall once in every quarter of a year . . . be visited . . . if resident in a workhouse, by the medical officer of the workhouse.” By the Mental Treatment Act, 1930, s. 19 (1), where a person of unsound mind is liable under the Act of 1890 to be detained in a workhouse, he may be detained instead in an approved hospital, subject to the same provisions of the Lunacy Acts, 1890 to 1922, as if he were in a workhouse. By the Mental Treatment Rules, 1930, r. 126 (1), within seven days of the last day of each quarter “each . . . medical officer of a . . . hospital approved under s. 19 of the Act of 1930 shall make a return of all rate-aided persons of unsound mind who during the preceding quarter were visited by him under s. 202” of the Act of 1890. By r. 126 (3) (as amended by the Mental Treatment (Emergency Provisions) Rules, 1940 (S.R. & O., 1940, No. 1095) ) : “Within two clear days after the receipt of the return in respect of a quarter ending Mar. 31 the clerk shall make a copy thereof and send the return to the Board [of Control].”

The visits required by s. 202 (1) of the Act of 1890 had been duly made by the medical officer, but the returns had not always been made within the time prescribed by r. 126 (1), and were not sent to the Board of Control within the time prescribed by r. 126 (3), although they were sent at some subsequent time. ORMEROD, J., now held that the failure to make the returns within the time prescribed did not invalidate or bring to an end the order of Apr. 25, 1930, for the “care and treatment” of the wife, and he granted the decree *nisi*.

*King Anningson* for the husband.

*Horner* for the wife.

ORMEROD, J. : I think it is clear that in this case I should grant a decree. [After stating the facts, HIS LORDSHIP dealt with the relevant statutory provisions, and continued :] The only question that arises is whether the fact that the returns were not made and sent to the Board of Control within the prescribed time has the effect of bringing to an end the period of “care and treatment” under the order of Apr. 25, 1930, or whether, in spite of the neglect of the medical officer to make his returns within the prescribed time, the order still remains in force and, therefore, the “care and treatment” continue. I see nothing in r. 126 to lead me to think that, if the provisions of the rule are not complied with, the person affected ceases to be subject to the original order that was made. I think that, had it been the intention of those framing the Mental Treatment Rules, 1930, that that should be so, it would have been clearly expressed, because there is the plain statutory provision in s. 24 of the Act of 1890 setting out the circumstances in which an order shall be made and the effect of an order when it is made. Therefore, I am satisfied that the neglect of the medical officer to make the returns within the prescribed time does not in any way invalidate or bring to an end the order which was made, and which has been in force for some years, for the “care and treatment” of the wife. I am not in any way excusing the neglect of the medical officer in question to make the prescribed returns. The rules are made for the protection of the patients in the hospital or the asylum, as the case may be, and, therefore, it is of the highest importance that the returns should be made and that they should be complied with strictly so that the patients and their relatives may have access to the returns and be satisfied that the interests of the patients are being looked after, as the law of the country provides that they should, but I do not think that, in the event of neglect to comply with one of the rules, it follows that an order which has been made should come to an end. Therefore, I am satisfied that, so far as the Supreme Court of Judicature (Consolidation)



Act, 1925, s. 176 (d) (as amended by the Matrimonial Causes Act, 1937, s. 2), is concerned, the conditions have been complied with and this is a proper case for a decree *nisi* to be made.

*Decree nisi granted. The wife's costs to be paid by the husband, and an order for maintenance of the wife.*

Solicitors : *Lewis-Barnes, Wheeler & Co.* (for the husband) ; *The Official Solicitor* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

B

### NOTE.

## CRIMINAL JUSTICE ACT, 1948 : PRACTICE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Cassels, JJ.), December 12, 1949.]

*Criminal Law—Sentence—Corrective training—Preventive detention—Supervision order—Previous convictions—Admission—Need to caution prisoner—Notice of intention to prove conviction—Need to give notice to produce notice—Criminal Justice Act, 1948 (c. 58), s. 21 (1) ; s. 22 (1) ; s. 23 (1).*

D Case referred to :

(1) *R. v. Turner*, [1910] 1 K.B. 346 ; 79 L.J.K.B. 176 ; 102 L.T. 367 ; 74 J.P. 81 ; 14 Digest 482, 5258.

### STATEMENT BY THE LORD CHIEF JUSTICE.

E LORD GODDARD, C.J. : I want to mention two matters of practice under the Criminal Justice Act, 1948, with regard to ss. 21-23. I am told that certain chief officers of police have raised the question whether, when they serve notice on the prisoner of previous convictions and invite him to say whether he admits them or not, it is necessary to administer a caution. In the opinion of the court it is not necessary that any caution should be administered when the police are serving the appropriate notices.

F The other point is that I am told there has been an inquiry from quarter sessions, or a point has been raised at a certain borough quarter sessions, whether or not a police officer can give evidence of the contents of the notice that he serves on the prisoner without giving a notice to produce it. I am surprised this question should have been raised because I thought it was a well known rule of evidence relating to documents that no notice to produce the notice ever

G need be given. The classic case, of course, is a notice to quit where an action is brought to recover possession of land. No notice to produce the notice is ever necessary, and, if authority were wanted, it was so expressly ruled by this court in *R. v. Turner* (1), in which CHANNELL, L.J., pointed out that, if you had to give notice to produce the notice, you would have to give notice to produce the notice to produce, and so *ad infinitum*. If ever the question is raised again,

H chairmen of quarter sessions can rest assured that it is not necessary to give notice to produce the notice which has been served on the prisoner.

## R. v. GREEN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Pritchard, JJ.), December 5, 1949.]

*Criminal Law—Trial—Irregularity—Communication from jury to judge—Answer given in absence of prisoner.*

At the conclusion of the trial of the appellant on a charge of receiving stolen property, the jury, having retired to consider their verdict, sent to the recorder a written note in which they asked a question relating to the case. The recorder received and answered the note in his private room, without returning to court, and so the contents of the communication were not made known to the prosecution or to the appellant or his counsel.

**HELD :** any communication between a jury after their retirement and the presiding judge, even though it may be purely immaterial, must be read out in open court and the answer given, in the presence of the prosecution and the accused person ; this procedure had not been followed ; and the conviction must be quashed.

[AS TO COMMUNICATIONS WITH A JURY OUT OF COURT, see HALSBURY, Hailsham Edn., Vol. 19, p. 312, para. 650 ; and FOR CASES, see DIGEST, Vol. 30, pp. 236-237, Nos. 312-327.]

Case referred to :

- (1) *R. v. Bodmin Justices, Ex parte McEwen*, [1947] 1 All E.R. 109 ; [1947] K.B. 321 ; [1947] L.J.R. 338 ; 111 J.P. 47 ; 2nd Digest Supp.

**APPEAL** against conviction.

The appellant, who was convicted at Bolton Quarter Sessions of receiving stolen cloth valued at £7,000, based his appeal on the fact that, unknown to him written communications had passed between the jury and the recorder while the jury were in their room considering their verdict. The Court of Criminal Appeal allowed the appeal and quashed the conviction.

*H. Lever* for the appellant.

*W. G. Morris* for the Crown.

**LORD GODDARD, C.J.**, delivered the following judgment of the court. The appellant was convicted before the recorder of Bolton of receiving 60,947 yards of cloth, valued at more than £7,000. There can be no doubt that on the evidence the conviction was amply justified, but, unfortunately, the recorder made an error. After the jury were enclosed, they sent him a communication which he received in his private room and then sent an answer to the jury in their room without coming into court and disclosing what was the question which the jury had put, or what was his answer thereto. He says :

"The note from the jury was returned to them. It contained a simple question (the exact terms I do not remember) with which I had dealt in my summing-up. I considered whether it was necessary to call them back into court, but, as the question was, as I have said, so simple and had been dealt with, I did not deem it necessary."

This court and the Divisional Court have said on more than one occasion that any communication between a jury and the presiding judge must be read out in court, so that both parties, the prosecution and the defence, may know what the jury are asking and what is the judge's answer. Very likely, in the present case, the communication was quite immaterial, and, if the recorder had been able to tell this court what was the question asked by the jury, we might have been able to consider it, although nothing that I say now should be taken in any way to authorise a departure from the well-recognised rule that these matters must be dealt with openly in court. In *R. v. Bodmin Justices, Ex parte McEwen* (1), after the magistrates had retired to consider a case, they sent for a witness

and asked him a question in their room. The question, they stated in their affidavit, was in the interests of the prisoner, but, as it was done in the absence of the prisoner, the Divisional Court felt that the only thing they could do was to bring up the conviction on *certiorari* and quash it. In the present case the court feels the same difficulty. The communication made to the recorder was not read out in court and the appellant, therefore, did not, and does not, know what it was. In these circumstances, however unfortunate it may be, the appellant having been shown to the satisfaction of the jury to have been guilty of a most serious crime, this court feels that there is no option but to quash the conviction.

*Conviction quashed.*

Solicitors : J. H. Milner, agent for Lewis & Co., Manchester (for the appellant); E. Fielding, Bolton (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

### NOTE.

#### *Re* KAVANAGH. *Ex parte* THE BANKRUPT *v.* JACKSON (THE TRUSTEE).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.),  
December 5, 6, 1949.]

*Bankruptcy—Property available for distribution—Claim by bankrupt for damage to reputation and property—Settlement of action—Apportionment of agreed damages—Bankruptcy Act, 1914 (c. 59), s. 38 (a).*

APPEAL by the trustee in bankruptcy from an order of the Divisional Court of the Chancery Division, dated June 27, 1949, reported [1949] 2 All E.R. 264.

On Nov. 7, 1947, K., on whom a bankruptcy notice had been served, issued a writ against her former solicitor, B., and alleged in her statement of claim that B. had divulged information given him in confidence as her solicitor, causing her irreparable loss of credit and reputation, and preventing her from managing her financial affairs so as to avoid bankruptcy. As special damages she claimed (i) cost of appearing at and defending the bankruptcy proceedings; (ii) costs of defending an originating summons issued by a bank in respect of a mortgage; and (iii) loss of profit in a business which she had carried on. On Nov. 11, 1947, a receiving order was made against K., and adjudication followed on Dec. 3, 1947. K.'s action against B. never came to trial, it being settled on Feb. 22, 1949, by the payment of £1,000 by B. together with K.'s party and party costs, and judgment being entered accordingly. The trustee in bankruptcy made no application in the action, although on Nov. 10, 1948, he wrote to K.'s solicitors saying that, in reliance on the Bankruptcy Act, 1914, s. 38, he would claim any sum recovered in the action as assets in the bankruptcy. On Mar. 4, 1949, the trustee notified all persons concerned by letter that he claimed the £1,000. B. paid the £1,000 into the county court to abide the decision of the court and the trustee moved in the county court for a declaration that the whole of the money was payable to him. It was agreed at the hearing that K. would have become bankrupt in a fortnight or so irrespective of the acts of B.'s of which K. complained, and K. argued that, therefore, the acts of B. had not resulted in any damage to her property, but that the whole £1,000 was attributable to damage to her personally in



respect of her credit or reputation and was payable to her. The trustee argued that there was, equally, no case to show damage to her credit or reputation in view of her impending bankruptcy, and that the £1,000 must vest in him under s. 38 (a).

HELD : in view of the facts that there was a judgment ordering the payment of the £1,000 in satisfaction of all claims and that there was no evidence that that sum should be allocated wholly to one head, the argument based on s. 38 (a) could not be upheld and the money should be divided equally between the two heads of claim.

*Decision of the Divisional Court of the Chancery Division* ([1949] 2 All E.R. 264), *affirmed*.

[AS TO ENTITLEMENT TO PROPERTY DEVOLVING ON BANKRUPT BEFORE DISCHARGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 219-225, paras. 290-295 ; and FOR CASES, see DIGEST, Vol. 5, pp. 724-729, Nos. 6286-6323.]

Cases referred to :

(1) *Addis v. Gramophone Co., Ltd.*, [1909] A.C. 488 ; 78 L.J.K.B. 1122 ; 101 L.T. 466 ; 17 Digest 78, 1.

(2) *Wilson v. United Counties Bank, Ltd.*, [1920] A.C. 102 ; 88 L.J.K.B. 1033 ; 5 Digest 974, 7971.

The county court judge ordered the apportionment of the £1,000 as to £300 to K. personally, and £700 to her trustee in bankruptcy. The Divisional Court varied that order, apportioning the money equally between the bankrupt and the trustee.

*Appeal dismissed with costs.*

Solicitors : *Field, Roscoe & Co.*, agents for *Cook, Fowler & Outhet*, Scarborough (for the trustee) ; *Gibson & Weldon*, agents for *Tasker, Hart & Munby*, Scarborough (for the bankrupt).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

*Followed.* BATER v. BATER. [1950] 2 All E.R. 458.

## DAVIS v. DAVIS.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), November 8, 9, 1949.]

*Divorce—Cruelty—Standard of proof—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (2) (as substituted by the Matrimonial Causes Act, 1937 (c. 57), s. 4).*

By s. 178 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by the Matrimonial Causes Act, 1937, s. 4 : "If the court is satisfied on the evidence that—(i) the case for the petition has been proved . . . the court shall pronounce a decree of divorce."

A husband petitioned for divorce on the ground of his wife's cruelty. The learned judge found that cruelty had not been proved with the same degree of strictness as is required for proof of a criminal offence in a criminal court, and dismissed the husband's petition.

*Per BUCKNILL and SOMERVELL, L.JJ.* : the word "strict" is sufficiently apt to describe the measure and standard of proof required of a charge of cruelty in the Divorce Court, and it is unnecessary to introduce any question of the standard of proof required of a criminal charge.

*Per DENNING, L.J.* : s. 178 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (as substituted) lays down a sufficient test by providing that a decree shall be pronounced if the court is "satisfied on the

evidence that the case for the petition has been proved." That puts the burden on the person who makes the allegation, but it is not a burden of extraordinary weight. The same standard of proof as that required in criminal cases is not needed, to say nothing of the rules as to corroboration of the evidence of accomplices and so on which apply in criminal courts.

*Per curiam* : the charges of cruelty were proved beyond reasonable doubt, and the husband was entitled to a decree.

[AS TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694.]

Cases referred to :

(1) *Ginesi v. Ginesi*, [1948] 1 All E.R. 373 ; [1948] P. 179 ; [1948] L.J.R. 892 ; 112 J.P. 194 ; 2nd Digest Supp.

(2) *Churchman v. Churchman*, [1945] 2 All E.R. 190 ; [1945] P. 44 ; 114 L.J. (P.) 17 ; 173 L.T. 108 ; 2nd Digest Supp.

(3) *Lauder v. Lauder*, [1949] 1 All E.R. 76 ; [1949] P. 277.

(4) *Wright v. Wright*, (1948), 77 C.L.R. (2) 191.

(5) *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 ; [1948] L.J.R. 203 ; 177 L.T. 536 ; 2nd Digest Supp.

(6) *Mordaunt v. Moncreiffe*, (1874), L.R. 2 Sc. & Div. 374 ; 43 L.J.P. & M. 49 ; 30 L.T. 649 ; 39 J.P. 4 ; 27 Digest 384, 3770.

(7) *Loveden v. Loveden*, (1810), 2 Hag. Con. 1 ; 27 Digest 296, 2730.

APPEAL by the husband from a judgment of BARNARD, J., dated Mar. 18, 1949, dismissing the husband's petition for divorce on the ground of his wife's cruelty.

The wife had brought a cross-charge in her answer for divorce on the ground of her husband's cruelty, which the learned judge had dismissed and against that decision there was no appeal. The Court of Appeal, in allowing the husband's appeal, indicated that they were not prepared to extend the decision in *Ginesi v. Ginesi* (1) to include cases of cruelty, and held that, on the evidence, cruelty had been established.

*E. G. H. Beresford* for the husband.  
*Cuddon* for the wife.

**BUCKNILL, L.J.** : This is an appeal from a judgment of BARNARD, J., dismissing a petition by the husband for a divorce on the ground of the cruelty of his wife and dismissing the cross-petition of the wife in her answer for a decree of divorce on the ground of the husband's cruelty. There is no appeal by the wife from the latter decision, and the only question we have to consider is whether the judge was right in dismissing the husband's petition.

[HIS LORDSHIP stated the facts and continued :] The one point made by counsel for the husband is that the learned judge misdirected himself in saying that a charge of cruelty must be proved with the same degree of strictness as that with which a crime must be proved in a criminal court. That has caused a certain amount of discussion, and, no doubt, the question may require to be finally settled hereafter. I do not propose to attempt to settle it today, but I must draw attention to two cases. In *Ginesi v. Ginesi* (1) the Court of Appeal accepted the statement of LORD MERRIMAN, P., in *Churchman v. Churchman* (2) that so far, at any rate, as adultery is concerned the same strict proof is required as in criminal offences properly so called. It is true that in *Churchman v. Churchman* (2) LORD MERRIMAN used rather broader words than that because he spoke merely of a matrimonial offence, but in that case the court was dealing with the question of adultery. In *Ginesi v. Ginesi* (1), after quoting the dictum of LORD MERRIMAN in *Churchman v. Churchman* (2), WROTTESELEY, L.J., said ([1948] 1 All E.R. 376) :

"It will be observed, therefore, that the standard of proof with which we have been dealing in this case is there said by LORD MERRIMAN to apply

to all matrimonial cases. All that it has been necessary to establish in the present case is that that standard applies to the proof of adultery, and since all the authorities cited to the court are cases of adultery, I only desire to say that it seems to me that today this court need only lay down that this standard of proof applies to cases of adultery, leaving it to other occasions to decide whether it is equally true of other matrimonial matters—in addition, of course, to connivance, which was the offence which LORD MERRIMAN must have had in mind in *Churchman v. Churchman* (2).”

It is interesting to note that in *Lauder v. Lauder* (3) LORD MERRIMAN said ([1949] 1 All E.R. 77) on the question of cruelty :

“ It is a commonplace to say that cases of that character need, as, indeed, do all cases of cruelty, to be strictly proved, and strictly proved in accordance with the well known definition of cruelty to which I will refer later.”

I myself think that the word “ strict ” is sufficiently apt to describe the measure and standard of proof required of a charge of cruelty and that it is unnecessary to introduce any question of the standard of proof required of a criminal charge. As a matter of interest, the matter has been considered in Australia in *Wright v. Wright* (4), where the High Court declined to follow *Ginesi v. Ginesi* (1). The decision in *Wright v. Wright* (4), however, is not binding on this court. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (2) (as substituted by the Matrimonial Causes Act, 1937, s. 4), requires that the court should be “ satisfied on the evidence that the case for the petition has been proved.” I understand that simply to mean that, if there is any reasonable doubt at the end of the case, the burden of proof has not been discharged and the decree ought not to be granted. If, on the other hand, the court is satisfied beyond all reasonable doubt, the petitioner is entitled to his decree. I mention this because it is possible that the learned judge in this case has set up a slightly too high standard of proof. [HIS LORDSHIP then dealt with the incidents of cruelty alleged by the husband and came to the conclusion that the charges of cruelty were proved beyond reasonable doubt and that the appeal should be allowed.]

SOMERVELL, L.J., concurred.

DENNING, L.J. : The judge directed himself in these words :

“ A charge of cruelty is a very serious charge to make and this court has said over and over again that the party who makes it must prove it beyond all reasonable doubt. It must be proved with the same degree of strictness as a crime is proved in the criminal court.”

If that has been said over and over again it must have been in very recent times, because, so far as I am aware, it was not said previously. If it is correct, it marks an important departure, for there is a considerable difference between the standard of proof required in criminal cases and that required in civil cases—a difference which I endeavoured to define in *Miller v. Minister of Pensions* (5) to which I need add nothing now.

In considering the standard of proof in divorce cases it is important to remember that it has been held by the House of Lords in *Mordaunt v. Moncreiffe* (6) that a suit for divorce is a civil and not a criminal proceeding. One would expect, therefore, to find that in the ordinary way the rules of civil procedure and not the rules of criminal procedure would apply to divorce suits. The standards and rules of the criminal courts have been built up out of the high regard which the law has for the liberty of the individual. No man's liberty is to be taken away unless the case is proved against him beyond reasonable doubt. The same stringency is not necessarily called for in divorce suits, or, at any rate, in divorce suits on the ground of cruelty or desertion, where the court is concerned, not to punish anyone, but to give statutory relief from a marriage that has broken down. I should have thought that s. 178 (2) of the



Supreme Court of Judicature (Consolidation) Act, 1925 (as substituted by the Act of 1937) lays down a sufficient test by providing that a decree shall be pronounced by the court is "satisfied on the evidence that the case for the petition has been proved." That puts the burden of proof on the person who makes the allegation, but it is not a burden of extraordinary weight. It is a burden which exactly accords with SIR WILLIAM SCOTT's general rule in *Loveden v. Loveden* (7) where he said (2 Hag. Con. 3) :

"The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion."

That was the rule of the ecclesiastical courts and it was cited with approval by TUCKER, L.J., in *Ginesi v. Ginesi* (1). The court in that case clearly did not intend to introduce any new rule. Whatever may be the position in adultery cases, it is clear that *Ginesi v. Ginesi* (1) gives no authority to the Divorce Court to adopt in all divorce cases the standard of proof required in criminal cases, to say nothing of the rules as to corroboration of the evidence of accomplices and so on which apply in criminal courts.

There is a danger in asserting, what the statute does not assert, that the charge must be proved beyond reasonable doubt because of the temptation it affords to give effect to shadowy or fanciful doubts. That standard is a proper safeguard to persons accused in criminal cases, but if it were applied in divorce cases it might mean unjustly depriving an injured party of a remedy which he ought to have. *Ginesi v. Ginesi* (1) does not apply to cases of cruelty, and in such cases I do not think the court should require any higher standard than the statute itself requires, namely, that it should be "satisfied." The judge here seems to have required more. He required corroboration of acts of cruelty which were, I should have thought, proved clearly enough by the husband and of which the wife's explanation is so incredible that it ought to be rejected. If corroboration were required of all acts of cruelty, it would mean that many petitioners would be unable to prove their cases because it often happens that cruelty is committed in the privacy of the matrimonial home. The injuries caused by the acts are often the subject of corroboration, but not the acts themselves. It seems to me, therefore, that the learned judge misdirected himself as to the standard of proof. I agree that the appeal should be allowed.

*Appeal allowed. No order as to costs on the husband's undertaking to comply with the order for security made below.*

Solicitors : *Dennes & Co.*, agents for *Harvey, Mabey & Walker*, Birmingham (for the husband) ; *J. D. Daniell*, Birmingham (for the wife).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

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## NOVELLO &amp; CO., LTD. v. ERNST EULENBURG, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., and Cohen, L.J.), November 29, 30, December 1, 2, 1949.]

*Copyright—Emergency legislation—Enemy owner of copyright—Grant of interest in copyright to non-enemy person—Non-exclusive licence—Action by licensee for infringement—Rights of licensee—Joinder of owner—Dispensation—Discretion of court—Onus of proof that owner an enemy alien—Evidence—Existence of licence—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (c. 107), s. 2 (1) (5).*

By the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2 (1) : "Where—(a) an enemy or an enemy subject is, or has at any time since the beginning of Sept. 3, 1939, been, whether alone or jointly with any other person, . . . the owner of a copyright, or entitled to any other interest in a . . . copyright (not being merely the interest of a licensee), and (b) the [Comptroller-General of Patents, Designs and Trade Marks] is satisfied that it is in the interest of all or any of His Majesty's subjects that the rights conferred by . . . the copyright [should be] exercised . . . and that a person who is not an enemy or an enemy subject desires . . . to exercise the said copyright and is in a position so to do, the Comptroller may, on the application of that person, make an order granting to him . . . an interest in the copyright . . . either for the whole of the residue of the term of the . . . copyright, or for such less period as the Comptroller thinks fit. . . (5) A licensee under a licence granted under this section may institute proceedings for infringement in his own name as though he were . . . the owner of the copyright . . . so, however, that any person other than an enemy who, whether alone or jointly with any other person, is . . . the owner of the copyright . . . shall, unless the court in which the proceedings are taken thinks fit to direct otherwise, be made a party to the proceedings either (a) if he consents in writing thereto, as a plaintiff or (b) if he does not so consent as a defendant."

On Aug. 13, 1945, the Comptroller granted to the plaintiffs, a firm of publishers, a non-exclusive licence in the copyright of two tone poems by the composer, Richard Strauss. Under that licence the plaintiffs claimed an injunction and ancillary relief against the defendants who published two miniature scores of these works. The defendants pleaded, *inter alia*, that the owner of the copyright was not an enemy, and that the action was, therefore, not maintainable without his being joined. Before 1939 the owner of the copyright was a firm in Leipzig, the proprietor of which was Henry H., a Jew. In July, 1939, an official of the German Ministry of Information purported to sell that business on behalf of Henry H. In 1942 Henry H. died in enemy occupied territory. In 1949 his son Max H., a British subject, obtained letters of administration *cum testamento annexo* of the estate of Henry H. **HARMAN, J.**, dismissed the action on the ground that it was incompetent through want of proper parties, and he declined to exercise in the plaintiffs' favour a discretion to dispense with the joinder of the Max H. who, he held, was the owner of the copyright.

**HELD :** (i) the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2 (5), was not a purely procedural provision, but gave a non-exclusive licensee such rights to sue for infringement as the owner of the copyright could have, but the licensee would hold the fruits of the action on behalf of the owner so far as those fruits related to a remedy appropriate only to the owner.

(ii) the onus of proof that the owner of the copyright was an enemy rested on the plaintiffs.

(iii) as Max H., the alleged owner, did not appear before the Comptroller, although he had had notice of the plaintiffs' application, the grant of the

licence was not conclusive evidence of enemy ownership at the material date. The fact that he threatened opposition, but did not persist in it, was some evidence, but it could readily be displaced.

*Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips* ([1907] 2 Ch. 236), distinguished.

(iv) in the circumstances the court ought to have exercised its discretion and dispensed on terms with the joinder of the alleged owner of the copyright.

[FOR THE PATENTS, DESIGNS, COPYRIGHT AND TRADE MARKS (EMERGENCY) ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 1170.]

Cases referred to :

(1) *Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips*, [1907] 2 Ch. 236 ; 76 L.J.Ch. 627 ; 97 L.T. 266 ; 23 T.L.R. 601, C.A. ; *affmd.*, [1908] A.C. 12, 15 ; 33 Digest 161, 450.

(2) *Van Grutten v. Foxwell, Foxwell v. Van Grutten*, [1897] A.C. 658 ; 66 L.J.Q.B. 745 ; 77 L.T. 170 ; 46 W.R. 426, H.L. ; 33 Digest 161, 447.

APPEAL by the plaintiffs from an order of HARMAN, J., dated July 29, 1949.

In an action for infringement of copyright brought by the plaintiffs under s. 2 (5) of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, the defendants alleged *inter alia* that the owner of the copyright was a British subject and should have been joined in the action. At the trial HARMAN, J., refused an application of the plaintiffs to dispense with the joinder of the alleged owner of the copyright and dismissed the action as incompetent. The Court of Appeal, being of opinion that the discretion ought to have been exercised in favour of the plaintiffs, allowed the appeal. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

*Shelley, K.C.*, and *Aldous* for the plaintiffs.

*S. Pascoe Hayward, K.C.*, and *Busse* for the defendants.

**SIR RAYMOND EVERSLED, M.R. :** This appeal against the dismissal of the plaintiffs' action by HARMAN, J., relates to the publication by the defendants of two miniature full orchestral scores of two tone poems by the composer, Richard Strauss, namely, "Don Juan" and "Till Eulenspiegel." The plaintiffs claimed in the action as licensees under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, of the copyright in those two works, and they allege that the defendants are infringing the English copyright by publishing the two miniature orchestral scores I have mentioned. Many issues were raised on the pleadings, but HARMAN, J., dismissed the action on the ground that it was incompetent through want of proper parties and he declined to exercise in the plaintiffs' favour a discretion to dispense with the joinder of the particular person who, according to his judgment, was the owner of the copyright. On all the judge's findings throughout the case I find myself in entire agreement with him save on one point only. As will appear, the result of the difference of view is somewhat important in the ultimate result.

The plaintiffs are publishers of musical works. Before the last war they were the agents of a publishing business in Leipzig, called C. F. Peters. I understand that, according to German law as it then was, C. F. Peters as a business had no separate legal entity from the individual or individuals who owned it, but it will be convenient in the course of the judgment to refer to the business as "Peters." About 1930 or 1931 Peters acquired the English copyright in the musical works of Richard Strauss which I have mentioned. At that time Peters was wholly owned by one individual, a Mr. Henri Hinrichsen, a Jew. At some time thereafter he took into partnership or co-ownership of the business a son of the name of Max Hinrichsen who left his native land about 1937 and came to England. At all times material in this action he was a British subject by naturali-



sation. After the departure of his son Max, Henri Hinrichsen took into the business another son, Hans. In July, 1939, there occurred a transaction to which I shall have to allude hereafter. Leaving that for the moment aside, I will pursue the fortunes of Henri and Hans to their unhappy end. They both left Germany some time before February, 1940, for in that month they appeared in Brussels, then free from the German occupation which later overwhelmed it. Later in 1940 Hans died of typhoid fever in a French concentration camp. All his property, and, therefore, any interest that he then had in the business and assets of Peters, passed on an intestacy to his mother and father. The father, Henri, appears to have survived his wife, but probably he died in 1942. Apart from any effect that the transaction of July, 1939, had, Henri at his death was the sole proprietor of the business and the assets of Peters, including the English copyright in Richard Strauss' works. That English asset, therefore, until representation in this country was effected, would vest, I assume, in the President of the Probate, Divorce and Admiralty Division. A B

However that may be, on Mar. 2, 1949 (which was after the present action had started) Max obtained letters of administration *cum testamento annexo* to his father's will, and, therefore, he now represents his father's estate, and any English rights and properties in copyright or otherwise that Henri had at his death indubitably are now vested in him as his father's personal representative. C By virtue of relation back that would be the position at the date of the writ in this action in May, 1948. I repeat, therefore, that, apart from the effect of the transaction of July, 1939, at the material dates—namely, those of the issue of the writ in this action and of the happenings complained of immediately before that event—the owner of the Strauss copyrights was a British subject. On the other hand, it may well be that when the war broke out in September, 1939, the owner was an enemy, for while Hans and Henri left Germany on some date before February, 1940, they may have done so after September, 1939. I do not think that for present purposes that matters, but I mention it as an introduction to the reading of the relevant sub-sections of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, for it is under that Act that the plaintiffs D E derive their title. It was an Act designed to make, as the title suggests, "special provision with respect," among other things, to copyright, "to meet any emergency which may arise as a result of war." Section 2 empowers the Comptroller to grant licences under copyrights of enemies and enemy subjects. The words "enemy" and "enemy subject" are defined by reference to the earlier Trading with the Enemy Act, 1939, but nothing for present purposes turns on those definitions and I shall not further allude to them. Section 2, so far as relevant, is F as follows :

"Where (a) an enemy or an enemy subject is, or has at any time since the beginning of September 3, 1939, been, whether alone or jointly with any other person . . . the owner of a copyright . . . and (b) the Comptroller is satisfied that it is in the interests of all or any of His Majesty's subjects that the rights conferred by . . . the copyright should be exercised . . . and that a person who is not an enemy or an enemy subject desires to exercise the said rights of copyright and is in a position so to do, the Comptroller may, on the application of that person make an order granting to him a licence . . . or granting an interest in the copyright . . . either for the whole of the residue of the term of the . . . copyright, or for such less period as the Comptroller thinks fit." G H

It was under that section that the plaintiffs made their application, and on Aug. 13, 1945, the licence sued on in this action was granted. The Act proceeds to provide for the exercise of the rights when they have been granted, but I will observe before I pass to the next sub-sections which are material that the licence may be on such terms as the Comptroller thinks fit, and, in particular,

may be either an exclusive licence or a non-exclusive licence. In this case, beyond any question, the licence granted was a non-exclusive licence. Section 2 (4) provides :

A “An order granting a licence under this section shall, without prejudice to any other method of enforcement, operate as if it were embodied in a deed granting the licence which . . . the owner of the copyright . . . and all other parties having any interest therein had executed with full capacity so to do, and the order shall accordingly operate to take away from any such party any right in relation thereto the exercise whereof would be inconsistent with the existence of the licence in accordance with and subject to the terms on which it is granted.”

B Counsel for the defendants has relied on those words as casting a light on the proper interpretation to be given to sub-s. (5) which is of great importance for this case and is as follows :

C “A licensee under a licence granted under this section may institute proceedings for infringement in his own name as though he were . . . the owner of the copyright, . . . so, however, that any person other than an enemy who, whether alone or jointly with any other person, is . . . the owner of the copyright . . . shall, unless the court in which the proceedings are taken thinks fit to direct otherwise, be made a party to the proceedings, either—(a) if he consents in writing thereto, as a plaintiff, or (b) if he does not so consent, as a defendant.”

D The first question which arises under that sub-section is this. Counsel for the defendants has argued that sub-s. 5 is a purely procedural section and so is not effective to confer on a licensee any right of action which he would not have had, apart altogether from the Act, if he had sued and had joined with him the owner of the copyright. Applying the argument to this case, counsel for the defendants says that the plaintiffs are non-exclusive licensees, and, therefore, if the owner of the copyright had been a British subject and this Act had had no application, such a licensee could not have sued to restrain publication of the works which the defendants have published whether or not he joined the owner of the copyright, for, even if the non-exclusive licensee could complain to his copyright owner that some other person was being allowed to exercise rights in derogation of the grant alleged to have been made, nevertheless he, the non-exclusive licensee, would have no cause of action against that other person. It was argued that it would be wrong to construe this section so as to give a non-exclusive licensee rights and remedies which are far in excess of any rights and remedies that an ordinary non-exclusive licensee would have, and by way of emphasis it was said that, if the construction put forward by the plaintiffs is right, a person publishing in this country material in respect of which a licence has been given to other persons would be liable to be sued by all those other persons, each of them claiming his proper remedy, not as a licensee, but as copyright owner, including damages and delivery up of the infringing copies. HARMAN, J., on that point decided adversely to the argument of counsel for the defendants. He dealt with it quite briefly and, as I have already indicated, I agree with the conclusion at which he arrived. He said :

H “It seems to me that [s. 2 (5)] has exactly the effect which it is said to have, namely, that it gives to the licensee such rights as the owner of the copyright could have, and, therefore, the question is : Would C. F. Peters, suing here, have the right to stop Eulenburg and Eulenburg, Ltd., from reproducing the works in England ? As I have already said, I think he would.”

I agree that this sub-section should be given the meaning which the language conveys on its ordinary commonsense interpretation. It does not, of course, follow, (and counsel for the plaintiff has, indeed, conceded this point) that a

licensee, recovering damages or getting some other remedy appropriate only to the owner of the copyright, can put in his own pocket or appropriate to himself the fruits of the action. They would be held by him on behalf of the true owner of the copyright, and that, which I think is inherent in the sub-section, seems to remove the main basis of the argument of counsel for the defendants. If Parliament had intended merely to say that a licensee under this Act should have the same rights of action as an ordinary licensee, but should not be embarrassed by the fact that he could not join the copyright owner because the copyright owner was an enemy, it would have been quite easy to say so, but, deliberately, as I assume, Parliament has vested in the licensee for the purposes of proceedings the rights of action of the owner, and the section states that he is to sue as though he were the owner with all the consequences that flow therefrom. If that view were not right, it would appear to me that the grant of a non-exclusive licence would be a singularly valueless operation, since the licensee could never prevent anybody else coming into the market and publishing the same documents with the advantage of having no royalty to pay in respect thereof. I cannot think that that was the intention. A B

That disposes of the point under sub-s. 5, and I agree with HARMAN, J., that, therefore, the question is : Would Peters have been entitled to sue or, turning again to the section, have the plaintiffs in this action satisfied the other conditions which are there laid down ? It is to be noted that their obligation is that any person other than an enemy who is alone or jointly the owner must be joined unless the court in the exercise of its discretion thinks fit to direct otherwise. The first point seems to me to be : On whom does the onus of proof lie to show whether the owner is or is not an enemy ? I think that the answer to that is that it lies on a plaintiff. If he comes to the court clothed, as it were, with all the authority and rights of the owner and the owner is not here, then he must establish that the reason that he is not here is that he is an enemy. That is, again, in entire accord with the view of HARMAN, J., and I shall proceed to the question whether that onus has been discharged, but, anticipating the important matter that follows, the plaintiff, if he fails to discharge the onus, may either at the trial or, I take it, at any earlier time ask the court in the exercise of its discretion to dispense with joining the owner who is not an enemy. C D E

I turn to the first matter : Have the plaintiffs discharged the onus of proving enemy ownership of the copyright ? They set out to prove it, first by the production of the licence of Aug 13, 1945, and they add to that (and the matter is not without some significance) this point. When the application was made it was advertised, and the advertisement came to the attention of Max Hinrichsen, a person who, in the absence of the transaction of July, 1939, would be the copyright owner. Max, having written a somewhat bellicose communication to the plaintiffs, did not carry his warfare any further, but allowed the plaintiffs to proceed with their application and obtain the licence. That, says counsel for the plaintiffs, is strong evidence in support of the view that the owner was not Max Hinrichsen and so the inference is that the owner was an enemy. How far, apart from Mr. Hinrichsen's inactivity when the matter had been brought to his attention, counsel for the plaintiffs could rely on the licence of itself it is, perhaps, not material to consider, though counsel argued that under the authority of *Hill v. Clifford* (1) it was not only admissible but was *prima facie* evidence of enemy ownership, since the order could only have been made and the licence could only have been granted on the footing that this case fell within the Act—in other words, that it was the case of an enemy-owned copyright. I agree with counsel for the defendants that *Hill v. Clifford* (1) is not an authority governing this case. There the question was whether two dentists had been guilty of disgraceful conduct in a professional respect, because, if they had, their partner was entitled to determine the partnership. Their transactions had come before the General Medical Council, which, by the appropriate statute, is given certain F G H I



rights, and, in particular, the right to strike dentists off the register if they are guilty of the kind of conduct which I have mentioned. Messrs. Clifford, having appeared before the General Medical Council, had been found guilty of malpractices and had been struck off the register. It was objected on their behalf in the partnership proceedings that that fact was not admissible in evidence against them, and this court held that that was not so. I need not pursue the matter, for the reasons which I have already intimated, but I point out that in

A *Hill v. Clifford* (1) and in the case quoted in it (*Van Grutten v. Foxwell* (2)) the person against whom the finding was made was before the body that made the finding. If Mr. Hinrichsen had been before the Comptroller and had argued against the grant of the licence on the ground that he, Hinrichsen, was the owner and the Comptroller had found against him and issued the licence, I think that *Hill v. Clifford* (1) might have been authority for the view that counsel for the

B plaintiffs could in this action rely on the order against a third party, Eulenburg, Ltd., but those are not the facts, and, the order having been made in the absence of Hinrichsen, I cannot see that any particular weight can be attached to it of itself in this matter. At the same time, as I have already indicated, the fact that Max Hinrichsen had notice of the plaintiffs' application and made a threat entitles counsel for the plaintiffs to say that it is some evidence of enemy owner-

C ship at the material date, but it is evidence which can quite readily be displaced.

[His LORDSHIP reviewed the evidence relating to the transaction of July, 1939, and said that the court was not justified in treating what purported to be a sale of the Peters business by a German government official in July, 1939, as a nullity.] He continued : I think that the plaintiffs failed to satisfy the onus of proving an enemy owner of the copyright, but the plaintiffs

D then asked the court to exercise its discretion and to dispense with joinder of the owner. If HARMAN, J., was right, Max was held and found to be the owner, and the question, therefore, in respect of which the judge's discretion was sought was : Can the joinder of Max as owner be dispensed with ? HARMAN, J., in all the circumstances of the case, refused, and, if the premise be accepted, I should not myself think that there was any ground for disturbing the judge's

E exercise of discretion, but, if the premise goes, what then ? Indeed, I ask myself (and I am by no means clear of the answer) : If HARMAN, J., had thought it right to hold that, however probable might be the invalidity of the 1939 transactions, it was not finally to be decided, would he have exercised the discretion as he did ? I am inclined to think that he would have done otherwise, but, however that may be, if the premise on which the discretion came to be exercised

F vanishes, the question which he had to answer was a different question.

I think, therefore, that we are bound to review afresh this question of discretion. This has been the most difficult and vexing part of the case, made far more so by the circumstances mentioned by counsel for the defendants. I will state certain matters which I think are relevant. The position now is, not that Max is the owner, but that he may be—that he probably, but not certainly,

G is the owner. Indeed, as counsel for the plaintiff pointed out, there is a rival claimant in his brother, Walter. Whose joinder, therefore, on this hypothesis is the judge asked to dispense with and in what capacity is it suggested that they were to be joined ? Assuming that we confined our attention solely to Max, he would only be joined as one who claimed to be the owner, and the plaintiffs would presumably put in the amended statement of claim that he claimed to be

H the owner and was joined as such, though the plaintiffs denied his title. Max might or might not have taken any part in the proceedings. If not, the joinder would have been futile. If the issue as to whether he was the owner was raised, the whole question which is in issue in another action which has been brought by the plaintiffs against Hinrichsen Edition, Ltd., would be raised also in this action. If those matters had been brought to the attention of HARMAN, J., I think that he might well have said that the best thing was to postpone the further hearing of this case, which counsel for the defendants has asked him



earlier to do. [HIS LORDSHIP having referred to the discussion in the court below on the application for an adjournment until after the hearing of the plaintiffs' action against Hinrichsen Edition, Ltd., continued :] On what terms ought the discretion to be exercised? If terms could not be satisfactorily found which protected the rights that ought to be protected, that would be a powerful reason for not exercising it, but I am disposed to think that they can. Counsel for the defendants told us that on one occasion his clients offered to stop selling. That appears to have fallen on deaf ears. At any rate, I do not think that there is any ground for imposing such terms on them today. I do not think that in all the circumstances the plaintiffs ought to stop the defendants selling or that they should have any injunction. I think that, pending the determination of the main question all that the defendants should be required to do is to keep an account of any sales that in the meantime they may make. Likewise as to damages. Though an enquiry can be ordered, I suggest that it should not be proceeded with, again, until after the substantive question has been decided. Nor do I think it right that the question of the costs of the action should be dealt with until that matter has been finally considered. All those things would be postponed, but I think that subject to those terms the discretion ought to be exercised, that the joinder of Max Hinrichsen or any other person should be dispensed with, and that the fruits of the plaintiffs' cause of action (if it exists) should be kept intact until these other matters have been determined.

**COHEN, L.J. :** I am of the same opinion, and for the same reasons. This court is always reluctant to interfere with a judge's exercise of his discretion and will, shortly speaking, only do so if it is satisfied that he has gone wrong in principle or that injustice will be done if his exercise of discretion is allowed to stand. The present case seems to me to be one in which we are bound to review the exercise by HARMAN, J., of his discretionary power to dispense with the joinder of the owner of the copyright. He found that the Hinrichsen family had inherited between them the whole interest in the Peters firm. This inheritance was through Henri, the father, who at the date of his death was entitled to the whole interest in the Peters firm. The judge then points out that Max was a British subject and had taken out letters of administration and it followed therefrom, in the judge's view, that the whole legal title was in Max. The beneficial interest, though I do not think that that is material, was in Max and his brothers and sisters. That view which HARMAN, J., had reached must, I think, have coloured his whole decision on the discretion point, since, if it was shown that the legal title to the copyright was vested in a British subject resident in England, it must plainly be wrong to dispense with that British subject being a party to the action. I think that the conclusion of the learned judge was not justified by the evidence before him. In those circumstances, it was plainly our duty to consider what on the facts as we found them would be a proper exercise of the discretion. It seems to me that, had I been in the position of HARMAN, J., and had to exercise the discretion, I should have exercised it on terms, since I am satisfied that it is possible to devise terms which will do justice to both parties. I think that the terms that SIR RAYMOND EVERSHED, M.R., has outlined will give the defendants reasonable protection in the event of it being held in the Hinrichsen action that the title to the Peters firm was vested in Henri Hinrichsen at his death, and at the same time will not deprive the plaintiffs of the rights to which they will clearly be entitled if the title to the Peters firm is held to have been effectively transferred to Mr. Herman and Mr. Petschull. It seems to me, therefore, that justice does require in the present circumstances that we should hold that HARMAN, J., wrongly exercised his discretion on the facts as he should have found them and that it should be exercised on the terms which my Lord has indicated. I should add that in reaching the conclusion which I have reached I take into account, and I think

that SIR RAYMOND EVERSLED, M.R., did, too, the fact that the defendants are shown not to have had the rights that they alleged in their original defence or, indeed, any rights in respect of this alleged copyright in issue in the action. For those reasons, I agree with my Lord that the appeal must be allowed.

*Appeal allowed with costs of the appeal. Order in terms of the judgment that the defendants keep an account of their sales and that the plaintiffs be entitled to an inquiry as to damages to become effective after the question of the ownership of the copyright is decided by the court. Costs in the court below to await that decision.*

Solicitors : *Shaen, Roscoe & Co.* (for the plaintiffs) ; *Booth & Blackwell* (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

[*Affirmed.* H.L. [1951] 2 All E.R. 352.

C K. C. SETHIA (1944), LTD. v. PARTABMULL RAMESHWAR.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), December 5, 6, 1949.]

*Contract—Implied term—Shipment of jute from India to Italy—Export permitted only under licence and subject to quota—Contract not expressed to be subject to quota—Conditions governing sellers' ability to perform contract under quota system known to both parties.*

In July and September, 1947, the sellers, who carried on business in Calcutta, entered into contracts with the buyers, a company registered in England and carrying on business in London, to ship certain quantities of jute to Genoa. The time for shipment was originally from October, 1947, to January, 1948, but it was extended by consent to October, 1948. The contracts were on c.i.f. terms and expressed to be on the terms and conditions of the London Jute Association contract. At all material times the export of jute from India was permitted only under licence from the government of India, and during 1947 exports were allowed only on a quota system whereby a shipper had to choose as his basic year one of the years from 1937 to 1946 and was allotted a quota in regard to the countries to which he had shipped in his basic year. The sellers chose 1946 as their basic year, but they had made no shipments to Italy in that year, with the result that they obtained no quota for Italy and were unable to make any shipments under the contracts until 1948 when, under new regulations, they were allowed a small quota for Italy against evidence of firm contracts. As a result, they were able to ship less than a third of the amount of jute which they had agreed to ship under their four contracts of July and September, 1947. The buyers, as well as the sellers, knew of the regulations which were in force in regard to the export of jute, but the contracts were not expressly stated to be "subject to quota." On a claim by the buyers for damages for breach of contract, the sellers based their defence on the lack of quota and contended that, to give business efficacy to the contracts, a term must be implied in them that they were subject to quota. The buyers contended that such a term could not be implied.

**HELD :** the court would read an implied term into a contract only where it was clear that both parties intended that term to operate; although both parties knew that the contracts could only be met out of the sellers' quota, the question whether that quota would suffice for the purpose depended on matters concerning the conduct of the sellers'



business which were peculiarly within their knowledge as opposed to that of the buyers (*e.g.*, the sellers alone would know (a) which year they had chosen as their basic year and what quota they were likely to receive as a result of their choice, and (b) what contracts with other buyers had to be satisfied out of their quota), and an unqualified provision to the effect that the contract was subject to the quota being sufficient and to the seller using his best endeavours to obtain a sufficient quota, would be quite inadequate to secure the business efficacy of the contracts; as, therefore, the parties could not be taken to have intended that the term sought by the sellers to be implied should be incorporated in the contracts, it was impossible to read into the contracts of July and September, 1947, the term contended for by the sellers.

*Re Anglo-Russian Merchant Traders and Batt (John) & Co. (London)*, [1917] 2 K.B. 679, *distinguished*.

[AS TO IMPLIED TERMS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 607-613, Nos. 5028-5066.]

Cases referred to :

- (1) *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London)*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 12 Digest 397, 3223.
- (2) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest 611, 5048.

APPEAL by the sellers from a decision of LORD GODDARD, C.J., dated June 23, 1949, whereby he upheld the award of the committee of the London Jute Association, stated in the form of a Special Case for the opinion of the court, on four appeals, which were brought before the committee by the buyers, against awards made by arbitrators in favour of the sellers in regard to four separate contracts. The committee of the London Jute Association quashed the awards of the arbitrators and made an award of damages in favour of the buyers, subject to the question of law raised in the Special Case.

The sellers were a partnership carrying on business in Calcutta and dealing, *inter alia*, in jute. The buyers were a limited liability company, registered in England and carrying on business in London. By the four contracts, two of which were made on July 28, 1947, and the other two on Sept. 5, 1947, the sellers agreed to sell certain quantities of jute, the shipments to be made to Genoa by October, 1948. The contracts were on c.i.f. terms and expressed to be on the terms and conditions of the London Jute Association contract. They were not expressed to be "subject to quota." At all material times the export of jute from India was prohibited except under licence, both parties being aware of this fact. In February, 1947, the government of India introduced a quota system for regulating the export of jute. Under this system, shippers were required to choose as their basic year one of the years from 1937 to 1946, and were allotted a quota in regard to the countries to which they had shipped in their basic year and in proportion to the amount shipped to those countries in that year. The sellers chose 1946 as their basic year, but they had made no shipments to Italy in that year, with the result that no quota was allotted to them for Italy and they were unable during 1947 to make any shipments under the contracts. Under new regulations which were in force for the first six months of 1948 they were allotted a small quantity of jute for shipment to Italy, but by October, 1948, the time fixed for the completion of the contracts, they had shipped less than one-third of the amount which they had contracted to ship. The buyers claimed damages for breaches of the four contracts and the disputes were referred to arbitration. It was contended on behalf of the sellers that an implied term should be read into the contracts that they were subject to the necessary licences and quotas being obtainable, as it must obviously have been

the intention of the parties to include such a term to give to the transaction the efficacy which both parties had intended it to have. The Court of Appeal now held that this was not a case in which it would be right or possible to read into the contracts an implied term, and they dismissed the appeal. The facts appear in the judgment of TUCKER, L.J.

*Sir William McNair, K.C., A. P. Chaudhuri and J. G. S. Hobson for the sellers. Scott Cairns, K.C., and B. J. M. MacKenna for the buyers.*

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**TUCKER, L.J. :** This is an appeal from a decision of LORD GODDARD, C.J., on an award in the form of a Special Case stated for the opinion of the court by the committee of the London Jute Association relating to four appeals, which were brought before the committee by the buyers, against awards which had been made by four arbitrators in favour of the sellers with regard to four separate contracts. The committee of the London Jute Association overruled the awards of the arbitrators, and made an award of damages in favour of the buyers, awarding them £14,273, subject to the question of law raised in the Special Case. The award of the committee has been upheld by the Lord Chief Justice.

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The sellers carry on business in Calcutta, dealing *inter alia* in jute which is the subject of these contracts. The buyers are a limited liability company, registered in England and carrying on business in London. By the four contracts, of which the first two are dated July 28, 1947, and the second two, Sept. 5, 1947, the sellers agreed to sell to the buyers under the first two contracts five hundred bales of jute under each contract, and under the second two contracts 1,250 bales under each contract, the jute being graded in two cases as "Tossa" and in the other two cases as "firsts." They were c.i.f. contracts, the shipments were to be made to Genoa, and the date fixed for shipment was, with regard to the first contract, October to November, 1947, with regard to the second, September to October, 1947, and, as regards the third and fourth, December, 1947, to January, 1948. It is common ground that eventually the time for shipment was by consent extended until October, 1948. Under these contracts there were shipped one hundred bales under the first, 250 under the second, and approximately 250 under each of the last two, leaving a balance unshipped of four hundred on the first contract, 250 under the second and one thousand under each of the last two, and it is in respect of these unshipped balances that the damages have been awarded. The contracts were made on the terms of the form of contract in use by the London Jute Association, cl. 1 of which provides :

"Shipment. To be shipped from Calcutta and/or Chittagong . . ."

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Clause 3 deals with unavoidable delay, which was not relied on. Clause 18, headed "Paramount," is attached to the form of contract by a slip and reads as follows :

"Notwithstanding anything hereinbefore contained, should this contract in whole or in part become impossible of fulfilment through the interruption or the result of interruption of the normal course of business in India or Pakistan or any part of India or Pakistan by or in consequence of civil war or social unrest or by or in consequence of the action of any Indian or Pakistan Government or any government claiming to be such for or for any part of India or Pakistan or other authority, then it shall be null and void without the payment of any damages or penalties by either party to the other upon the declaration by the Committee of the London Jute Association that such impossibility has, in fact, come about."

Neither side sought to avail themselves of that clause, and no declaration under that clause had ever been made by the committee, but its insertion shows that the state of affairs prevailing in India and Pakistan had come to the knowledge of the association, and its incorporation in the contract shows that the parties must be taken to have been not unmindful of the difficulties and complications which might arise in performing the contract.

The point of law raised in this appeal is whether or not, in order to give business efficacy to the contracts, it is necessary to imply into them a term which is not to be found expressly therein. Counsel for the sellers submits that there must be implied into them a term that they were subject to the necessary licences being obtainable, this being, in his submission, a necessary term by reason of the fact that at all material times the export of jute from Calcutta and Chittagong could be carried out only under licences granted by the government of India, or, after the partition of India and Pakistan, by the government of India and the government of Pakistan, respectively. A

The facts, as found in the Special Case, may shortly be stated as follows. There was a licensing system in force in India before the contracts were made, and in February, 1947, the government of India notified the jute trade that regulations were to be made with regard to shipment by quota of jute. We have not seen the precise regulations that were made, but have merely a summary of the law which was in force, which shows that the export of jute was under control, that licences had to be obtained before it could be exported, and that the licences were granted pursuant to what is called a quota system. Under the regulation of shipment by quota, established shippers (among whom were the sellers) had to choose one particular year out of the years 1937 to 1946 as their basic year, and declare their shipments and the countries to which they had shipped in that basic year. The closing period for making applications to obtain quotas was March, 1947. The sellers chose 1946 as their basic year, but in that year they had made no shipments to Italy, with the result that, when quotas were allotted, they obtained no quota for Italy, the quota system being based on the countries to which the established shippers had shipped in the basic year : *i.e.*, the shippers were allotted a total quota, and out of that total they were allotted quotas for specific countries, having regard to the countries to which they had shipped in the basic year. The sellers, therefore, could ship no jute to Italy, but, although this was the position when the contracts of July, 1947, were made, they contracted in absolute terms to make the shipments to Genoa. In determining whether or not a term that the contracts were subject to the necessary licences being obtainable should be implied into these contracts, it is important to remember that a potential buyer in England might have assumed that the sellers had chosen as their basic year one in which they had made shipments to Italy and that they had, accordingly, received a substantial quota for that country. D E

On the partition of Pakistan and India, which became effective on Aug. 15, 1947, Calcutta remained in India, but Chittagong became part of Pakistan. The governments of India and Pakistan had entered into an agreement, called a Standstill Agreement, whereby Pakistan undertook to carry out the restrictions on export then existing in India, but, notwithstanding that agreement, the authorities in Pakistan at first not only put no obstacle in the way of exports from Chittagong but tried to stimulate them. Early in 1948, however, their policy changed, and they began to tighten up the export system, beginning with Italy, and by February, 1948, there was a licensing system in force similar to that in India, and it has remained in force ever since. The Case finds, however, that between October, 1947, and June, 1948, over 700,000 bales of jute were, in fact, shipped from Chittagong, and that the sellers shipped a small quantity of jute from Chittagong in February, 1948, but made no shipments from Chittagong to the buyers. From the beginning of 1948 until June 30, 1948, new provisions were brought into force in India, whereby quotas were allotted to shippers who could produce evidence of having concluded firm contracts, and on Feb. 18, 1948, the sellers applied under these provisions. They submitted eleven contracts, including the four entered into with the buyers in the present case, and they were allotted, for export from Calcutta to Italy, 83 tons on Apr. 7, 1948, and 194 tons on May 13, 1948, making a total of 277 tons out of the F G H



995 tons required to carry out the eleven contracts. Of this, they distributed 842 bales, amounting to about 150 tons, to the buyers in the present case, and there is no question that they distributed equitably between their various buyers the quota which was allotted to them under that application. For the period from July 1, 1948, to Oct. 31, 1948, no licences for export from Calcutta to Italy were granted by the government of India. On Sept. 15, 1948 (as a result of a suggestion made by the buyers, at some unspecified date), the sellers applied to the government of Pakistan for a quota to Italy. The Case does not find what the fate of that application was, but I think it is a fair inference, as counsel for the sellers submits, that no quota was allotted.

I think that has sufficiently dealt with the facts for the purposes of deciding the question of law, *viz.*, whether or not it is necessary, so as to give business efficacy to these contracts, to incorporate the implied term on which counsel for the sellers relies. The sheet anchor of his argument lies in *Re Anglo-Russian Merchant Traders and John Batt & Co. (London)* (1), a decision of this court on arbitration proceedings between sellers and buyers in connection with aluminium during the 1914/1918 war. The headnote is as follows:

"By a contract made in London, and dated Aug. 19, 1915, the appellants sold to the respondents, both parties being resident in this country, fifty tons of aluminium 'to be shipped by steamer(s) to Vladivostok during December/January next,' at a price including cost and freight; payment to be by cash against documents in London. At the date of the contract there was, to the knowledge of both parties, a prohibition against the export of aluminium from this country except on licence granted by the British government. On Dec. 7, 1915, an order was made applying reg. 30A of the Defence of the Realm (Consolidation) Regulations, 1914, to aluminium. That regulation provides that 'no person shall, without a permit . . . (a) buy, sell, or deal in; or (b) offer or invite an offer or propose to buy, sell, or deal in; or (c) enter into negotiations for the sale or purchase of or other dealing in, any war material' to which the regulation might be applied by order, whether or not the sale, purchase, or dealing was effected in the United Kingdom. No aluminium was shipped under the contract. The buyers claimed damages for breach of contract, and the dispute was referred to arbitration. The umpire found that the parties in fact contemplated that the aluminium would be shipped from this country, and that neither of the parties contemplated or intended the performance of the contract by shipment of American aluminium; that the sellers duly applied for a licence to export the aluminium from this country, but a licence was refused, and that the failure to ship was due to their inability to obtain a licence; and that the sellers did not, after Dec. 7, 1915, or at all, apply for a permit to purchase aluminium in America so as to ship it from there, but if they had so applied the proper authority in this country would not have granted a permit :—*Held*, upon the assumption that the shipment was limited to a shipment from the United Kingdom, that the contract did not impose upon the sellers an absolute obligation to ship or to pay damages in default of shipment, and that therefore the sellers, who had used reasonable diligence to obtain a licence to ship, were not liable in damages to the buyers."

It is not necessary to refer to the finding on the further point with regard to purchases in America.

On the argument of that case before this court - and I think this is important - counsel on each side agreed that some term had to be implied into that contract to give business efficacy to it. The only dispute between the parties was : What was that term ? Counsel for the sellers submitted that a term must be implied in the contract that it was subject to a licence to export being obtained. Counsel

for the buyers submitted that in order to give the contract its business efficacy it was necessary to imply a term that the sellers undertook to obtain a licence and to ship the aluminium. In his judgment, VISCOUNT READING, C.J., said ([1917] 2 K.B. 685) :

"The question is what is the obligation of the sellers under the contract ? It is admitted by both parties that some obligation must be implied in the contract. In my opinion the implied obligation is no higher than that the sellers shall use their best endeavours to obtain a permit. That is a term which is necessary to give to the contract such business efficacy as both parties must have intended, when they entered into the contract, that it should have, within the principle laid down by BOWEN, L.J., in *The Moorcock* (2)."

The other members of the court, LORD COZENS-HARDY, M.R., and SCRUTTON, L.J., agreed. The decision in that case was that a particular term had to be implied into a particular contract, and it cannot, of course, amount to a decision that in other contracts of a different nature such a term must necessarily be implied. Nor do I think it can possibly go so far as to bind a court to hold that, whenever the obtaining of a licence forms some part of the transaction at some stage, such a term must always inevitably be implied. I think that every contract must be looked at separately, and the surrounding circumstances with regard to each contract are always material.

In the *Anglo-Russian Merchant Traders* case (1) there is nothing to indicate that the obtaining of a licence was in any way dependent on any action—other than that of applying for the licence—to be carried out by the party whose duty it was to obtain the licence. If in that case the facts had been that the sellers had, or might have had, an aluminium quota at the time they entered into the contract, and that the obtaining of a licence was a mere formality for exporting the quota which they had already obtained, or which under the prevailing system they might have obtained, then I think the position would have been very different. At the time when the contracts in this case were made, for all that anyone in this country knew, the sellers might have had a quota for Italy. They had not got one, however, and knew that they had not. None the less, they chose to enter into these contracts. In my view, these contracts and the circumstances surrounding them are clearly distinguishable from the position which existed in the *Anglo-Russian Merchant Traders* case (1). Another feature of the present case which results from the quota system, and which, I think, is material, is that the sellers' position *vis-a-vis* the buyers, is, or might be, dependent, to a certain extent, on what other contracts the sellers chose to enter into with other buyers. Assuming that they had obtained a quota out of which they could allocate to the buyers, the more contracts they entered into (*i.e.* the greater quantity they contracted to sell to other buyers), the smaller would be the amount out of the quota which they could supply to the buyers in this case. That, again, I think, tends to negative the necessity for implying into these contracts the term which the sellers seek to incorporate in them.

That, in effect, is the decision at which LORD GODDARD, C.J., arrived, but some criticism has been made with regard to the language which he used, which, it is said, indicates that he had not fully appreciated the working of this particular system. I do not think that those portions of his judgment where he is dealing in general terms with quota systems were intended to apply precisely to the facts of this case. He was indicating the position that might arise under quota systems, showing that one case cannot always govern another. He said :

"If, therefore, he chose to say to some customer of his abroad : 'I will sell you five hundred tons of jute,' I cannot read into that contract a term saying : 'only if I can get a licence to increase my quota.' He has got a quota."

That passage was criticised as showing (so it was said) that the Lord Chief Justice thought that, at the time of the contracts, the sellers had got a quota for Italy. Of course, they had not, but, on the other hand, they had sent in their application and received quotas for other countries. However, whether or not they had, in fact, got a quota at the time these contracts were made does not alter the principle of the decision. The point is that under this system they might have got a quota, for all that was known to the buyers in this country. It was a matter peculiar to these particular sellers that they had not been able to get a quota for Italy, the country to which shipment was to be made under the contracts, and for these reasons I think that it is not necessary to imply into the contracts the term which counsel for the sellers seeks to incorporate, that they have a business efficacy without any such term being implied, and that the case is distinguishable from the *Anglo-Russian Merchant Traders* case (1).

The committee have found in the Case, that each of the contracts was what is known in the jute trade as a "clean contract," *i.e.* :

"... a contract which or shipment under which is not expressly stated to be 'subject to quota'."

The Case goes on to find :

"It was not and is not unusual to specify in a contract that it or shipment under it is 'subject to quota'."

I have arrived at my decision independently of that finding. Where buyers and sellers are both members of a particular association, and where that association has in force two alternative contracts, I should desire to reserve for further consideration the question, if it should arise, whether or not it is permissible to give evidence to say that the parties had selected the one contract to the exclusion of the other. Generally speaking, it is beyond question that one contract cannot be construed by reference to another, but whether or not the fact that there are two forms of contract might not be a circumstance which it was proper to regard in a case where the sellers and buyers are both members of the same association, is a matter which can be dealt with if and when it arises. It is to be observed that in the present case there is no finding that the sellers were members of this association. I agree with counsel for the buyers that, if a term has to be implied in this contract, it is open to considerable doubt and speculation as to the precise nature of the implied term which would be necessary, having regard to all the circumstances to which I have already referred, including the possibility of the sellers obtaining contracts with other buyers. For these reasons I think that this appeal fails.

SINGLETON, L.J. : On the facts of this case, I do not see any reason why the sellers should be allowed to introduce another term into the contracts between them and the buyers. In no sense is it necessary to do so for the purpose of giving business efficacy to the contracts. There are, apparently, two forms of contract in use in the jute trade, and it must be assumed that the parties to these contracts were familiar with both. One is the "clean contract," which this was, and the other, which, as the Case Stated, is not unusual, is the form which is "subject to quota." It is the "subject to quota" form which the sellers now wish to have, and it is not surprising that the buyers resist that claim. Counsel for the sellers submitted that we are not entitled to have before us any form of contract other than the "clean contract" when considering the question now before the court. I will assume that that is right, though it must not be taken that I accept it as a correct proposition. Both parties knew of the requirements as to licences and quota. It seems to me that the sellers took a risk and now they wish to change the nature of the bargain they made. As LORD GODDARD, C.J., pointed out, this case differs from *Re Anglo-Russian Merchant Traders and John Batt & Co. (London)* (1) in several respects. I propose to refer



to one difference only. The extracts from the arguments in that case, and the passages from the judgment of VISCOUNT READING, C.J. ([1917] 2 K.B. 685), which my Lord read, show quite clearly that it was admitted by both sides in the course of the argument that some additional term must be read into the contract in that case, and the only question was : What was the term to be ? In the case under appeal, it is not necessary to read anything into the contracts. They are clear and free from ambiguity. The sellers found that the quota given to them did not enable them to fulfil all their obligations, and they seek to be relieved from the burden of the contracts, but they have not shown, as I think, any ground for the introduction of any term into them.

There is one other matter to which I think it right to draw attention. The contracts between the parties were on the terms and conditions of the London Jute Association contract, cl. 12 of which is that any dispute shall be referred to arbitration in accordance with the bye-laws of the association, and there is a provision for appeal to the committee of the association against any award. This dispute was referred to arbitration, and subsequently there was an appeal to the committee. Thereafter a Special Case was stated by the committee and came before LORD GODDARD, C.J. Most respectfully, I would point out that this procedure adds greatly to the cost and trouble which the parties have to encounter in a case of this kind. It would, I think, be much better that a dispute such as this should go direct to the Commercial Court, and there be dealt with, as it would be a saving of costs for the parties. If this court had taken a view in favour of the submission of counsel for the sellers, it would still have been necessary, I think, for the case to be referred back again. All that procedure and a good deal of the costs would be avoided if a matter of this kind was dealt with by the judge sitting in the Commercial Court. I agree that the appeal must be dismissed.

**JENKINS, L.J. :** I agree that the appeal fails. In considering the question whether an implied term should be read into contracts such as these, there is, I think, a real and important distinction between circumstances such as those in *Re Anglo-Russian Merchant Traders and John Batt & Co. (London)* (1), where the commodity in question was a commodity all dealings in which were unlawful in the absence of a licence and circumstances such as those in the present case which concerns a commodity subject to control on a quota system under which individual dealers can lawfully deal with the commodity up to the amount of the quota allotted to them respectively. In cases of the former type, it is easy to imply a term to the effect that the transaction is subject to the necessary licence being obtained, for otherwise it would be manifest to both parties that the transaction could not be carried out at all, but in cases of the present type, while it is, no doubt, true that both parties know that the contract can only be met out of the seller's quota, the question whether the seller's quota will suffice for that purpose seems to me to depend on a variety of matters concerning the conduct of the seller's business, and, as such, matters peculiarly within his knowledge as opposed to that of the buyer. The seller will know which basic year he chose for the purpose of fixing his quota. He will know (as is material here) to which countries he exported, and, therefore, what quota he is likely to get, if any, for the particular country where the commodity, the jute, is to be delivered. The seller will further know, and he *prima facie* alone will know, what other contracts he has entered into or intends to enter into. These would, of course, affect the sufficiency or otherwise of his quota. Further, it must be presumed that he knows the market in which he deals, and knows the prospects, if necessary, of buying quota to supplement any deficiencies in his own, or, perhaps, of exchanging quota available for one country for quota available for another, and thus enabling himself to carry out his contract. In these circumstances, as it seems to me, *prima facie* the sufficiency of the seller's quota to meet any contract he enters into is a matter for him to see to, and any difficulties

he may encounter as regards the sufficiency of his quota seem to me *prima facie* to be a business risk which he must accept in the absence of some provision to the contrary in the contract. Otherwise, it seems to me that these transactions would be unworkable.

A One thing, I think, is clear about implied terms. I do not think that the court will read a term into a contract unless, considering the matter from the point of view of business efficacy, it is clear beyond a peradventure that both parties intended a given term to operate, although they did not include it in so many words. In the *Anglo-Russian Merchant Traders* case (1) it was relatively easy to formulate the implied term. Here it seems to me that it is absolutely impossible to do so. An unqualified provision to the effect that the contract was subject to the quota being sufficient and to the seller using his best endeavours to obtain a sufficient quota, would, as it seems to me, be quite inadequate, for the reason B my Lord has pointed out, that the sufficiency of quota depends not only on the amount of quota the seller is able to get but on the quantity of jute he is committed to deliver under the totality of contracts that he has entered into. The term would, therefore, have to include a provision dealing in some way or other with the situation in which the seller had, in fact, had sufficient quota to meet the C particular contract, but not enough to meet that contract and all his other contracts. How the seller and the buyer are to be assumed to have wished to deal with that kind of situation, it is really quite impossible to say. For these reasons, in addition to those given by my Lords, I agree that this is not a case in which it is right, or, indeed, possible, to read into the contracts an implied term of the kind contended for by the sellers. The appeal, accordingly, fails, D and should be dismissed.

*Appeal dismissed with costs.*

Solicitors : *Linklaters & Paines* (for the sellers) ; *Stuart Hunt & Co.* (for the buyers).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

Re Nos. 38, 39 AND 40 WINDMILL STREET,  
ST. PANCRAS, LONDON.

[CHANCERY DIVISION (Vaisey, J.), December 8, 1949.]

War Damage—Value payment—"Proprietary interest"—"Short tenancy"—Term of more than seven years under two instruments—Lease for five years extended to twelve years—War Damage Act, 1943 (c. 21), s. 123.

G The War Damage Act, 1943, s. 12, provides : "(1) The right to receive a value payment shall vest in accordance with the following provisions of this section. (2) The time by reference to which the vesting of the right to receive a value payment is to be regulated . . . shall . . . be the time immediately before the occurrence of the war damage, and (a) if at the material time the only proprietary interest subsisting in the hereditament was a fee simple in the whole of the hereditament . . . the right to receive the payment . . . shall vest in the person who was at the material time the owner of that proprietary interest . . . (b) in any other case, the payment shall be apportioned between the several proprietary interests subsisting in the hereditament or in any part thereof at the material time . . ." Section 105 of the Act provides : "(1) . . . references in Part I of this Act to the owner of a proprietary interest . . . shall be construed as references to the person in whom the legal estate in respect of the interest . . . is vested . . ." Section 123 defines "proprietary interest" in relation to any hereditament H

as “(a) the fee simple in the land comprised therein . . . and (b) any tenancy of that land . . . other than a short tenancy.” That section defines a “short tenancy” as “a tenancy granted for a term of seven years or less.”

By a lease dated Apr. 8, 1931, B. and F., the owners of certain hereditaments, demised those hereditaments to W.H. for a term of five years. On Dec. 31, 1934, W.H. died and by his will he bequeathed his interest in the said lease to his son, H.H. By a deed dated Dec. 3, 1935, executed in counterpart and made between B. and F., of the one part (described as the lessors), and H.H., of the other part (described as the lessee), it was recited *inter alia* that the deed was supplemental to the lease dated Apr. 8, 1931 (the effect of which was stated), that the interest of W.H. in the said lease was vested in H.H., and that B. and F. had agreed to demise to H.H. the premises demised by the lease “for the further term of seven years to commence on June 24, 1936,” at a certain rent and subject to certain covenants and provisions thereafter reserved and expressed. By the operative part of the instrument B. and F. demised to H.H. the property comprised in the recited lease for a term of seven years from June 24, 1936, subject to the rent payable “at the like times and in the like manner as the rent reserved by the lease and subject to like covenants and agreements” on the part of H.H., with certain exceptions. H.H. covenanted to observe and perform the covenants and that he would be subject to the proviso for re-entry “in like manner as if all such covenants and conditions as to re-entry had been repeated in the deed with such modifications . . . as the circumstances might require.” There followed, *inter alia*, an option to H.H. to purchase “the reversion in fee simple in the premises hereby demised” at a price to be agreed. Each part of the deed was indorsed: “Deed extending the term of lease of [the hereditaments] for seven years from June 24, 1936, at £230 per annum rent.” On Nov. 15, 1940, the hereditaments suffered war damage and were rendered a total loss. On the question whether H.H. was entitled to a proprietary interest so as to be entitled to receive a proportion of the value payment to be made in respect of the war damage:

**HELD:** the period of seven years mentioned in the definition of “short tenancy” in s. 123 of the Act was not necessarily a term of that period granted by one and the same instrument, but it might be such a term subsisting under the combined effect of two or more instruments; on construction, the deed of Dec. 3, 1935, extended the original term granted in 1931 and did not constitute a new lease; and, therefore, on the material date H.H. was in possession of a term granted for twelve years and not under a “short tenancy”, with the result that he had a proprietary interest within the meaning of s. 123 and the value payment must be apportioned under s. 12 (2) (b).

[FOR THE WAR DAMAGE ACT, 1943, s. 12 (2), see HALSBURY'S STATUTES, Vol. 36, pp. 350, 351.]

Cases referred to:

- (1) *Lewis v. Baker*, [1905] 1 Ch. 46; 74 L.J.Ch. 39; 91 L.T. 744; 30 Digest 484, 1444.
- (2) *Terroni & Necchi v. Corsini*, [1931] 1 Ch. 515; 100 L.J.Ch. 289; 145 L.T. 95; Digest Supp.
- (3) *Lawrence v. Sinclair*, [1949] 1 All E.R. 418; [1949] 2 K.B. 77; [1949] L.J.R. 1003.

ADJOURNED SUMMONS to obtain payment out of court of a sum of £1,018 7s. 10d. standing to the credit of an account entitled “In the matter of the War Damage Act, 1943, and In the matter of the hereditaments known as 38, 39 and 40 Windmill Street, St. Pancras, in the county of London,” the money having been paid into court under the War Damage Act, 1943, s. 33.



The right to receive the payment depended on whether or not the respondent had a proprietary interest in the hereditaments within the meaning of the War Damage Act, 1943, s. 12 (2) (b). VAISEY, J., held that he had such an interest and was, therefore, entitled to receive a proportion of the value payment. The facts appear in the judgment.

*McMullen* for the applicants (owners of the hereditaments).

A *G. B. Parker* for the respondent (occupier thereof).

**VAISEY, J. :** This is an application to obtain payment out of court of a sum of £1,018 7s. 10d. standing to the credit of an account entitled "In the matter of the War Damage Act, 1943, and In the matter of the hereditaments known as 38, 39 and 40, Windmill Street, St. Pancras, in the county of London." That sum of money was paid into court by the War Damage Commission under the War Damage Act, 1943, s. 33, which provides :

"(1) If the right to receive a sum representing a payment under this Part of this Act in respect of war damage, or a part of such a payment, is claimed by two or more persons adversely to each other, or the commission are unable to ascertain in whom such a right is vested . . ."

C the commission are entitled to pay the money into court.

The applicants to the present summons, Mr. Bull and Mr. Foyster, were, at all material times, the owners of the hereditaments in question. On Nov. 15, 1940, the hereditaments suffered war damage which, for the purposes of and within the meaning of the War Damage Act, 1943, rendered them a total loss, and, accordingly, a value payment fell to be made under that Act. The respondent to the summons is Mr. Harold William Hensman, and he, at the date of the disaster, was in possession of the property under a certain document which is described by the applicants as a lease. That document, which was dated Dec. 3, 1935, requires to be examined with particularity. It is described, not as a lease, but as a deed. It was executed in counterpart, one part being executed by the applicants, and the other by the respondent. It is indorsed, for what that is worth, in these terms : "Deed extending the term of lease of Nos. 38, 39 and 40, Windmill Street, St. Pancras, London, for seven years from June 24, 1936, at £230 per annum rent." The deed is made between the applicants, defined as the lessors, of the one part, and the respondent, described as the lessee, of the other part. The operative part of the document is prefaced by three recitals. The first recital states that the deed is supplemental to a lease dated Apr. 8, 1931, made between the lessors, of the one part, and one William Hensman, of the other part. I pause here to observe that William Hensman was the father of the present respondent. The effect of the lease is recited as being that it was a demise by the lessors to William Hensman of the property in question for a term of five years at the yearly rent of £220 thereby reserved. The second recital states : "The interest of William Hensman in the said lease is now vested in" the respondent. The third recital says that the lessors had agreed with the lessee—i.e., the applicants had agreed with the respondent—

"to demise to him the premises comprised in and demised by the lease for a further term of seven years to commence on June 24, 1936, at the rent of £230 and subject to the covenant and conditions hereinafter reserved and expressed."

H Then comes the operative part, which states that the lessors—i.e., the applicants—thereby demise to the respondent the property in question—i.e., the property comprised in and demised by the recited lease—for a term of seven years from June 24, 1936, subject to the enhanced rent of £230 a year "payable at the like times and in the like manner as the rent reserved by the lease and subject to the like covenants and agreements" on the part of the respondent, with certain exceptions which I do not think it is necessary to state in detail. The

respondent then covenants to observe and perform the covenants and that he would be subject to the proviso for re-entry

"in like manner as if all such covenants and conditions as to re-entry had been repeated in the deed with such modifications as the circumstances might require."

It is further stated that during the term of seven years the respondent would "repair and make good" certain specified matters of disrepair which were set out in the schedule to the deed. There is a covenant on the part of the applicants, and a corresponding covenant on the part of the respondent, that during the term they would observe all the covenants and provisions as therein specified "which ought on their respective parts to be performed and observed." Finally, there was a provision entitling the respondent to purchase the reversion at not more than a specified sum on giving notice before the expiration of the term thereby granted. The evidence shows that the respondent had acquired the interest of his father in the lease of Apr. 8, 1931, by reason of the fact that he was his father's executor and was the specific legatee of the business of the father which was carried on on that property. The effect of the deed of Dec. 3, 1935, is perfectly plain, apart from the technicalities of the law and from the undoubted circumstance that it can be described in legal phraseology in more than one way.

The issue here is whether the deed of 1935 ought to be treated as a new lease to the respondent, without any regard to the earlier history of the matter, or whether it should be regarded as having the operation merely of extending the existing term due to expire on June 24, 1936, so as to expire at a date seven years later. The deed may be accurately described, so far as its effect goes, in either of those two ways. The War Damage Act, 1943, s. 12, provides :

"(1) The right to receive a value payment shall vest in accordance with the following provisions of this section. (2) The time by reference to which the vesting of the right to receive a value payment is to be regulated . . . shall . . . be the time immediately before the occurrence of the war damage, and (a) if at the material time the only proprietary interest subsisting in the hereditament was a fee simple in the whole of the hereditament . . . the right to receive the payment . . . shall vest in the person who was at the material time the owner of that proprietary interest . . . (b) in any other case, the payment shall be apportioned between the several proprietary interests subsisting in the hereditament or in any part thereof at the material time . . ."

Section 105 of the Act defines what is meant by the owner of the proprietary interest, and says :

"(1) Subject to the provisions of this section, references in Part I of this Act to the owner of a proprietary interest . . . shall be construed as references to the person in whom the legal estate in respect of the interest . . . is vested . . ."

In s. 123, which is the definition section of the Act, it is stated :

" 'proprietary interest' means, in relation to any hereditament or property—(a) the fee simple in the land comprised therein . . . and (b) any tenancy of that land or of any part thereof, other than a short tenancy."

The question is whether or not the interest of the respondent was "a short tenancy." If it was a tenancy other than a short tenancy, the respondent is entitled to a share in this value payment. On the other hand, if the interest of the respondent is a short tenancy, he is not entitled to participate in the value payment and the only other claimants to that payment are the applicants. That brings me to the question : What is a short tenancy ? According to the definition in s. 123 :

“ ‘short tenancy’ means a tenancy granted for a term of seven years or less . . . , and includes—(a) a tenancy granted for a term of more than seven years but subject to a subsisting right of the landlord to determine the tenancy . . . ; (b) a tenancy from year to year ; (c) a tenancy at will ; (d) a tenancy granted for a term limited to expire . . . not later than seven years after [certain occasions].”

A Finally, a tenancy, according to s. 123 :

“includes a tenancy under an underlease and a tenancy under an agreement for a lease or underlease, but does not include an option to take a tenancy and does not include a mortgage.”

B If, in this case, the proper significance to attach to the deed of Dec. 3, 1935, is that it extended an existing term from five years to twelve years, or extended an existing term of five years by an additional seven years, I do not think it can be disputed that the respondent, in whom that term was vested, is a person entitled to a tenancy which is not “a short tenancy.” On the other hand, if the true effect of that deed of Dec. 3, 1935, is that it created *de novo* a fresh lease giving a tenancy to another lessee, I do not think it can be disputed that the tenant had a short tenancy.

C The rather difficult question which I have to decide is : Did the deed of 1935 extend an existing term, or did it create a new term—*i.e.*, was it a tenancy granted for a term of seven years and no more, or was it an extension of an existing term to more than seven years ? Counsel for the applicants has referred me to the Law of Property Act, 1925, s. 149, which, by sub-s. (1), abolished the ancient conception of *interesse termini*, and then by sub-s. (2) provided that, as from the commencement of the Act (Jan. 1, 1926), all terms of years absolute should take effect at law or in equity “from the date fixed for commencement of the term, without actual entry.” To remind me of the law as it stood before that legislation counsel called my attention to the judgment of SWINFEN EADY, J., in *Lewis v. Baker* (1) where the law as it then existed was stated with all the clearness and conviction which judgments of that very learned judge always commanded. In the headnote to that case it is stated ([1905] 1 Ch. 46) :

“As a reversionary lease merely creates an *interesse termini* until entry thereunder, it does not enlarge the term of the original lease.”

F A question arose there as regards the right to distrain and as regards the existence or non-existence of a proper legal reversion to support the right of distraint. Counsel also referred me to the decision of MAUGHAM, J., in *Terroni & Necchi v. Corsini* (2) where the matter was debated in the light of the change of the law effected by the Act of 1925.

G The enlargement of a term is, of course, a sort of metaphor. It is only a metaphorical way of examining the significance and operation of the later of two deeds. It is true to say that, whichever way you describe the later of these two deeds, you get to the same practical result. It is, indeed, nothing more than a method of approach. I think one ought to look at the realities of the case. If this had been a fresh lease granted to the present respondent without regard to the past history of the matter, it is rather surprising to find recitals as to the then existing lease (though that, no doubt, was a useful way of shortening the document), and, more especially, the reference to the respondent as being the successor in title of his father. I do not think it is without significance, though I do not think it is the determining factor in this case, that both parts of this document of Dec. 3, 1935, which must, undoubtedly, have been prepared by the applicants, are endorsed in the terms which I have already stated, to the effect that it was a deed extending the term of an existing lease. It seems to me that while various lawyers' descriptions of the effect of that deed are accurate so far as they go, one is driven back to the realities of the situation which were that



the applicants had created a lease for five years, and that, before the expiration of that five years, an arrangement was made with the successor in title of the lessee for extending to twelve years the five years' term of the existing tenancy. I think the result of that was that at the material date—i.e., immediately before the war damage occurred—the respondent was in possession of a tenancy which was a proprietary interest, because it was not, in my view, a short tenancy, that is to say, not a tenancy granted for a term of seven years or less, but a tenancy granted for twelve years. It seems to me that, whereas the other description which has been suggested as applicable to this document is a perfectly appropriate and adequate description of its general effect, on the whole the right conclusion to come to on the facts and having regard to the purpose and intention of the War Damage Act, 1943, is that at the relevant date there was an unexpired term of twelve years and not seven years.

I have been referred to *Lawrence v. Sinclair* (3), a case under the Landlord and Tenant Act, 1927. There the decision of the Court of Appeal was that the tenant under the Landlord and Tenant Act, 1927, s. 4, was entitled to be treated as a tenant for a period of not less than five years when the facts were that he had had a lease which was extended from time to time by a series of yearly tenancies. Although I do not know that that case binds me, I think it guides me, and throws some light on the kind of approach which should be made to the problem which I have to consider, indicating, as it does, that one should look at the realities of the case. The learned judges in the Court of Appeal there said that the argument was that into the words in s. 4 (1) "for a period of not less than five years" there must be read the words "under one and the same title," and they said that there was no ground for reading the sub-section in that way. So, here, I think that the period of seven years mentioned in the definition of proprietary interest is not necessarily a term of seven years in one and the same instrument, but that it may be a term of more than seven years subsisting under the combined effect of two or more instruments. So far as I can make out the sum paid into court, which represents, of course, only part of the value payment, has been determined by the War Damage Commission as that portion of the value payment which is attributable to the proprietary interest of the respondent, assuming that he had such an interest. If I had held that he had no proprietary interest, I should have had to order that sum to be paid out to the applicants, but, as I have held that he was entitled at the material date to a proprietary interest, I order that that sum be paid out to him. I think I must also order the applicants to pay his costs.

*Order accordingly.*

Solicitors : *Scadding & Bodkin* (for the applicants) ; *Bridges, Sawtell & Co.* (for the respondent).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

**TUDOR FURNISHERS LTD. v. MONTAGUE & CO. AND  
FINER PRODUCTION CO., LTD.**

[CHANCERY DIVISION (Wynn-Parry, J.), December 6, 1949.]

*Costs—Security for costs—Interpleader—Issue directed—Parties in substance both claimants—Discretion of court—Corresponding security offered by respondent to application.*

**A** T. Ltd. issued a writ against M. Co. claiming a sum of money representing the proceeds of the sale of certain leasehold property. F. Co. also laid claim to the money, and an interpleader was directed and also an issue in the interpleader proceedings between T. Ltd. and F. Co. in which T. Ltd. were plaintiffs and F. Co. were defendants. M. Co. paid the money into court. F. Co. now applied under the Companies Act, 1948, s. 447, for an order that T. Ltd. should give security for costs. It appeared in evidence that the financial position of T. Ltd. gave reason to believe that T. Ltd. would be unable to pay the costs of F. Co. if F. Co. were successful, and F. Co. itself was in compulsory liquidation. At a late stage of the present proceedings F. Co. offered to give security to the same amount as might be ordered against T. Ltd.

**B** **C** **D** **HELD :** it was necessary in view of the interpleader proceedings to look at the substance of the matter and not merely at the form ; in substance F. Co. and T. Ltd. were both claimants ; therefore, the court had a discretion either to direct that no security be given by either party, or that security be given by T. Ltd. only if corresponding security were given by F. Co. ; and, in view of the offer to give security made by F. Co., it was proper to order T. Ltd. to give security.

*Dictum of BANKES, L.J., in Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co. ([1923] 2 K.B. 175), applied.*

[AS TO WHEN SECURITY FOR COSTS WILL BE ORDERED, see HALSBURY, Hailsham Edn., Vol. 18, pp. 628-630, para. 1039 ; and FOR CASES, see DIGEST, **E** Vol. 29, pp. 480-482, Nos. 304-320.]

Cases referred to :

- (1) *Tomlinson v. Land and Finance Corpn.*, (1884), 14 Q.B.D. 539 ; 53 L.J.Q.B. 561 ; 29 Digest 482, 316.
- (2) *Universal Aircraft Ltd. v. Hickey*, (1943) (unrep.), see ANNUAL PRACTICE, 1948, p. 1530.
- F** (3) *Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co.*, [1923] 2 K.B. 166 ; 92 L.J.K.B. 685 ; 129 L.T. 257 ; Digest, Practice, 904, 4451.
- (4) *Belmonte v. Aynard*, (1879), 4 C.P.D. 352 ; 29 Digest 482, 318.

PROCEDURE SUMMONS for an order that the plaintiffs in the action and issue should give security for costs.

**G** **WYNN-PARRY, J.**, held that in substance both the applicants (the defendants in the action, Finer Production Co., Ltd.) and the respondents (the plaintiffs, Tudor Furnishers Ltd.) to the summons were claimants in the issue and that he had a discretion either not to order security to be given or to order security to be given only on the applicants giving like security. The applicants offered to give security in the same sum as the respondents might be ordered to give, and **WYNN-PARRY, J.**, ordered security to be given by the respondents. The relevant facts appear in the judgment.

*M. M. Wheeler* for the applicants.

*Quintin Hogg* for the respondents.

**WYNN-PARRY, J. :** This is a summons taken out by the defendants in the action, Finer Production Co., Ltd., as applicants, against the plaintiffs, Tudor Furnishers Ltd., as respondents, for an order that Tudor Furnishers

Ltd. should give security for costs. By the writ in the action Tudor Furnishers Ltd., as plaintiffs, sued a firm, Montague & Co., as defendants, for a sum of money representing the net proceeds of the sale of the goodwill of a business and the leasehold interest in certain premises in Eastbourne. In the upshot an interpleader was directed and also an issue in the interpleader proceedings. Montague & Co., to use BOWEN, L.J.'s phrase in *Tomlinson v. Land and Finance Corpn.* (1) (14 Q.B.D. 542), slipped out of the matter by paying the sum in dispute into court, and the issue which has to be tried is between Tudor Furnishers Ltd. and Finer Production Co., Ltd., and relates to which of those two companies is entitled to have the sum in court paid out to it. In that issue Tudor Furnishers Ltd., the original plaintiffs, are plaintiffs, and Finer Production Co., Ltd., are defendants.

In support of the application, Finer Production Co., Ltd., have produced evidence which shows that, not merely have Tudor Furnishers Ltd. issued a debenture charging their assets (a circumstance which, by itself, would be insufficient to give the court any jurisdiction under the Companies Act, 1948, s. 447, in view of the unreported decision of MORTON, J., in *Universal Aircraft Ltd. v. Hickey* (2)) but, further, that a receiver and manager of the whole, or substantially the whole, of the company's property charged by the debenture was appointed in July, 1949, and the financial position of the company is such that, in the words of the section, it appears by credible testimony that there is reason to believe that the company would be unable to pay the costs of the Finer Production Co., Ltd., if the latter were successful in their defence. On the evidence before me, if the relations between the applicants and the respondents were those of defendants and plaintiffs in an ordinary action, I should have no hesitation in concluding that a case had been made out for ordering security for costs under the Companies Act, 1948, s. 447, but the matter does not end there. In view of the interpleader proceedings, I have, as directed by the authorities, to look at the substance of the matter and not merely at the form in order to see what is the true position in the issue between Tudor Furnishers Ltd. and Finer Production Co., Ltd. I find that the position of each party as regards the point in dispute in the issue is the same. They are, in effect, both claimants, and it is a fortuitous circumstance that in the issue Tudor Furnishers Ltd. appear as plaintiffs and Finer Production Co., Ltd., appear as defendants.

In those circumstances and having regard to the authority of *Maatschappij Voor Fondsenbezit v. Shell Transport and Trading Co.* (3) and, particularly, the judgment of BANKES, L.J., where he reviewed the two earlier authorities of *Tomlinson v. Land and Finance Corpn.* (1) and *Belmonte v. Aynard* (4), this is a case in which I ought to exercise my discretion either by directing that no security should be given by either of the parties, the Finer Production Co., Ltd., being itself in compulsory liquidation, or that I ought not to order security to be given by Tudor Furnishers Ltd. except on the basis that corresponding security is given by Finer Production Co., Ltd. BANKES, L.J., in the course of his judgment said ([1923] 2 K.B. 174) :

"The real question, as it seems to me, in this appeal is whether, having regard to the peculiar circumstances of the case, the court is not entitled to look at the substance of the dispute and to say that though the action remains an action in form it is in substance indistinguishable for the present purpose from an interpleader proceeding. When once the defendants admitted liability the whole character of the proceedings in my opinion changed. Had the defendants applied under Ord. 57, r. 7, for an order that the Perlak Co. should be substituted as defendants instead of themselves, I can see no reason why the order should not have been made. Can it make any difference in the jurisdiction of the court that instead of the defendants applying for such an order the Perlak Co. apply for leave to



intervene as defendants? I think not. Speaking for myself only, I think that the order of this court allowing the Perlak Co. to intervene was made because the court was of opinion that after the admission of liability by the defendants the dispute had resolved itself into a question of whether the Fondsenbezit Co. or the Perlak Co. were entitled to receive the money owing by the defendants to the plaintiff Deen."

A That discloses an almost similar position to that which has arisen in the present case. The lord justice goes on:

"As a result I think that the court has jurisdiction in the present case, without in the least infringing on the accepted rule that a foreigner who is made a defendant should not be ordered to give security for costs, to make an order requiring the Perlak Co. to give security."

B Applying that to this case, it is clear that I have jurisdiction to order Tudor Furnishers Ltd. to give security. The learned lord justice continues:

"... but having regard to the fact that the plaintiffs who are applying for the order are themselves in precisely the same position in relation to the dispute as the Perlak Co. are and are not offering themselves to give security, I think that the court should exercise its discretion as it did in the case of *Belmonte v. Aynard* (4) and refuse to make any order."

C It is clear from that latter passage which I have read that a reason which militated in the mind of BANKES, L.J., against making any order for security was that the party applying for security did not itself offer to give security. Nobody disputes that the Finer Production Co., Ltd., being in liquidation, could themselves be the object of an application for an order that they give security for costs. The question has been expressly left open by BANKES, L.J., and it is clear from his reasoning that the court in a case such as the present has the alternatives I have mentioned, either to see that security is provided by both or to make no order against either.

D At a late stage of the proceedings, faced with this judgment, counsel for Finer Production Co., Ltd., offered that that company should give security to the same amount as might be ordered against Tudor Furnishers Ltd. Counsel for Tudor Furnishers Ltd., argued that, even in face of that offer, it was not right to make any order his ground being that, owing to some fortuitous circumstance, one party might be able to offer security for costs while the other was unable to do so, and that might produce the result that an impecunious litigant

E would be unable to pursue his claim. On the other hand, as the parties are in the same position, I do not myself see why the plaintiffs, Tudor Furnishers Ltd., should be enabled to pursue their claim, their financial position being as I have already mentioned, without providing some sort of security for the costs which will necessarily be incurred by the Finer Production Co., Ltd., on the issue. Therefore, I think this is a case in which, having regard to the fact that Finer

G Production Co., Ltd., have offered to provide security for costs, I should make an order against Tudor Furnishers Ltd. to give security for costs. The action has only reached the stage when the pleadings have been closed and discovery has not yet been had. Having regard to that circumstance, only a small sum should be ordered at this stage, and I propose to order that Tudor Furnishers Ltd. should give security for costs in the sum of £50 conditional on the payment into court of a similar sum by Finer Production Co., Ltd., and that there be liberty to renew the application at the close of discovery.

H

*Order for security to be given accordingly. Costs to be costs in the action.*

Solicitors: *Sidney Pearlman* (for the applicants); *Herbert Baron & Co.* (for the respondents).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

*Re* ITTER (deceased). DEDMAN AND OTHERS *v.* GODFREY AND ANOTHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Ormerod, J.), November 10, December 2, 1949.]

*Will—Alteration after execution—Evidence of original contents—“ Apparent ”—Original words photographed by use of infra-red rays—Not visible on document itself unless slips removed—Wills Act, 1837 (c. 26), s. 21.*

Where a will or codicil has been altered after the execution thereof and the words or effect of the will before such alteration can only be read or ascertained by such scientific means as the photographing of the document by the use of infra-red rays such words or effect are not “ apparent ” within s. 21 of the Wills Act, 1837.

The testatrix, who died on Apr. 6, 1946, made her will on Nov. 5, 1942, and a codicil thereto on Feb. 22, 1944. By the codicil she gave certain pecuniary legacies to the plaintiffs, but, after executing the codicil, she pasted a slip of paper over the amount given in each case. A sum of money was written on each slip, which was signed by the testatrix, but was not attested, as required by the Wills Act, 1837, s. 9 and s. 21. Pursuant to an order of the court, the codicil was examined by a handwriting expert who was not able to ascertain what was under the slips by looking at the document itself and without removing the slips, but he was able, by the use of infra-red rays, to take a photograph (which was produced to the court) of the parts of the codicil which were under the slips. It was thus shown that in some of the cases alterations had been made in the codicil itself before the slips were pasted on.

HELD : “ apparent ” in s. 21 of the Wills Act, 1837, meant “ apparent on the face of the instrument itself,” and, as the words which had been covered over by the slips could be read only on the creation of a new document, *i.e.*, a photograph of the original writing on the codicil, they were not “ apparent ” within the meaning of s. 21 of the Act of 1837.

*Townley v. Watson*, (1844) (2 L.T.O.S. 376), *applied*.

[AS TO ALTERATIONS IN WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 70-73, paras. 94-97 ; and FOR CASES, see DIGEST, Vol. 44, pp. 306-309, Nos. 1369-1406.]

AS TO DEPENDENT RELATIVE REVOCATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 89, 90, para. 127 ; and FOR CASES, see DIGEST, Vol. 44, pp. 361-365, Nos. 1944-1978.]

Case referred to :

- (1) *Townley v. Watson*, (1844), 3 Curt. 761 ; 3 Notes of Cases, 17 ; 2 L.T.O.S. 376 ; 44 Digest 306, 1374.

PROBATE ACTION.

The plaintiffs claimed to be entitled to certain legacies under a codicil to the will of the testatrix, who died on Apr. 6, 1946. On some date after she had executed the codicil the testatrix covered the amounts given by the legacies with slips of paper on each of which a sum of money had been written, but the new bequests could not take effect as they had not been duly executed, and letters of administration were granted to the defendants with blanks referring to the matter covered by the slips. On an application by the plaintiffs, ORMEROD, J., made an order, dated Nov. 10, 1948, and reported ([1948] 2 All E.R. 1052), for a handwriting expert to be appointed to examine the codicil. The expert was unable to find out what was under the slips by looking at the document itself without removing the slips, but he was able to produce a photograph, taken by infra-red rays, of the parts of the codicil under the slips. ORMEROD, J., now held (a) that the words

and figures under the slips were not "apparent" within the meaning of the Wills Act, 1837, s. 21, and (b) that it was the intention of the testatrix to revoke the original bequests only if new bequests were effectually substituted, and, accordingly, he gave judgment for the plaintiffs, and made an order revoking the original grant of letters of administration and granting to the defendants letters of administration of the will and codicil annexed, with the inclusion of the original writing in the codicil. The facts appear in the judgment.

*Middleton, K.C., and Sophian for the plaintiffs.*

*Tyndale, K.C., and R. J. A. Temple for the defendants.*

*Cur. adv. vult.*

Dec. 2. **ORMEROD, J.**, read the following judgment. In this case the plaintiffs claim as legatees under a codicil of Feb. 22, 1944, to the will, dated Nov. 5, 1942, of Ivy Eveline Itter, deceased, and ask that the letters of administration for the said will and codicil annexed should be granted to the defendants, or some other proper person, with the inclusion of the original writing in the codicil. The defendants, on the other hand, claim that the testator revoked certain legacies by pasting slips of paper over the amounts of the legacies.

On Nov. 5, 1942, the deceased executed her will, which was duly signed and attested, and no question arises on it. On Feb. 22, 1944, she executed a codicil to her will, the codicil being attested by Miss Ethel Leach and Miss E. M. Weir, both of whom worked at the office where the testator was employed. It is agreed for both parties that both the will and the codicil were properly executed. It should be noted, however, that Mr. Harrison, one of the witnesses to the will, and the two witnesses to the codicil gave evidence of the circumstances in which the will and codicil were signed, but no one was able to give to the court any information about the testatrix or her intentions, and no such evidence appeared to be available. At some time after executing the codicil the testatrix pasted slips of paper over the amounts of certain legacies. There were six slips in all, and in each case they appeared to be pasted over the amounts of the legacies only. In each case a sum of money had been written on the slip and each slip had been signed by the testatrix. I think it is fair to say that it appeared to be clear that it was the intention of the testatrix to bequeath to the respective legatees the amounts written on the slips of paper, but her signatures on these slips were not attested, as required by the Wills Act, 1837, s. 9 and s. 21.

Before the hearing an examination of the codicil was made by Captain Wilkins, a handwriting expert appointed for the purpose. He took photographs of the document by the use of infra-red rays and was able to produce to the court a photograph of the parts of the codicil which were under the slips of paper. I accepted Captain Wilkins' evidence of the original figures, and, indeed, his evidence was not disputed by counsel on either side on this point. He said, however, that he was only able to find out what was under the slips by taking the photograph. He could not, by the assistance of any modern scientific means in his possession or known to him, see what was on the codicil by looking at the document itself without removing the slips. I am asked by the plaintiffs to say that in these circumstances the words and figures under the slips are "apparent" within the meaning of s. 21 of the Wills Act, 1837. I cannot accept this contention. As SIR H. JENNER FUST said (3 Curt. 764) in *Townley v. Watson* (1), which deals with this point, "apparent" must mean "apparent on the face of the instrument itself." If the words of the document can be read by looking at the document itself, then they are, I think, "apparent" within the meaning of the section, however elaborate may be the devices used to assist the eye and however skilled the eye which is being used, but, if they can only be read by creating a new document, e.g., by producing a photograph of the original writing on the codicil, as in this case, then I cannot find that the words



are "apparent." They may be discoverable, and in this case they have been proved to be so, but that is not the word used in the section.

It is, however, argued on behalf of the plaintiffs that, even if the original words on the codicil are not apparent, they should, nevertheless, be admitted to probate, since it was the clear intention of the testatrix to revoke the parts of the codicil covered by the slips of paper only in the event of her having effectively substituted other words to take their place. It is said that, if the slips were pasted on the codicil with the intention of revoking the legacies completely and it was only at a later date that the testator attempted to revive them in a modified form by writing on the slips, there would still be a revocation, but, if, on the other hand, she pasted the slips over the amounts of the legacies with the intention of substituting other amounts, the original legacies would still be in existence until there was an effective alteration of the codicil. The only evidence available in this case is the evidence of the document itself. It is to be noticed that on the first of the slips the top portion of the letter "P" is missing in such a way as to indicate that the letter was written before the slip was cut from the original piece of paper. On four of the slips the amount written in is the same under the slip in each case, although in three of these cases alterations had been made on the original before the slip was pasted on. I think what probably happened was that the testatrix decided to make some alterations to the amounts of the legacies and, after making the alterations on some of them on the face of the document, pasted the slips over the amounts and wrote the final amounts on the slips. It may well be that she wrote the amounts on the slips before they were pasted on the document, as the shortened letter "P" on the first slip appeared to show. I do not think it is necessary, however, to go so far. From the fact that the amounts of the legacies only were obliterated in this way and not the whole of the bequests, I think that the inference should be drawn that it was the intention of the testatrix to revoke the part of the bequests covered by the slips only if new bequests were effectually substituted. This seems to me to be the only reason that the testatrix could have for dealing with the codicil in the way in which she did. If this be so, it follows that the slips may be taken off the document, if necessary, or any other means used to ascertain the writing which was on the document before the slips were pasted on, and, accordingly, there must be judgment for the plaintiffs. In view of the evidence which has been given by Captain Wilkins and which has been accepted by counsel for the defendants, it would hardly seem necessary to go so far as to direct that the slips should be removed, but they can be removed if necessary. The form of the order should be that I revoke the original grant of letters of administration with the will annexed and pronounce for the will and codicil in solemn form, in the form in which the words were originally in the codicil, the letters of administration being granted to the defendants.

*Order accordingly.*

Solicitors : *Mount, Sterry & Co.* (for the plaintiffs) ; *Kingsford, Dorman & Co.*, agents for *Shepheards & Bingley*, Kensington (for the defendants).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

## JONES v. WHITEHILL.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.J.J.), December 15, 1949.]

*Rent Restriction—Death of tenant—“Member of tenant’s family”—Niece of tenant’s wife—Nursing of tenant and wife for substantial period—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).*

A

In 1947 the defendant, a niece of the tenant’s wife, went to live with the tenant of a dwelling-house to which the Rent Acts applied, and nursed him and his wife until their deaths between eighteen months and two years later. At the time of his death the tenant had become a statutory tenant of the premises. In an action by the landlord for possession, the defendant claimed the protection of the Rent Acts on the ground that she was a “member of the tenant’s family” within the meaning of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

B

HELD : in the circumstances the defendant was a “member of the tenant’s family” within the meaning of s. 12 (1) (g), and, therefore, was entitled to the protection of the Rent Acts.

C

*Dicta* of WRIGHT, J., in *Price v. Gould*, (1930) (143 L.T. 334) and COHEN, L.J., in *Brock v. Wollams* ([1949] 1 All E.R. 718), *applied*.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401 ; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255.]

D

Cases referred to :

(1) *Brock v. Wollams*, [1949] 1 All E.R. 715 ; [1949] 2 K.B. 388.

(2) *Price v. Gould*, (1930), 143 L.T. 333 ; 94 J.P. 210 ; Digest Supp.

APPEAL by the defendant, the niece of a deceased tenant’s wife, from an order of His Honour JUDGE FORBES, made at Birmingham County Court, on July 21, 1949, granting the landlord possession of a dwelling-house subject to the Rent Restrictions Acts. The Court of Appeal now held that the defendant should be regarded as a “member of the tenant’s family” within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g) and so entitled to the protection of the Rent Acts. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

F

*C. G. Heron* for the landlord.

*Blennerhassett* for the niece of the deceased tenant’s wife.

**SIR RAYMOND EVERSLED, M.R. :** The short question raised on this appeal is whether the interpretation given to the phrase “member of the tenant’s family” in s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is to be carried a stage further than hitherto.

G

The defendant, Mrs. Whitehill, was the niece of a Mrs. Bailey, the wife of the tenant of the premises here in suit. Mrs. Bailey died in July, 1948, and her husband some five months later. At the time of his death he had become a statutory tenant of the premises. He died intestate. The defendant went to live with Mr. and Mrs. Bailey early in 1947 to look after them because they were in poor health. No child of their own was at any material time living with them in the house. There is no question that the residence qualification required by s. 12 (1) (g) is satisfied, but there remains the point whether the defendant is fairly and properly to be described as a member of the tenant’s family.

H

In answering this question we are much assisted by the recent decision in this court of *Brock v. Wollams* (1). In the course of his leading judgment in that case, BUCKNILL, L.J., cited ([1949] 1 All E.R. 717) these observations of WRIGHT, J., in *Price v. Gould* (2) (143 L.T. 334) :

"It has been said in a number of equity cases, relating principally to wills or to settlements under powers of appointment, that the word 'family' is a popular, loose, and flexible expression, and not a technical term. It has been laid down that the primary meaning of the word 'family' is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decide that the exact scope of the word must depend on the context and the other provisions of the will or deed in view of the surrounding circumstances . . . I hold that in the section now under consideration the word 'family' includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptance of the word in this connection, and that the legislature has used the word 'family' to introduce a flexible and wide term."

COHEN, L.J., in his judgment ([1949] 1 All E.R. 718), also referred to that language of WRIGHT, J., and agreed with it, rejecting the alternatives with which it was suggested he was faced, namely, either that the word meant consanguinity or extended to cover anybody in the household. The lord justice said that another view appealed to him, namely, that the question whether a particular individual was a member of the tenant's family should be answered according to the ordinary sense of the word. Taking that test, on the facts I have stated, can the defendant fairly be described according to the ordinary use of language as a member of Mr. Bailey's family? It was strongly urged by counsel for the landlord that, if we gave an affirmative answer to that question, it would follow that we had laid it down that nephews and nieces of the wives or husbands of tenants were within the phrase "members of the tenant's family" in all cases and for all purposes, thus describing another circle in a widening series of rings. I am not saying whether or not that would be so. I am not suggesting necessarily that all nephews and nieces by marriage should be regarded as members of the tenant's family, but be it observed here that the defendant, a niece of Mrs. Bailey, assumed, out of natural love and affection, the duties and offices peculiarly attributable to members of a family, namely, she went to live with her uncle and aunt and looked after them in their declining years. On those facts I think that, if it were asked in an ordinary conversation: Was the defendant a member of Mr. Bailey's family?, an affirmative answer would be given. I, therefore, come to the conclusion that the defendant should be regarded as within the protection of s. 12 (1) (g), and that this appeal should be allowed.

COHEN, L.J. : I am of the same opinion. I do not think we are differing from the learned judge on a question of fact. As I read his note he seems to have come to the conclusion that the defendant could not be a member of the family because she was only a daughter of a sister of the wife and no blood relation of the deceased tenant. In other words, I think he went wrong in principle, and, on the facts of this case, that this particular niece by marriage is a member of the family within the meaning of s. 12 (1) (g).

ASQUITH, L.J. : I also agree.

*Appeal allowed with costs.*

Solicitors : Underwood & Co., agents for J. Foley Egginton, Sutton Coldfield (for the landlord) ; Sharpe, Pritchard & Co., agents for Bailey, Cox, Bosworth & Co., Birmingham (for the niece).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]



## WIGLEY v. LEIGH.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), December 15, 1949.]

*Rent Restriction—Personal occupation—Tenant unable to live in house owing to illness—Intention to return—House kept in readiness for return—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1).*

A A married woman was the statutory tenant of a dwelling-house in which she lived with her husband until 1940. From 1940 to 1945, while the husband was away on war service, she sub-let the house and went to live with friends in Northern Ireland. In 1945, when the husband was demobilised, she gave the sub-tenant notice to quit, as she intended to return to the house with her husband, but she was unable to carry out her intention as she fell ill and had to remain in Northern Ireland for the sake of her health. Since then she had spent only three months in the house—in the summer of 1947, but she and her husband intended to live there as soon as her health improved or living conditions in England improved. In the meanwhile, the husband stayed with his mother, going to the house for two or three weeks each year and sometimes for the week-end. The tenant employed a servant to remain in the house and keep it always ready for occupation, and she had spent a considerable sum of money on the upkeep of the house and on improvements. The landlord claimed possession of the house on the ground, *inter alia*, that the tenant was not entitled to the protection of the Rent Restrictions Acts as she was no longer in occupation.

B Held : although the tenant was away from the house because of illness, the house remained the matrimonial home, and, as she clearly had the intention to return and had kept the house in readiness for her return and there was no reason to suppose that she would not return within a reasonable time, she was in occupation of the house and entitled to the protection of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1).

*Skinner v. Geary* ([1931] 2 K.B. 546), distinguished.

E [AS TO POSITION OF STATUTORY TENANT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, para. 401, and 1949 Supplement ; and FOR CASES, see DIGEST, Vol. 31, p. 563, Nos. 7100-7103, and Supplement.]

Case referred to :

(1) *Skinner v. Geary*, [1931] 2 K.B. 546 ; 100 L.J.K.B. 718 ; 145 L.T. 675 ; 95 J.P. 194 ; Digest Supp.

F APPEAL by the tenant from an order of His Honour JUDGE TUCKER, at Leek County Court, on July 25, 1949, whereby he granted to the landlord possession of a house subject to the Rent Restrictions Acts on the ground that the tenant was no longer in occupation. The tenant left the house in 1940 when her husband went into the army and she intended to return there with him in 1945 when he was demobilised. She fell ill, however, and had not yet been able to return G (except for a short while in 1947), but she intended to do so as soon as she was better. She and her husband continued to regard the house as their home and kept a servant there to have it always ready for their return. The Court of Appeal now held that the tenant was still in occupation and allowed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

H *Fearnley-Whittingstall, K.C.*, and *Openshaw* for the tenant.  
*Scott Cairns, K.C.*, and *Shorrocks* for the landlord.

BUCKNILL, L.J. : This is an appeal by the tenant, Vida Mary Leigh, from an order of His Honour JUDGE TUCKER, who gave judgment for possession of a certain house, called "The Hut," to the landlord on the ground, to put it briefly, that the tenant was no longer in occupation of the house of which she was the statutory tenant. The appeal is put forward on the ground that there was no evidence on which the judge could properly come to that conclusion.

Before considering the facts, I think it is as well to state shortly the principles on which the court may act in granting possession to the landlord of a rent-restricted house on grounds such as those on which the judge has acted. The leading case on the subject is *Skinner v. Geary* (1), and the judgment most frequently referred to is that of SCRUTTON, L.J. It is not necessary to state the facts in that case, except to say that there the tenant had for the last ten years been living elsewhere with his wife—some ten miles away—and that at no time did he contemplate residing in the house again. On those facts, SCRUTTON, L.J., had some remarks to make in general which are applicable to this case. He said ([1931] 2 K.B. 561) :

“A non-occupying tenant was in my opinion never within the precincts of the [Rent Restrictions] Acts, which were dealing only with an occupying tenant who had a right to stay in and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and who has no intention of returning to it. I except, of course, such a case as that to which I have already referred—namely, of temporary absence, the best instance of which is that of a sea captain who may be away for months but who intends to return, and whose wife and family occupy the house during his absence.”

Later in his judgment SCRUTTON, L.J., said (*ibid.*, 564) :

“For the reasons I have given the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return. If it were to be held otherwise odd consequences would follow.”

One could reverse that statement and say that, if he is in occupation of the house in the sense that the house is his home, he is protected.

The learned judge in this case had those statements of the law before him because he referred to them in a note of his judgment, but he said :

“On careful consideration of the whole of the evidence, including the above-mentioned and the rest of the evidence before me, and including also the admitted facts, . . . I was of opinion and found that the [tenant] was not living in or occupying the house as her home and was not an occupying tenant and had no intention of returning to live there within any time that could be estimated.”

With due respect to the learned judge, I am of opinion that the facts do not justify that conclusion.

The tenant, Mrs. Leigh, who has at all times been the statutory tenant, is a married woman, and until 1940 she and her husband lived in this house, which is in the open country about twenty-five miles from Manchester. The husband carries on his profession in Manchester and, therefore, the house is a suitable place for them to live in. In May, 1940, the husband was sent as a soldier to the Orkneys, and the tenant then went to Ireland to live with friends whilst he was away, and they sub-let the house furnished. The husband continued to serve in the army until he was demobilised in 1945, and he and the tenant then intended to return to “The Hut.” They gave notice to the sub-tenant to quit and the sub-tenant left. Unfortunately, whilst the husband was on his way home, the tenant had a haemorrhage, and the doctors refused to allow her to go back to “The Hut.” It appears that she had suffered from pulmonary tuberculosis prior to 1945, and I presume that she had been temporarily cured. From that time she has lived in “The Hut” only once, for three months in the summer of 1947. The husband said that she intended to come over each year in the summer, but had not been well enough to do so, but that it has always been their intention to live at “The Hut” when her health permits, and, pending her

complete cure, to go there in the summer months, provided that the doctors agree to it. Meanwhile, the husband has been living with his mother at Wilmslow, but has been going from time to time to "The Hut." He said that he generally stayed there for periods of two to three weeks each year and also spent some week-ends and odd nights there, and occasionally he has taken a friend there. The tenant and her husband employ a man who is there the whole time and keeps the house ready for occupation, and they have spent quite a considerable sum of money on the upkeep of the house. It is not necessary to state all the moneys spent, but it is sufficient to say that in 1948 the tenant spent £65 in putting in a new copper boiler and in 1947 she had a telephone extension put into her bedroom when she expected to come over. I think that there is not the slightest doubt that the tenant and her husband regard "The Hut" as their home, and their only home, and that they intend to live there when the tenant is well enough to go. The advice given by the medical advisers, as it appears in the admitted statement of facts, is as follows :

"Her said medical advisers have further advised that she should not return to the said premises permanently until her health further improves or living conditions in England sufficiently improve."

C There does not seem to me any reason to suppose that her health will not improve, and I hope that there is no reason for saying that living conditions in England will not improve in the future. I take "living conditions" to mean, in this particular case, the conditions, as regards milk and butter and other foods which people suffering from this complaint need.

D In these circumstances, it seems to me that the tenant is in occupation of the house because she has clearly the intention to return. That intention is not unreasonable, and there is no reason to suppose that she will not return within a reasonable time. That being so, it seems to me that the principle applied in *Skinner v. Geary* (1) has no application to this case. As regards the policy of the Rent Restrictions Acts, which is to prevent persons from being turned out of their homes, it is quite true that, if a tenant is not in occupation of the house, he is in effect keeping other people who need a home out of it, and, therefore, he is not entitled to the protection of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), but it would be a very bad policy to hold in a case of this kind that a home occupied, so far as it could be, by a husband and wife is to be taken from them merely because the wife is suffering from illness.

F **SOMERVELL, L.J. :** I agree.

**DENNING, L.J. :** There are many cases where a husband, who is a statutory tenant, is, by force of circumstances, not able to live in the matrimonial home, but is nevertheless protected by the Rent Restrictions Acts. The naval man who is away for two or three years at sea, or the soldier who is taken prisoner in war, does not lose the protection of the Acts, and his wife cannot be turned out. So, also, if the husband becomes a chronic invalid and is removed to hospital. In this case, therefore, although the wife, who is the tenant, is away because of illness, nevertheless the house remains the matrimonial home. They have no other home, and they have kept the house ready for occupation in the hope that the wife will be cured and come to live there. The husband sleeps there occasionally, it is all kept in readiness for their return, and it cannot be said that the tenant is not in occupation. She is, therefore, entitled to the protection of the Acts, and I agree that the appeal should be allowed.

*Appeal allowed with costs in the Court of Appeal and below.*

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Pattinson, Harrison & Milne, Macclesfield* (for the tenant) ; *Burton, Yeates & Hart*, agents for *Barclay, May & Co.*, Macclesfield (for the landlord).

[*Reported by C. N. BEATTIE, Esq., Barrister at-Law.*]



PILLING *v.* ABERGELE U.D.C.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Cassels, JJ.), December 15, 1949.]

*Housing—Moveable dwelling—Licence—Consideration of local amenities—Public Health Act, 1936 (c. 49), s. 269 (1), (2).*

The appellant, who was the owner and occupier of certain land forming part of a field, applied to the respondents under s. 269 (1) of the Public Health Act, 1936, for the grant of a licence to allow him to use the land as a site for moveable dwellings. The respondents refused the licence on the ground that the site was unsuitable because such use would be detrimental to the amenities of the district, particularly on account of the close proximity of other dwellings. The justices affirmed this decision. On appeal,

**HELD :** on the application for the grant of a licence under s. 269 (1) of the Act of 1936, a local authority were empowered only to take into consideration matters relating to public health and sanitary conditions and not matters relating to local amenities, and, therefore, the respondents should have granted the licence.

[FOR THE PUBLIC HEALTH ACT, 1936, s. 269 (1), see HALSBURY'S STATUTES, Vol. 29, p. 494.]

CASE STATED by Abergele (Denbigh) justices.

On June 4, 1949, at a court of summary jurisdiction sitting at Abergele, the appellant appealed against the refusal of the respondents to grant him a licence under s. 269 (1) of the Public Health Act, 1936, authorising him to allow a certain piece of land in his occupation to be used as a site for moveable dwellings. The appellant contended that the sole ground on which the respondents had refused the application was that the site was unsuitable because its use would be detrimental to the amenities of the district and that that was a ground of refusal not contemplated by the Public Health Act, 1936, s. 269 (1), and so not one which the respondents were lawfully entitled to consider. The justices refused to accept this contention and dismissed the appeal. The Divisional Court now allowed the appeal.

*H. A. Hill* for the appellant.

*A. E. Boucher* for the respondents.

**LORD GODDARD, C.J. :** This is a Case stated by justices for the county of Denbigh to whom an appeal lay under s. 269 (4) of the Public Health Act, 1936, against the refusal of the local authority to grant the appellant a licence authorising him to use or allow his land to be used as a site for moveable dwellings—caravans, camping huts, and so forth. The respondents refused the applicants' application for a licence on the ground that

"the site is unsuitable because such use would be detrimental to the amenities of the district particularly on account of the close proximity of other dwellings."

In other words, they refused the licence for what may be compendiously called town planning reasons, and the question is whether they have power to consider those matters in coming to a conclusion whether or not they should grant a licence. If the local authority had merely refused the licence without giving any grounds it might have been very difficult for the appellant to have brought an appeal successfully, but I have always understood the law to be that where a duty to hear and determine a question is conferred on a local authority and they state reasons which show that they have taken into account matters which they ought not to have taken into account or have failed to take into account matters which they ought to have taken into account, the court to whom an appeal lies ought to allow an appeal. The appellant appealed under s. 269 (4) to the justices who gave this opinion :

“(i) Local authorities are not restricted under s. 269 of the Public Health Act, 1936, as to the grounds on which they may refuse a licence. (ii) The local authority have exercised their discretion in a fair and reasonable manner.”

Therefore, they dismissed the appeal.

- A The real question arises under the first reason which the justices gave, namely, that local authorities are not restricted by the section as to the grounds on which they can refuse a licence. When s. 269 is considered, especially in relation to the other sections in the Act, I think it is clear that it deals with sanitary matters only. Counsel for the appellant points out that the Act of 1936, the title of which is “An Act to consolidate with amendments certain enactments relating to public health,” is, unlike the Public Health Act, 1875, an Act dealing with sanitary matters only. The Act of 1875 deals with a variety of other matters
- B which come within the purview of local sanitary authorities, such as the paving and making up of private streets, but the Act of 1936 is a sanitary Act purely and simply. Part XI of the Act of 1936, of which s. 269 forms a part, is headed
- C “Miscellaneous,” and it starts with s. 259 which deals with nuisances in connection with watercourses, ditches and ponds which are so foul as to be prejudicial to health or a nuisance, and s. 260 gives a local authority or parish council power to deal with them. Section 262 gives a local authority power to require the culverting of watercourses and ditches where building operations are in prospect so as to prevent houses becoming damp or being flooded. Sections 264 and 265 empower the authority to do the work themselves if it is not done.
- D Section 267 makes ships and boats lying in any inland or coastal waters subject to the authority of the port health authority, and, so far as boats used for human habitation are concerned, it applies the provisions of pt. II of the Act relating to filthy or verminous premises or articles and verminous persons, and provides that the provisions of pt. III with regard to smoke nuisances shall not apply in relation to a vessel habitually used as a seagoing vessel subject to certain exceptions. Section 268, the first section in the group of sections headed :
- E “Tents, vans, sheds, etc.,” provides :

“(1) The provisions of Parts III, V, VII and XII of this Act and the provisions of Part II relating to filthy or verminous premises or articles and verminous persons, shall apply in relation to tents, vans, sheds and similar structures used for human habitation as they apply in relation to other premises and as if a tent, van, shed or similar structure used for human habitation were a house or a building so used.”

So those provisions are applied to vans and so forth, and, it may be, to moveable dwellings.

Section 269 provides :

- G “(1) For the purpose of regulating in accordance with the provisions of this section the use of moveable dwellings within their district, a local authority may grant—(i) licences authorising persons to allow land occupied by them within the district to be used as sites for moveable dwellings ; and (ii) licences authorising persons to erect or station, and use, such dwellings within the district ; and may attach to any such licence such conditions as they think fit—(a) in the case of a licence authorising the use of land, with respect to the number and classes of moveable dwellings which may be kept thereon at the same time, and the space to be kept free between any two such dwellings, with respect to water supply, and for securing sanitary conditions ; (b) in the case of a licence authorising the use of a moveable dwelling, with respect to the use of that dwelling (including the space to be kept free between it and any other such dwelling) and its removal at the end of a specified period, and for securing sanitary conditions.”
- H

Except for the words "its removal at the end of a specified period," it is clear that the whole of sub-s. (1) deals with sanitary matters.

By sub-s. (2)

"... a person shall not allow any land occupied by him to be used for camping purposes on more than forty-two consecutive days or more than sixty days in any twelve consecutive months, unless either he holds in respect of the land so used such a licence from the local authority of the district as is mentioned in para. (i) of the preceding sub-section."

That shows that a person may use his land for six weeks if he uses it continuously, or altogether in the year sixty days without getting a licence. That, I suppose, is because it is considered that six weeks will not be sufficient to cause a nuisance or to foul the land to such an extent that the land may be a nuisance. I think that counsel for the appellant was justified in saying that that is a very odd provision to find in this Act if the local authority are entitled to take amenities into account, because the detriment to the amenities or disfigurement of the neighbourhood would be permitted for six weeks or for sixty days during the whole of the year. Sub-s. (6) provides :

"If an organisation satisfies the Minister that it takes reasonable steps for securing—(a) that camping sites belonging to or provided by it, or used by its members, are properly managed and kept in good sanitary condition ; and (b) that moveable dwellings used by its members are so used as not to give rise to any nuisance, the Minister may grant to that organisation a certificate of exemption."

That, again, seems to point entirely to this being a public health or sanitary section.

We have to construe this Act and to consider whether or not the section gives the local authority when they are considering an application for a licence power to take into consideration the amenities of the district or whether they are confined to public health matters. I am not going to refer in any detail to the very complicated town planning legislation which has been the subject of various Acts of Parliament since 1932 beyond saying that it is to those Acts that I think appeal must be made if a question with regard to amenities arises. It may be that the local authority as a town planning authority may have some power. On that I need not express any opinion because this was purely an application under s. 269 of the Public Health Act, 1936, and the justices have held that the local authority have an uncontrolled, unrestricted discretion. In my opinion, that was wrong. I think that the discretion which the section gives to the local authority is to consider the application for the grant of a licence from the point of view of public health and the sanitary conditions at the site, and that they are not entitled to take into account any question of local amenities under this section. In my view, therefore, the justices ought to have allowed the appeal, and we now do so.

**HILBERY, J. :** I concur.

**CASSELS, J. :** I agree.

*Appeal allowed with costs.*

Solicitors : *Vizard, Oldham & Co.*, agents for *Chamberlain, Johnson & Parke*, Llandudno (for the appellant) ; *Jaques & Co.*, agents for *Cyril Jones, Son & Williams*, Wrexham (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]



ATTORNEY-GENERAL v. ST. AUBYN  
(SIR JOHN MOLESWORTH)

[COURT OF APPEAL (Somervell, Singleton and Jenkins, L.JJ.), November 22, 23, December 14, 1949.]

*Estate Duty—Determination of life interest—Successive dispositions of life interest—*

A *Transfer of life interest to company—Transfer of assets by company to new company—Life interest merging with reversion by virtue of ultimate disposition by new company—Life tenant owning all issued capital of new company at date of ultimate disposition—Exclusion of benefit to “person who had interest”—Guarantee of payment of annuity—Finance Act, 1940 (c. 29), s. 43 (1), (2), s. 56 (1), (2).*

B The Finance Act, 1940, s. 43, provides: “(1) . . . where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession,—(a) if apart from the disposition or determination the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death . . . (2) Where the relevant disposition or determination was *bona fide* effected or suffered three years before the death (or, if it was effected or suffered for public or charitable purposes, one year before the death), the preceding sub-section shall not have effect—(a) if *bona fide* possession and enjoyment of the property in which the interest subsisted was assumed immediately thereafter by the person becoming entitled by virtue of or upon the disposition or determination and thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise ; . . .”

E Section 56 of the Act provides: “(1) For the purposes of s. 3 of the Finance Act, 1894 . . . if a company to which this section applies was concerned in a transaction in relation to which it is claimed that the provisions of that section have effect . . . those provisions shall have effect in relation thereto if and only if . . . the commissioners are satisfied that those provisions would have had effect in the following circumstances, namely, if the assets of the company had been held by it on trust for the members thereof and any other person to whom it is under any liability incurred otherwise than for the purposes of the business of the company wholly and exclusively, in accordance with the rights attaching to the shares in and debentures of the company and the terms on which any such liability was incurred, and if the company had acted in the capacity of a trustee only with power to carry on the business of the company and to employ the assets of the company therein. (2) Where a company to which this section applies was concerned in the disposition or determination of an interest limited to cease on a death effected or suffered as mentioned in sub-s. (2) of s. 43 of this Act, or in a surrender made as mentioned in sub-s. (3) of s. 48 of this Act, or was concerned in any one or more of associated operations of which the disposition or determination or surrender formed one, the conditions as to the entire exclusion of the person who had the interest or of the deceased, and of any benefit to him, specified in the said sub-s. (2) or in the said sub-s. (3) as the case may be, shall be treated as having been satisfied if and only if they would have been so treated in the circumstances aforesaid.”

H

Up to 1926, H. was tenant for life of the P. and T. estates with remainder to his son J. in tail male with remainders over. By an assignment dated

Aug. 14, 1926, H. assigned his life interest to a private unlimited company ("the old company") in consideration of an annuity of £7,000 and the issue to him of one-hundred shares of the old company. By a further deed dated June 20, 1929, the old company covenanted with H. to pay him during his life an additional annuity of £2,000 in consideration of his surrendering the one-hundred shares to the old company, the effect of which surrender was to reduce the issued share capital of the company to three shares, all of which were in the beneficial ownership of H. Under an agreement dated Aug. 17, 1929, the old company transferred to a new company (specially formed for the purpose) all the assets of the old company subject to any liabilities affecting the same, in consideration of the new company's satisfying all the liabilities of the old company and allotting to every member of the old company one £1 share of the new company for every share in the old company held by him. Besides the three shares of the new company allotted pursuant to the said agreement, the only shares of the new company issued were two issued to the signatories to the new company's memorandum of association. All five issued shares were in the beneficial ownership of H. Pursuant to a deed of family arrangement dated Oct. 25, 1930, by a deed dated Oct. 29, 1930, the new company conveyed H.'s life interest in the T. estate to J. to the intent that such life interest might merge and be extinguished in the remainder expectant thereon, and, by a further deed of Oct. 29, 1930, J. assigned his reversionary interest in the P. estate to the new company, for which the assignment of H.'s life interest in the T. estate was partial consideration, the remaining consideration being the allotment to J. of all the unissued capital of the new company, to be held by J. in trust for himself absolutely in the event (which happened) of his surviving H. By a further deed of the same date, J. guaranteed the payment to H. during his life of the aggregate annuity of £9,000. The five shares in the new company to which H. was beneficially entitled were agreed to be transferred to J. By a deed dated Nov. 17, 1930, H. released the new company from the said annuity. On Jan. 5, 1942, H. died and the Crown claimed estate duty in respect of the T. estate under the Finance Act, 1894, s. 1. It was admitted that the new company was a company to which s. 56 of the Act of 1940 applied.

**HELD :** (i) section 43 (1) was addressed to a situation in which property had in the first instance been settled in such a way that it would have passed on the death of the deceased under s. 1 of the Act of 1894, but there had been some disposition or determination of the deceased's interest in his lifetime which had prevented the property from so passing, and, therefore, the words "if apart from the disposition" in s. 43 (1) (a) must be construed as meaning "if but for the disposition," and the disposition for the purposes of s. 43 (1) and s. 43 (2) could not be H.'s assignment of his life interest to the old company or the old company's assignment to the new company because neither of those transactions would have prevented the property from passing on H.'s death, but it must be the new company's surrender to J.

(ii) by virtue of s. 56 (2) and the assumption of the hypothetical circumstances specified in s. 56 (1), the new company was to be treated as having held its assets prior to the transactions effected pursuant to the deed of family arrangement of Oct. 25, 1930, in trust to pay thereout the £9,000 annuity to H. during his life, and, subject to such annuity, in trust for H. absolutely, subject only in effect to its powers of management, and, therefore, immediately before the surrender of the life interest to J., H. was "the person who had the interest" within the meaning of s. 43 (2), and, as H. received a benefit in the form of a guarantee of the annuity by J., he, as "the person who had the interest," was not excluded from all benefit,

and the claim which *prima facie* arose under s. 43 (1) was not defeated by lapse of time under s. 43 (2).

[FOR THE FINANCE ACT, 1940, ss. 43 and 56, see HALSBURY'S STATUTES, Vol. 33, pp. 110-112, 124.]

Cases referred to :

- A (1) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198 ; 68 L.J.Q.B. 435 ; 80 L.T. 361 ; 63 J.P. 436 ; 21 Digest 7, 27.
- (2) *A.-G. v. Beech*, [1899] A.C. 53 ; 68 L.J.Q.B. 130 ; 79 L.T. 565 ; 63 J.P. 116 ; 21 Digest 7, 26.
- (3) *A.-G. v. De Preville*, [1900] 1 Q.B. 223 ; 69 L.J.Q.B. 283 ; 81 L.T. 266, 690 ; 21 Digest 10, 42.
- B (4) *Sudeley (Lord) v. A.-G.*, [1897] A.C. 11 ; 66 L.J.Q.B. 21 ; 75 L.T. 398 ; 61 J.P. 420 ; 21 Digest 122, 917.

APPEAL by the taxpayer from an order of CROOM-JOHNSON, J., dated May 4, 1949, and made on an English Information laid by the Attorney-General.

C CROOM-JOHNSON, J., held that estate duty was payable under the Finance Act, 1894, s. 1, in respect of property in which the deceased at one time had a life interest, although that interest had been determined some twelve years before his death. The learned judge accepted the argument of the Crown based on the Finance Act, 1940, s. 43 (1). The Court of Appeal now refused to accept that argument, but accepted the alternative argument of the Crown based on both s. 43 (1) and s. 56 (2) of the Act of 1940, and, therefore, affirmed the decision of CROOM-JOHNSON, J.

D *Millard Tucker, K.C.*, and *N. C. Armitage* for the taxpayer.

*The Solicitor-General (Sir Frank Soskice, K.C.)*, *Upjohn, K.C.*, and *J. H. Stamp* for the Crown.

*Cur. adv. vult.*

Dec. 14. JENKINS, L.J., read the following judgment of the court. This is an appeal from a judgment of CROOM-JOHNSON, J., dated May 4, 1949, to the effect that on the death on Jan. 5, 1942, of Sir Hugh Molesworth St. Aubyn, Bart., the former tenant for life of property in Devonshire and Cornwall known as the Tetcott estate, estate duty became payable on the principal value of the Tetcott estate under the Finance Act, 1894, s. 1, in conjunction with the Finance Act, 1940, s. 43, notwithstanding that Sir Hugh's life interest had prior to his death been surrendered and merged in the interest in remainder of his son, the defendant and present appellant, Sir John Molesworth St. Aubyn, Bart.

G H The Finance Act, 1894, s. 1, is, of course, the familiar section imposing the charge of estate duty on the principal value of all property settled or not settled which "passes on the death" of any person (*i.e.*, changes hands on the death : *Earl Cowley v. Inland Revenue Comrs.* (1) ) ; while s. 2 of the same Act (of which the Finance Act, 1940, s. 43, is in effect an extension) enlarges the area of charge by declaring that property passing on the death of the deceased shall be deemed to include property falling within any of the various descriptions therein mentioned, although it may not actually change hands on the death so as to be property "passing on the death" within the meaning of s. 1 itself. Sub-section (1) (c) of s. 2 of the Act of 1894 included in the category of property deemed to pass on the death property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11 (with certain modifications to which we need not refer) and the provisions thus incorporated in the estate duty legislation had the effect of bringing into charge (*inter alia*) property comprised in gifts *inter vivos* made within twelve months before the death of the deceased and also property taken under any gift whenever made of which *bona fide* possession and enjoyment should not have been assumed



by the donee immediately on the gift and thenceforward retained to the entire exclusion of the donor and of any benefit to him by contract or otherwise.

The decisions in *A.-G. v. Beech* (2) and *A.-G. v. De Preville* (3) having shown that the Finance Act, 1894, s. 2 (1), did not suffice to bring into charge property in which the deceased had a life interest which had been surrendered and extinguished by a disposition *inter vivos*, this omission was made good by the Finance Act, 1900, s. 11, which, to put it shortly, provided, in effect, that property in which the deceased or any other person had an interest limited to cease on the death of the deceased should be deemed to pass on the death of the deceased, notwithstanding that it had been surrendered or otherwise disposed of whether for value or not to or for the benefit of the remainderman or reversioner, unless the same conditions were fulfilled as were required to exempt property comprised in a gift *inter vivos* from liability to duty under s. 2 (1) (c) of the Act of 1894. By the Finance (1909-10) Act, 1910, s. 59 (1), the period of three years was substituted for twelve months as the period preceding the death of the deceased before which a gift *inter vivos* under s. 2 (1) (c) of the Act of 1894, or a surrender of an interest limited to cease on the death of the deceased under s. 11 of the Act of 1900, must have been made or effected in order to escape liability to duty.

The Finance Act, 1940, s. 43, replaced, and substantially extended the scope of, the Finance Act, 1900, s. 11, with a view, no doubt, to defeating various methods which had been evolved of evading the operation of the old section, *e.g.*, by means of assignments by tenant for life and remainderman of their respective interests to a third party, or other indirect methods of effecting a merger of the life interest. The common expedient of making such assignments to a company formed for the purpose had already been specifically dealt with by the Finance Act, 1930, s. 35. For the present purpose it is only necessary to refer to sub-ss. (1), (2) and (6) of s. 43 of the Act of 1940 which are in these terms :

“(1) Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession,—(a) if apart from the disposition or determination the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death ; or (b) if apart from the disposition or determination the property in which the interest subsisted would have been deemed by virtue of para. (b) of sub-s. (1) of s. 2 of the said Act to be included to a particular extent in the property passing on the death, the property in which the interest subsisted shall be deemed by virtue of this section to be included to that extent in the property passing on the death. (2) Where the relevant disposition or determination was *bona fide* effected or suffered three years before the death (or, if it was effected or suffered for public or charitable purposes, one year before the death), the preceding sub-section shall not have effect—(a) if *bona fide* possession and enjoyment of the property in which the interest subsisted was assumed immediately thereafter by the person becoming entitled by virtue of or upon the disposition or determination and thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise ; or (b) in the case of a partial determination, if the conditions specified in the preceding paragraph were not satisfied by reason only of the retention or enjoyment by the deceased of possession of some part of the property, or of some benefit, by virtue of the provisions of the

instrument under which he had the interest : Provided that nothing in this sub-section shall be construed as affecting any charge of estate duty arising otherwise than by virtue of the provisions of the preceding sub-section. . .

(6) This section shall have effect only in relation to a person dying after the commencement of this Act, and s. 11 of the Finance Act, 1900, and ss. 35 and 39 of the Finance Act, 1930, shall not have effect in relation to such a person."

A Section 43 of the Finance Act, 1940, must be read in conjunction with s. 56 (2) of the same Act, which provides :

"Where a company to which this section applies was concerned in the disposition or determination of an interest limited to cease on a death effected or suffered as mentioned in sub-s. (2) of s. 43 of this Act, or in a surrender made as mentioned in sub-s. (3) of s. 48 of this Act, or was concerned in any one or more of associated operations of which the disposition or determination or surrender formed one, the conditions as to the entire exclusion of the person who had the interest or of the deceased, and of any benefit to him, specified in the said sub-s. (2) or in the said sub-s. (3) as the case may be, shall be treated as having been satisfied if and only if they would have been so treated in the circumstances aforesaid."

C The "circumstances aforesaid" referred to in this sub-section are those stated in sub-s. (1) of s. 56 as

"...the following circumstances, namely, if the assets of the company had been held by it on trust for the members thereof and any other person to whom it is under any liability incurred otherwise than for the purposes of the business of the company wholly and exclusively, in accordance with the rights attaching to the shares in and debentures of the company and the terms on which any such liability was incurred, and if the company had acted in the capacity of a trustee only with power to carry on the business of the company and to employ the assets of the company therein."

D Sir Hugh having died on Jan. 5, 1942 (and thus after the commencement of the Finance Act, 1940), it was claimed that, in the circumstances stated below, estate duty became payable on his death on the principal value of the Tetcott estate either by virtue of the Finance Act, 1940, s. 43 (1), alone or, alternatively, by virtue of that sub-section read in conjunction with s. 56 (2) of the same Act. The circumstances relevant to the claim are these :—(i) Immediately

F before the execution of the next-mentioned assignment, Sir Hugh was beneficially entitled for life to the Tetcott estate, the Pencarrow estate in Cornwall, and certain personal property, with remainder to Sir John in tail male with remainders over. (ii) By an assignment dated Aug. 14, 1926, Sir Hugh assigned his life interest in the Tetcott estate, the Pencarrow estate, and the above-

G mentioned personal property, to the Molesworth St. Aubyn Estates Co. (a private unlimited company incorporated under the Companies Acts, 1908 to 1917 below referred to as "the old company") in consideration of an annuity of £7,000 and the issue to him of one-hundred shares of the old company of £1 each credited as fully paid up, and the old company covenanted to pay to Sir Hugh during his life the said annuity of £7,000 as therein mentioned. (iii) By a further deed dated June 20, 1929, the old company covenanted with Sir Hugh to pay

H him during his life an additional annuity of £2,000 in consideration of his surrendering one-hundred shares of the old company credited as fully paid. The effect of this surrender was to reduce the issued share capital of the old company to three shares, all of which were in the beneficial ownership of Sir Hugh. (iv) The two annuities amounting together to £9,000 per annum were approximately equal to the net income of the old company. (v) On July 16, 1929, the old company went into voluntary liquidation with a view to reconstruction and on July 24, 1929, a limited company called the Molesworth St. Aubyn

Estates Co., Ltd. (below referred to as "the new company") was registered under the Companies Acts, 1908 to 1917, with a view to the acquisition of the undertaking of the old company. (vi) The terms of such acquisition were set out in an agreement dated Aug. 17, 1929, and made between the old company of the first part, its liquidator of the second part, and the new company of the third part, which provided for the transfer to the new company of all the assets of the old company, subject to any liabilities affecting the same, in consideration of the new company paying, satisfying and discharging all the debts, liabilities and obligations of the old company, and allotting to every member of the old company one £1 share of the new company credited as fully paid up for every share in the old company held by him. (vii) Pursuant to this agreement, the new company allotted three of its shares credited as fully paid to the holders of the three issued shares of the old company, and by an assignment dated Aug. 17, 1929, the old company and its liquidator assigned to the new company Sir Hugh's life interest in the Tetcott estate, the Pencarrow estate and the personal property above mentioned (or in the property then representing the same respectively) including all income accrued therefrom and then owing to the old company. (viii) Until after Oct 25, 1930, the only issued shares of the new company were the three shares allotted to the holders of the three issued shares of the old company, and the two shares issued to the signatories of the memorandum of association of the new company, and all these five issued shares of the new company were in the beneficial ownership of Sir Hugh until dealt with as mentioned below. (ix) By a deed of family arrangement dated Oct. 25, 1930, Sir John and Sir Hugh agreed (so far as material for the present purpose) :—

(a) that Sir Hugh should procure the new company (1) to purchase Sir John's reversionary interest in the unsold parts of the Pencarrow estate and in certain investments and heirlooms, and (2) to surrender Sir Hugh's life interest in the Tetcott estate to Sir John, such life interest to be taken, at the full market value thereof, in part satisfaction of the consideration for the sale of the said reversionary interest ; (b) that the balance of the consideration for the property to be purchased by the new company, taken at its full market value, was to be satisfied by the allotment to Sir John of all the unissued share capital of the new company credited as fully paid up and of income debentures as therein mentioned, such shares and debentures to be held by Sir John in trust for himself absolutely in the event (which happened) of his surviving Sir Hugh ; (c) that Sir Hugh should concur in the assurance or assurances to the new company for the purpose of vesting in it the absolute beneficial interest in all the property in which the reversionary interest was to be purchased from Sir John ; (d) that the payment of the above-mentioned annuity of £9,000 should be unconditionally guaranteed by Sir John to Sir Hugh who should be at liberty (without affecting such guarantee) to release the new company (if he thought fit) from all liability to pay the same ; (e) that the five shares in the new company to which Sir Hugh was beneficially entitled should be forthwith transferred to Sir John or his nominees ; (f) that, during the lifetime of Sir Hugh, his powers as governing director of the new company should not be affected without his consent, but that he should not be entitled to receive any payment from the new company by way of remuneration or otherwise ; (g) that the Tetcott estate and investments, Sir Hugh's life interest in which was to be surrendered by the new company to Sir John, should be disentailed by Sir John with Sir Hugh's concurrence, but should not be transferred to the new company or re-settled. (x) Pursuant to the deed of family arrangement :—(a) by a deed dated Oct. 29, 1930, and made between the new company of the one part and Sir John of the other part, the new company surrendered and conveyed to Sir John Sir Hugh's life interest in the Tetcott estate to the intent that such life interest might merge and be extinguished in the remainder expectant thereon. (From a recital in this deed it appears that the assignment by Sir John to the new company of the reversionary interest agreed to be sold by him had been completed by a deed of



the same date). (b) by a further deed dated Oct. 29, 1930, and made between Sir John of the one part and Sir Hugh of the other part, Sir John guaranteed the payment to Sir Hugh during his life of the above-mentioned aggregate annuity of £9,000. (c) by a deed dated Nov. 17, 1930, and made between Sir Hugh of the one part and the new company of the other part, Sir Hugh released the new company from the said annuity and all claims and demands in respect thereof.

A In these circumstances, inasmuch as Sir Hugh's life interest in the Tetcott estate had, after becoming an interest in possession, been determined in his lifetime by means of the new company's surrender in favour of Sir John, and apart from such surrender the Tetcott estate would clearly have passed on the death of Sir Hugh under the Finance Act, 1894, s. 1, it was not in dispute that  
B the case fell within the Finance Act, 1940, s. 43 (1), with the result that the Tetcott estate must be deemed to pass on the death of Sir Hugh by virtue of s. 43, unless the exemption from the operation of sub-s. (1) of that section afforded by sub-s. (2) was applicable. The question at issue was, therefore, whether the circumstances of the case were such as to fulfil the conditions on which that exemption depends. So far as material for the present purpose,  
C three conditions of exemption are prescribed by sub-s. (2). The first is that the relevant disposition or determination should have been *bona fide* effected or suffered three years before the death. The second is that *bona fide* possession or enjoyment of the property in which the interest subsisted should have been assumed immediately thereafter by the person becoming entitled on the disposition or determination. The third is that the person so becoming entitled should  
D thenceforward have retained such possession or enjoyment to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise. Of these conditions it is not in dispute that the first two were fulfilled in the present case, as, whatever is meant by "the relevant disposition," the latest in date of the three dispositions here in question, namely the surrender of Oct. 29, 1930, by the new company to Sir John, was effected more than three  
E years before the death of Sir Hugh on Jan. 5, 1942, and Sir John admittedly assumed *bona fide* possession and enjoyment of the Tetcott estate immediately on such surrender.

It is, however, claimed for the Crown that the third condition was not fulfilled because Sir Hugh was "the person who had the interest" within the meaning of sub-s. (2) and he received a benefit in the shape of the annuity (originally of  
F £7,000 and later increased to £9,000) which continued to be payable to him from the date of the assignment by him of his life interest to the old company on Aug. 14, 1926, down to the date of his death. The Crown's primary contention in support of this claim, both as formulated in the information and as argued before CROOM-JOHNSON, J., and in this court, was founded on s. 43 alone, without recourse to s. 56 (2), and (as developed in argument) was substantially of this  
G nature :—(i) Apart from special cases of determination of life interests otherwise than by disposition, which have no relevance here, s. 43 (1) applies wherever it is found on a death (a) that the deceased had a life interest in property ; (b) that such life interest was disposed of in the lifetime of the deceased; and (c) that such life interest was determined in the lifetime of the deceased (whether by the deceased's own disposition or by some subsequent disposition  
H made by a person claiming through him) with the result that the property did not pass on the death of the deceased under s. 1 of the Act of 1894 as it would have done if his life interest had remained on foot until his death. (ii) If these conditions are satisfied, then, in a case in which there have been successive dispositions of the life interest, the last of them bringing about its determination (as, for example, in the present case the assignment by Sir Hugh to the old company, the assignment by the old company to the new company, and finally the surrender by the new company to Sir John), any one of the

successive dispositions (and not necessarily the disposition which in itself brought about the determination of the life interest) can be relied on by the Crown, not only as being a disposition of the life interest within the broad terms of the opening words of s. 43 (1) (which it obviously must be), but also as being a disposition "apart from" which the property would have passed on the death under s. 1 of the Act of 1894, and further as being "the relevant disposition" within the meaning of sub-s. (2). In particular the Crown can in such a case rely simply on the initial disposition under which the deceased parted with his life interest and need not concern itself with the subsequent dispositions through which the determination was ultimately brought about. (iii) The Crown is therefore entitled in the present case to rely on Sir Hugh's assignment to the old company as being a disposition within the meaning of s. 43 (1) in general, and in particular as being a disposition "apart from" which the Tetcott estate would have passed on his death under s. 1 of the Act of 1894, because, if Sir Hugh had not made this assignment, the old company could not have assigned to the new company, and the new company could not have surrendered to Sir John. (iv) Sir Hugh's assignment to the old company is "the relevant disposition" for the purposes of sub-s. (2) because it is the disposition relied on by the Crown for the purposes of sub-s. (1) (a) and the disposition referred to in both places must as a matter of construction be the same. (v) Sir Hugh's assignment to the old company thus being "the relevant disposition" for the purposes of sub-s. (2), Sir Hugh was clearly "the person who had the interest" within the meaning of the same sub-section, inasmuch as he was the person who had owned the life interest down to the date on which it was assigned to the old company. (vi) In view of the annuity, Sir Hugh as "the person who had the interest" was clearly not excluded from all benefit. The third condition of exemption prescribed by sub-s. (2) was therefore not fulfilled, and the property was accordingly deemed to pass on his death by virtue of sub-s. (1).

This contention seems in effect to have been accepted by the learned judge, who decided the case in favour of the Crown, substantially on the short ground that Sir Hugh's assignment of his life interest to the old company was a disposition to which s. 43 (1) applied, notwithstanding that it did not in itself prevent the property from passing under s. 1 of the Act of 1894, that Sir Hugh received a benefit in the shape of the annuity, and that the two subsequent dispositions of the life interest, while possibly providing the Crown with alternative grounds for its claim under s. 43 (1), were immaterial for the purposes of the claim based on Sir Hugh's assignment. With respect to the learned judge, we find it difficult to accept the reasoning on which his conclusion was based, or the argument for the Crown by which he was presumably led to adopt that reasoning. After all due allowance is made for the greater width of expression manifested in the Finance Act, 1940, s. 43, as compared with the Finance Act, 1900, s. 11, and, in particular, the inclusion in the later section of all dispositions, no matter to whom they are made, and not merely dispositions to or for the benefit of the remainderman or reversioner as in the earlier one, the fact remains that s. 43 (1) is addressing itself to a situation in which property does not pass on the death under s. 1 of the Act of 1894, and, accordingly, in order that duty may nevertheless be exigible, must be deemed to pass on the death by an extension of the principles of s. 2 of that Act. Section 43 (1) is further addressing itself to a situation in which property has in the first instance been settled in such a way that it would have passed on the death of the deceased under s. 1 of the Act of 1894, but there has been some disposition or determination of the deceased's interest in his lifetime which has prevented the property from so passing. Section 43 (1) admittedly has nothing to say to a case in which the property does pass on the death of the deceased under s. 1 of the Act of 1894, whether it so passes because there have been no dispositions of the deceased's interest, or because the only dispositions there have been were such as merely to change the

ownership of the deceased's interest while preserving its separate existence as an interest ceasing on his death—for instance, where a life tenant has merely assigned his interest, not to the remainderman but to a third party, who or whose successors in title (none of them being the remainderman) have retained it intact down to the original life tenant's death.

It, therefore, seems to us difficult to resist the conclusion that sub-s. (1) (a) in providing that

“if . . . apart from the disposition . . . the property . . . would have passed on the death under s. 1 of the Finance Act, 1894, it shall be deemed by virtue of this section to be included . . . in the property passing on the death ”

means that if, apart from the disposition which prevented it from doing so, the property would have passed on the death under s. 1 of the Act of 1894 it shall be deemed to pass by virtue of s. 43. In other words, we think that “if apart from the disposition” should be construed as equivalent to “if but for the disposition,” and that a disposition cannot for this purpose be regarded as one “apart from” which or “but for” which the property would have passed under s. 1 of the Act of 1894 unless it was a disposition which prevented the property

from so passing, so as to make it appropriate that the property, not actually passing, should be deemed to pass. It was argued for the Crown that “apart from the disposition” has a different meaning from “but for the disposition,” but in this context we think there is no distinction. To construe “apart from the disposition” as meaning “irrespective of the disposition” or “whether the disposition had been made or not” seems to us hardly to accord with the sense of the sub-section. Nor can we accept the Crown's argument to the effect that Sir Hugh's assignment was a disposition “apart from” or “but for” which the property would have passed on his death under s. 1 of the Act of 1894, because otherwise the old company could not have assigned to the new company and the new company could not have surrendered to Sir John. The true position, as it seems to us, is that “apart from” or “but for” the new company's

surrender to Sir John, which prevented it from doing so, the property would have passed on Sir Hugh's death under s. 1 of the Act of 1894 *notwithstanding* Sir Hugh's assignment to the old company and the old company's assignment to the new company.

In our opinion, therefore, there are cogent grounds for the view that the disposition which in the present case is relevant for the purposes of s. 43 (1), and is also “the relevant disposition” for the purposes of sub-s. (2), is the new company's surrender to Sir John. The language of s. 43 (2) suggests that “the person who had the interest” must be the person who was the beneficial owner of it immediately before the relevant disposition. That view accords with the requirement that possession and enjoyment must be assumed and thenceforward retained to the entire exclusion of the person who had the interest, which implies

that the person who had the interest must have possessed and enjoyed it down to the date of the disposition, and thereafter have been excluded from such possession and enjoyment by the person becoming entitled under the disposition. Accordingly, on the footing that the surrender was the relevant disposition, it might well follow that the new company was “the person who had the interest.”

But the new company (as is admitted by the Crown) received no benefit apart from the provision in the deed of family arrangement to the effect that Sir Hugh, while retaining his powers as governing director, should not be entitled to receive any payment from the new company by way of remuneration or otherwise, which, in our view, clearly could not be regarded as a benefit for the purposes of sub-s. (2). This difficulty might be surmounted if the Crown could successfully contend that “the person who had the interest” in sub-s. (2) means “the person who originally had the interest” (*i.e.*, Sir Hugh) or alternatively “any person who at any time had the interest” (*i.e.*, including Sir Hugh), but it



seems to us far from easy, as a matter of construction, to justify either of these two meanings for the words in question. Again, the Crown might succeed in making Sir Hugh "the person who had the interest" if the two assignments and the surrender could properly be treated as together constituting one composite disposition, or if the word "disposition" could be read in the plural as including all dispositions from the original assignment by the life tenant, so that, for the purpose of sub-s. (2), the effect of all the dispositions could be considered. These are difficult points and we find it unnecessary to express any final conclusion in the present case on the question whether the Crown could have made good its claim under s. 43 (1) alone, without recourse to s. 56 (2), as it seems to us reasonably plain that the alternative claim based on s. 43 (1) in conjunction with s. 56 (2) is well founded. We, therefore, prefer to leave the various points of difficulty, to which we have adverted, open for resolution one way or the other in some future case in which s. 56 (2) will not be available, and the result will, therefore, turn on the unaided scope and effect of s. 43.

As to the alternative claim under s. 43 (1) in conjunction with s. 56 (2), the matter stands thus. The new company was admittedly a company to which s. 56 applied, which makes it unnecessary for us to refer to the complicated referential definition of such companies contained in s. 58. Sir Hugh was admittedly the beneficial owner of all the issued shares of the new company from its incorporation until Oct. 25, 1930 (*i.e.*, the date of the deed of family arrangement which must, we think, be the critical date for this purpose) and although the date of the allotment to Sir John of the unissued shares of the new company pursuant to the deed of family arrangement is not in evidence, this presumably did not take place until Oct. 29, 1930, when the assurances by the new company to Sir John, and by him to the new company, were completed, and the five issued shares, or the beneficial interest therein, were transferred by Sir Hugh to Sir John. Finally, the new company as the actual surrenderor was clearly "concerned" within the meaning of s. 56 (2) in the disposition of Sir Hugh's life interest constituted by the new company's surrender of it to Sir John. It follows that, by virtue of s. 56 (2), the condition as to the entire exclusion of the person who had the interest and of any benefit to him, specified in s. 43 (2), is to be treated as having been satisfied if and only if it would have been so treated in the circumstances stated in s. 56 (1). In view of the fact that Sir Hugh was the beneficial owner of all the issued shares of the new company, the assumption of those hypothetical circumstances in the present case produces the result that the new company is to be treated as having held its assets (*i.e.*, Sir Hugh's life interest in the Pencarrow and Tetcott estates, and the other property above referred to) in trust to pay thereout the £9,000 annuity to Sir Hugh during his life, and, subject to such payment, in trust for Sir Hugh absolutely, with power to the new company as such trustee to carry on its business and employ its assets therein. In other words, the new company is to be regarded (in effect) as having held its assets in trust for Sir Hugh absolutely as sole beneficiary, subject only to the powers just mentioned, which amount in substance to general powers of management. If these hypothetical circumstances had existed in reality, it seems to us reasonably plain that Sir Hugh, as the sole beneficiary under the hypothetical trust of the new company's assets, would, in relation to the surrender of his life interest by the new company to Sir John, have been "the person who had the interest" within the meaning of s. 43 (2). It further seems to us reasonably plain that Sir Hugh as "the person who had the interest" would not have been excluded from all benefit since he received a palpable benefit in the form of Sir John's guarantee of the £9,000 annuity. We should here note that the question was raised in the course of the argument whether the new company ever assumed any direct liability to Sir Hugh for the annuity as opposed to a mere liability to the old company for its payment. This seems to us to be immaterial for the present purpose, except in the sense

that, if the new company was under no direct liability to Sir Hugh for the annuity, the benefit represented by Sir John's guarantee was all the more valuable.

- Counsel for Sir John contested the claim under s. 43 (1) in conjunction with s. 56 (2) on (in effect) three grounds. First, he said that "the person who had the interest" must be identified by reference to s. 43 alone, and that s. 56 (2) was only available for the purpose of ascertaining whether the person so identified
- A was excluded from all benefit. We see no justification for placing this restricted construction on the language of s. 56 (2). The identity of "the person who had the interest" must necessarily depend on the beneficial ownership of the interest, and the provisions of s. 56 (2) are on the face of them directed to imputing beneficial ownership to some person or persons other than the company concerned in the disposition. If the interest in question was comprised in the company's
- B assets so that the effect of applying s. 56 (2) is to bring about a notional change in the beneficial ownership of such interest, the identity of "the person who had the interest" must necessarily suffer a corresponding notional change. Secondly, counsel argued that on the principle of *Sudeley v. A.-G.* (4), Sir Hugh had no interest in the new company's assets under the hypothetical trust, but *Sudeley v. A.-G.* (4) was a case of an unadministered residuary estate and has no bearing
- C on a trust such as the hypothetical trust here in question relating to ascertained and specific trust property. Moreover, under the hypothetical trust in the present case, Sir Hugh as sole beneficiary could have called for the transfer to himself of the trust property at any time, subject only to the discharge of any outstanding liabilities. Thirdly, counsel contended that the facts in evidence (*i.e.*, as no other evidence was adduced by either side the facts established by the inter-
- D rogatories and the answers thereto) did not suffice to bring the beneficial ownership of the assets home to Sir Hugh on the application of the statutory hypothesis. He suggested that (for instance) there might be, in addition to Sir Hugh's annuity, some liability of the new company, incurred otherwise than for the purposes of its business wholly and exclusively, to some person other than Sir Hugh. Apart from income tax (which we think is clearly beside the point) he
- E did not attempt to specify any such liability, but merely put the possibility to demonstrate the alleged incompleteness of the evidence on a matter with respect to which the onus of proof was on the Crown. In our judgment, this point is clearly not open to Sir John. The eighteenth interrogatory in terms raised the questions whether at the date of the deed of Oct. 25, 1930, the new company would not in the circumstances postulated by s. 56 (2) have held its interest in
- F the Tetcott estate in trust for Sir Hugh as the sole beneficial owner of its issued share capital, and whether at the same date Sir Hugh would not have been the person beneficially entitled to such interest; and Sir John's answer to this interrogatory was merely to the effect that this was immaterial, without any suggestion of the existence of any facts which would have made the effect of the application of s. 56 (2) different from that alleged in the interrogatory.
- G Moreover, no attempt was made at the hearing before the learned judge to adduce any evidence of any such facts.

Junior counsel for Sir John advanced a further argument to the effect that the £9,000 annuity was wholly referable to the Pencarrow estate which, it will be remembered, was vested in the new company absolutely pursuant to the deed of family arrangement. He relied on the facts stated in para. 11 of Sir John's

H answer, which were (shortly) to the effect that the £9,000 annuity was never paid in full to Sir Hugh in any year from Oct. 29, 1930, until his death; that by a deed dated Feb. 19, 1931, Sir John charged the annuity on the debentures of the new company; that in 1931, and subsequent years, the net distributable income of the Pencarrow estate was always insufficient to pay the annuity; and that in these circumstances Sir Hugh voluntarily submitted to an arrangement under which the amount payable by Sir John in respect of the annuity was re-considered by Sir Hugh year by year with reference to the net distributable

income of the Pencarrow estate, the reduced amount accepted by Sir Hugh for each year being in practice paid by the new company, and set off against the debenture interest and dividends receivable from the new company by Sir John. Admittedly this arrangement was a purely voluntary one, with no consideration to support it, and was never embodied in any formal document. On these facts counsel contended (as we understood him) that the surrender of Sir Hugh's life interest in the Tetcott estate by the new company to Sir John took effect to the entire exclusion of any benefit to Sir Hugh, because Sir Hugh in fact received, in lieu of the £9,000 annuity, only a reduced annual sum corresponding to the net distributable income of the Pencarrow estate, which must be regarded as a benefit exclusively referable to that estate, thus leaving the surrender of Sir Hugh's life interest in the Tetcott estate as a disposition in respect of which no benefit whatever was received by Sir Hugh.

We cannot accept this contention. It is plain that in origin the £9,000 annuity represented (as to £7,000 directly and as to £2,000 by way of substitution for the one-hundred shares originally issued to Sir Hugh) the consideration for the transfer to the old company of Sir Hugh's life interest in the Tetcott estate as well as the Pencarrow estate. It is also plain that the provision in the deed of family arrangement under which Sir John guaranteed the payment of the £9,000 annuity was not exclusively referable to the Pencarrow estate. On the contrary, the reasonable inference is that the guarantee was provided for in order to make up to Sir Hugh for the diminution in the income available for payment of the £9,000 annuity by the new company occasioned by the new company's surrender to Sir John of Sir Hugh's life interest in the Tetcott estate. The fact that Sir Hugh (in exercise of the power reserved to him to do so without affecting the guarantee) released the new company from liability for the annuity, thus making Sir John principally and solely liable for it, cannot affect the question. The substance of the transaction was that Sir Hugh's right to receive the full income he had previously been entitled to, in the shape of the £9,000 annuity, was preserved to him, notwithstanding the surrender to Sir John of part of the property which had previously produced that income, namely, Sir Hugh's life interest in the Tetcott estate. This result was achieved by Sir John's guarantee and the subsequent substitution of Sir John for the new company as principal debtor in respect of the £9,000 annuity. Sir Hugh retained down to the date of his death a legally enforceable right to payment in full of the £9,000 annuity, and, in our judgment, it is immaterial for the present purpose that year by year from 1931 onwards he voluntarily accepted lesser sums than the full annual amount he was legally entitled to receive. We are, accordingly, of opinion that none of the points taken for Sir John on this part of the case provides an effective answer to the Crown's claim under s. 43 (1) in conjunction with s. 56 (2), which, for the reasons we have endeavoured to state, should, in our judgment, succeed. It follows that, as we have reached the same conclusion as the learned judge, though by a different and longer route, the order made by him should be affirmed subject only to its variation so as to declare that the duty became payable under the Finance Act, 1894, s. 1, in conjunction with the Finance Act, 1940, ss. 43 and 56 (2), instead of referring merely to s. 1 of the former, in conjunction with s. 43 of the latter, Act. Sir John, having in substance failed, must pay the costs of the appeal.

*Order accordingly.*

Solicitors : *Hunters* (for the taxpayer) ; *Solicitor of Inland Revenue.*

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]



## GRAHAM &amp; SCOTT (SOUTHGATE), LTD. v. OXLADE.

[KING'S BENCH DIVISION (Roxburgh, J., sitting as additional judge), December 15, 16, 1949.]

*Agent—Estate agent—Commission—Contract to pay commission on introduction of person “willing and able to purchase”—Person willing to purchase “subject to survey”.*

The plaintiffs, a firm of estate agents, after being instructed by the defendant to negotiate the sale of his property, wrote to him : “ We beg to confirm and thank you for your instructions to assist in the disposal of your property . . . We confirm that in the event of our introducing a person or persons willing and able to purchase we shall look to you for the payment of the usual commission . . . ” The defendant accepted the terms contained in this letter, and the plaintiffs introduced a person who was prepared to purchase the property “subject to contract [and] satisfactory survey.”

**HELD :** in view of the condition contained in the words “subject to satisfactory survey” the prospective purchaser was not “a person willing to purchase” within the meaning of the agreement, and, therefore, the plaintiffs were not entitled to their commission.

[AS TO REMUNERATION OF AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436 ; and FOR CASES, see DIGEST, Vol. 1, pp. 488-503, 508-518 ; Nos. 1664-1728, 1753-1801.]

**ACTION for commission.**

On Sept. 1, 1949, the plaintiffs, who were estate agents, received instructions from the defendant to sell his property, 2, Merrivale, Southgate, N.14, at the price of £5,000, nothing being then said about commission. On the same day the plaintiffs wrote to the defendant : “ . . . we beg to confirm and thank you for your instructions to assist in the disposal of your property as above. As instructed we are quoting £5,000 freehold and hope to have the pleasure of submitting an acceptable proposal within the course of a day or two. We confirm that in the event of our introducing a person or persons willing and able to purchase we shall look to you for the payment of the usual commission . . . ” The plaintiffs introduced a Mrs. Smith as a proposed purchaser, and, acting on instructions from the defendant, they arranged for the sale of the property to her for £4,650. On Oct. 3, 1949, they wrote to the defendant's solicitors : “ We have agreed a sale of the above property on behalf of Mr. D. W. H. Oxlade and we understand you will act for him in the matter. The proposing purchaser is Mrs. Dinah Smith. The purchase price agreed is £4,650, freehold, subject to contract, satisfactory survey, vacant possession on completion on or before Oct. 27 next . . . we hold £300 by way of deposit.” On the same day the defendant's solicitors had written to the plaintiffs informing them that the offer of Mrs. Smith was not acceptable to the defendant who was arranging to dispose of the property elsewhere. The defendant contended that the proposed purchaser introduced was not a person “willing and able to purchase” at the date of the withdrawal of the plaintiffs' authority because the contract she was prepared to enter into was “subject to survey.” ROXBURGH, J., upheld this contention.

*Stanley Rees* for the plaintiffs.

*Neil McKinnon* for the defendant.

ROXBURGH, J., stated the facts, held that the defendant had by his conduct accepted the terms of the plaintiffs' letter of Sept. 1, 1949, as those of the contract, and continued : That raises a question of importance which has worried me no little because I have not been able to find a statement of the *ratio decidendi* of the many cases on this subject which are to be found in the

reports. It is clear that in more than one case a person has been held to be willing to purchase although his agreement to do so has expressly been "subject to contract." It is well settled that an agreement "subject to contract" is in law of no binding effect and that a person who agrees "subject to contract" can change his mind for any reason. It is, therefore, not clear to me why on several occasions the courts have held that a person who has only agreed "subject to contract" is to be regarded as willing to purchase. I should regard the words "subject to contract" as a condition imposed on their willingness, but the trend of authority is against that view. If that were all, I should follow the trend of those decisions without comment, but no case has dealt with a willingness "subject to satisfactory survey." I feel no doubt that that is an important condition, and, in my judgment, a person is not "willing" who only agrees to purchase if the result of a survey, which has not yet been made, is satisfactory to him, for it is well settled that, if a prospective purchaser agrees to purchase subject to satisfactory survey, he is the arbiter of whether it is satisfactory. He is only willing on a contingency. I do not think that Mrs. Smith was a willing purchaser at the date when the authority was withdrawn, because she was only willing in the event of a survey, which had not yet been made, proving satisfactory to her.

There is a considerable difference in the practical result, if not in theory, between an agreement subject to contract and an agreement subject to a satisfactory survey, because, in the normal way, an estate agent's task is completed when everything is arranged subject to contract. That is the usual condition in which a transaction passes from him to the solicitor. It is likely that the estate agent will know nothing about such serious matters as, for instance, restrictive covenants. It is a little surprising to me that a person is said to be a willing purchaser at a certain price who has made no investigation of the title, though it is manifest that, if a serious restrictive covenant was disclosed on the preliminary enquiries, he would not be a willing purchaser at the price fixed. However, that is a matter for the solicitor rather than for the estate agent, but surveys of premises—testing drains, and so on—are normally carried out under the supervision of the estate agent and before the stage at which the transaction is handed over to the solicitors. It would be strange if an estate agent could earn his commission when the necessary business of having a survey of the premises on behalf of the proposed purchase had not been carried out. There is, therefore, a difference in the practical result, but I must confess that I cannot point to the logical distinction between a person who is willing to purchase "subject to contract" and a person who is willing to purchase "subject to survey." My own feeling would have been that neither of them was willing except in a certain contingency. The point in the present case is new, and I hold that, on the true construction of this contract, Mrs. Smith was not willing to purchase the property in the circumstances I have indicated.

*Judgment for the defendant with costs.*

Solicitors : *William White & Co.* (for the plaintiffs) ; *Craigén, Hicks & Co.* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

## WAROQUIERS v. MARSDEN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Hilbery, JJ)., December 19, 1949.]

*Criminal Law—Brothel—Keeping a brothel—Right to trial by jury—Charge under Criminal Law Amendment Act, 1885 (c. 69), s. 13 (1).*

A *Justices—Summary jurisdiction—Right to trial by jury—Offence triable summarily and also indictable at common law—Charge brought under Criminal Law Amendment Act, 1885 (c. 69), s. 13 (1).*

Where a statute makes an offence, which is indictable at common law, triable summarily subject to the provisions of the Summary Jurisdiction Acts, the prosecution have the right to decide whether to charge the offence as an indictable offence or as an offence triable summarily. If they charge it as an offence triable summarily, the defendant has no right to claim a trial by a jury except under the Summary Jurisdiction Act, 1879, s. 17 (1), which gives him that right if he is liable to be imprisoned for a term exceeding three months.

C By the Criminal Law Amendment Act, 1885, s. 13 : " Any person who (1) keeps or manages or acts or assists in the management of a brothel . . . shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable " to certain penalties, and, by the Criminal Law Amendment Act, 1922, s. 3 (a), the penalty on a first conviction is a fine not exceeding £100 or imprisonment for a term not exceeding three months.

D The appellant was charged with an offence under s. 13 (1) of the Act of 1885, it being a first offence. He claimed to be tried by a jury.

HELD : although the offence was an indictable offence at common law as well as a statutory offence triable summarily, the charge having been brought, not at common law, but under s. 13 (1) of the Act of 1885, the appellant was not entitled to claim a trial by jury.

E [AS TO RIGHT TO TRIAL BY JURY, see HALSBURY, Hailsham Edn., Vol. 21, pp. 592, 593, paras. 1037, 1038 ; and FOR CASES, see DIGEST, Vol. 33, pp. 318, 319, Nos. 333-344.]

Cases referred to :

(1) *R. v. Norman*, (1922), 17 Cr. App. Rep. 29 ; 14 Digest 242, 2316.

(2) *Kerwin v. Hines*, (1886), 50 J.P. 230.

F CASE STATED by the chief metropolitan magistrate.

At a court of summary jurisdiction sitting at Bow Street, London, the appellant was charged with assisting to keep a brothel contrary to the Criminal Law Amendment Act, 1885, s. 13 (1), under which the offence is triable summarily. At the opening of the case, the appellant claimed to be tried by a jury. The magistrate held that he had no right to trial by a jury, but agreed to state a Case for the opinion of the High Court. The Divisional Court now held that, as the charge was brought under s. 13 (1) of the Act of 1885, the appellant's right to a trial by jury could arise only under the Summary Jurisdiction Act, 1879, s. 17 (1), and, as the maximum term of imprisonment to which he was liable if convicted of the offence charged was for a term not exceeding three months, he was not entitled to be tried by a jury.

H *Salmon, K.C.*, and *Du Cann* for the appellant.  
*Vernon Gattie* for the respondent.

LORD GODDARD, C.J. : The appellant was charged with an offence against the Criminal Law Amendment Act, 1885, s. 13 (1), and it was not suggested that it was not a first offence. The difficulty in the case, if there be a difficulty, is caused by a reference to something said in the Court of Criminal Appeal in *R. v. Norman* (1). Brothel keeping has always been an offence at common law and it is indictable as a common nuisance, and AVORY, J., in



giving the judgment of the court in *R. v. Norman* (1), said (17 Cr. App. Rep. 32), with reference to s. 13 of the Act of 1885 :

“The latter sub-sections create new offences, whereas the offence under sub-s. (1) is merely the common law offence, and the sub-section only makes it an offence also triable summarily.”

There is no doubt—and I think this is what the learned judge had in mind—that, if a man is charged with keeping a brothel, the offence being laid as an offence against the Criminal Law Amendment Act, 1885, s. 13 (1), the magistrate may, if he thinks it a very serious case, decide not to deal with it summarily, but may send it for trial as a common law offence. He cannot send it for trial as an offence against s. 13 (1) of the Act of 1885, because that sub-section makes it an offence triable summarily. The prosecutor can decide in the first instance whether he will charge it as an offence to be tried summarily or as a common law offence. If he charges it as an offence to be tried summarily, the defendant is liable on a first conviction, to a fine not exceeding £100, or to imprisonment for a period not exceeding three months. If it is charged as a common law offence, the defendant would have to go for trial and would be liable to imprisonment for two years and a fine at discretion. Section 13 of the Act of 1885 provides :

“Any person who (1) keeps or manages or acts or assists in the management of a brothel . . . shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable . . .”

to certain penalties, and by the Criminal Law Amendment Act, 1922, s. 3 (a), the penalty on a first conviction is a fine not exceeding £100, or imprisonment for a term not exceeding three months. If the prosecution elect to proceed in a summary way in a court of summary jurisdiction for the offence, it seems to me that they are entitled to do so. If they proceed on the offence as at common law, the defendant would have to go for trial, but, if they treat it as an offence triable summarily under s. 13 (1) of the Act of 1885, the provisions of the Summary Jurisdiction Act, 1879, apply and a defendant has a right to elect to be tried by a jury only if he comes within s. 17 (1) of that Act, *i.e.*, if he is liable to be imprisoned for a term exceeding three months.

The nearest case on the subject is *Kerwin v. Hines* (2), where a man was charged with keeping a disorderly house, the information having been preferred under s. 13 of the Act of 1885. The Disorderly Houses Acts, 1751 and 1818 contained elaborate provisions in regard to the procedure required in laying the information, and in *Kerwin v. Hines* (2) the necessary procedure had not been carried out. The Divisional Court held that it was open to the prosecutor to elect whether to take proceedings by indictment under the earlier statutes or by summary procedure under s. 13 of the Act of 1885, and that, if he proceeded under the Act of 1885, the preliminary procedure required by the earlier Acts was not necessary. In his judgment, MATHEW, J., said (50 J.P. 231) :

“But the procedure under the late Act which is independent of the earlier Acts may also be taken by itself if the prosecutor pleases.”

If an offence is triable summarily, the defendant's right to claim to be tried by a jury arises, under s. 17 (1) of the Summary Jurisdiction Act, 1879, where the penalty on summary conviction is imprisonment for a term exceeding three months. In the case of the offence in question here, the prosecution can decide whether they will prosecute for an offence triable summarily or for an indictable offence, and, if the case comes before a court of summary jurisdiction, the court will deal with it summarily unless it is thought that the defendant should be committed for trial because the offence is so serious or for some other reason. If the depositions disclose that a serious offence has been committed, there is no doubt that a defendant can be committed for trial, and in that case he would be indicted, not for an offence against s. 13 (1) of the Act of 1885, but for the

common law offence. In these circumstances, I think that the magistrate came to a right decision in point of law.

**HUMPHREYS, J. :** I am of the same opinion. It is important that no doubt should be thrown by any decision of this court on the right of a prosecutor to proceed against an accused person on any charge which in law correctly fits the facts. Section 13 of the Act of 1885 has provided that a person convicted of a number of things, including the keeping or managing or assisting in the management of a brothel :

“... shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable ...”

He is liable to penalties one of which is imprisonment for a term not exceeding three months. The section gives the appellant no right to elect to be committed for trial by jury, but it was argued on his behalf that he had that right. From where does he get it ? He certainly does not get it from the Summary Jurisdiction Act, 1879, because s. 17 (1) of that Act gives a right of election only where a person is

“... charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months ...”

He is said to derive his right to be tried by a jury from the fact that certain acts may amount to two offences, one at common law and one under the statute, and they may be precisely similar offences. I do not find any authority for that proposition. It seems to me that the law, as it has been rightly understood

ever since 1885, is that a person who is brought before a court of summary jurisdiction is liable to be treated in the manner provided for a summary offence. The mere fact that different consequences might ensue if he had been charged with some other offence, or with the same offence under another Act seems to me to be quite immaterial. I think, therefore, that the magistrate was right in holding that the appellant had no right of election to go before a jury. I would

add that I entirely agree with my Lord that, if a magistrate in any such case comes to the conclusion that, owing to special circumstances, it would be in the interests of justice that the defendant should be sent to take his trial before a jury, when he would be liable to a much heavier punishment, the magistrate has the right to commit him for trial, whether he likes it or not, but, in my view, unless the magistrate chooses to act in that way, or unless the prosecutor chooses to prefer a charge of keeping a brothel at common law, there is no right of election.

**HILBERY, J. :** I concur.

*Appeal dismissed with costs.*

Solicitors : *Albin Hunt & Stein* (for the appellant) ; *Allen & Son* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

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## JACOBS v. JACOBS AND CEEN (CEEN v. JACOBS).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), December 14, 1949.]

*Divorce—Damages—Claim against co-respondent—Competence—Husband not domiciled in England.*

The husband, who was domiciled and resident in South Africa, filed a petition in that country for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent in England. No claim was made for damages in those proceedings, but before the action was tried the husband filed a petition in England claiming damages against the co-respondent. A decree of divorce having been granted to the husband in South Africa, the co-respondent entered an appearance under protest to the English petition, contending that the English court had no jurisdiction because the husband was not domiciled in England.

HELD : a husband who is not domiciled in England can maintain a claim for damages only against a co-respondent.

*Kent v. Atkinson* ([1923] P. 142), *applied*.

*Observations of SCRUTTON, J., in Phillips v. Batho* ([1913] 3 K.B. 32) and of BRAY, J., in *Harris v. Taylor* (111 L.T. 568), *not approved*.

[AS TO A HUSBAND'S PETITION FOR DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, p. 668, para. 985 ; and FOR CASES, see DIGEST, Vol. 27, pp. 304-306, Nos. 2814-2828.]

Cases referred to :

- (1) *Rayment v. Rayment and Stuart, Chapman v. Chapman and Buist*, [1910] P. 271 ; 79 L.J.P. 115 ; 103 L.T. 430 ; 27 Digest 392, 3684.
- (2) *Phillips v. Batho*, [1913] 3 K.B. 25 ; 82 L.J.K.B. 882 ; 109 L.T. 315 ; 11 Digest 458, 1149.
- (3) *Harris v. Taylor*, [1915] 2 K.B. 580 ; 84 L.J.K.B. 1839 ; 113 L.T. 221 ; 27 Digest 306, 2827.
- (4) *Kent v. Atkinson*, [1923] P. 142 ; 92 L.J.P. 54 ; 129 L.T. 473 ; 27 Digest 305, 2826.
- (5) *Bernstein v. Bernstein*, [1893] P. 292 ; 63 L.J.P. 3 ; 69 L.T. 513 ; 27 Digest 341, 3213.
- (6) *Cox v. Cox and Warde*, [1906] P. 267 ; 75 L.J.P. 75 ; 95 L.T. 546 ; 27 Digest 304, 2815.
- (7) *Bell v. Bell and Cooke*, (1932), *The Times*, June 10.

## TRIAL OF ISSUE.

The courts of South Africa granted the husband a decree of dissolution of marriage on the ground that his wife had committed adultery in England with the co-respondent. Both husband and wife were domiciled in South Africa. After the petition was filed in South Africa, but before the decree, the husband brought a claim for damages against the co-respondent in the Divorce Division, and, the jurisdiction of the English court being contested, it was ordered that this issue be tried, raising the question, with the co-respondent as the plaintiff and the husband as defendant. The facts are set out in the judgment.

*Marnham* for the co-respondent.

*Loudoun* for the husband.

**PILCHER, J. :** In this case an issue which was directed to be tried was worded as follows :

"Whereas proceedings for the dissolution of the marriage between the defendant and his wife, Fanny Evelyn Jacobs, filed in this cause were instituted in the Supreme Court of South Africa upon the same grounds as are stated in the petition, the said proceedings resulting in a final decree for the dissolution of the said marriage, no sum being prayed for



by way of damages against the plaintiff herein And whereas the plaintiff denies and the defendant affirms that this Honourable Court has jurisdiction now to hear a petition for the award of damages and to grant such relief And whereas by order of the court dated June 13, 1949, it was ordered that an issue as to the jurisdiction of this court be tried herein Therefore let the same be tried accordingly."

A Stated in simpler terms I have to determine whether, in an issue in which the co-respondent in a divorce suit in South Africa has been made the plaintiff and the petitioning husband in that suit has been made defendant, the husband is entitled in this court to claim and recover damages against the co-respondent.

On Mar. 3, 1947, the husband, Israel Jacobs, married his wife, Fanny Evelyn Jacobs, in Capetown. Both husband and wife were domiciled and resident in South Africa. On Mar. 9, 1949, the husband filed a petition against his wife asking for the dissolution of the marriage on the ground of her adultery with the co-respondent whose name is Ceen. In those proceedings the husband made no claim for damages against the co-respondent. At the material time, I understand, the co-respondent was not in South Africa and the adultery which the husband sought to prove in South Africa was adultery between his wife and the co-respondent which took place in this country. On June 9, 1949, the marriage between the husband and the wife was dissolved by the South African court, but, before that took place, on Apr. 9, 1949, the husband had filed a petition here in which the only relief for which he asked was damages against the co-respondent in the South African proceedings. To that suit the co-respondent entered an appearance under protest. In due course the issue which I have read was ordered, and the matter comes before me for the trial of the issue.

It is contended on behalf of the co-respondent that this court has no jurisdiction to entertain a claim for damages *simpliciter* against a co-respondent in this country unless the petitioner is domiciled in this country. On the other hand, the husband says that, while domicile is a necessary pre-requisite for a petitioner in this court who seeks the dissolution of his marriage and residence in this country is a pre-requisite for a petitioner who seeks a judicial separation, where the only claim is one for damages against a co-respondent, that is a claim in tort which is not necessarily ancillary to a claim for any other kind of relief, and, consequently, provided the tort was committed in this country or the party against whom the tort is alleged is in this country, this court has jurisdiction to entertain the claim whether or not the petitioner is domiciled or resident here.

F The most material sections which I have had to consider are s. 33 of the Matrimonial Causes Act, 1857, and s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 33 of the Act of 1857, which was replaced by s. 189 of the Act of 1925, provides :

G "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner . . ."

Pausing there, it is said by counsel for the co-respondent that the words "any husband" with which that section commences mean any husband who is domiciled in the case of a petition for dissolution or is resident in the case of a petition for judicial separation, and, therefore, where a claim is made neither for dissolution nor for judicial separation but only for damages it is necessary to construe the words "any husband" as meaning any husband who is domiciled or resident in this country—domiciled where, as in this case, the suit was for divorce. He also says that the husband here is admittedly not domiciled in this country, and, consequently, these proceedings are misconceived and the court has no jurisdiction to entertain them. Even apart from authority that submission does not appeal to me. The words "any husband" in s. 33 or "a

husband" in the corresponding s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925, seem to me to mean what they say, that is, any husband who can properly bring a suit for dissolution (if he brings that suit), or a suit for judicial separation (if he brings that suit), or a claim for damages if he only claims damages, so that it is impossible to say that the words "any husband" mean any husband domiciled in this country. In my view, the material words must mean, in a suit for dissolution, any husband who is domiciled in this country, in a suit for judicial separation, any husband who is resident in this country, and where the only claim is a claim for damages, any husband who is entitled to maintain an action for damages in this country.

That is the way the words of the section appeal to me, but I have been referred to a number of authorities with which I will deal shortly. The first case in point of time is *Rayment v. Rayment* (1). That was a claim for damages against a co-respondent and the headnote is as follows ([1910] P. 271) :

"Whatever it is that determines the jurisdiction of this court with regard to co-respondents, that jurisdiction does not depend upon the domicile of the co-respondent, nor is it to be determined by the question whether the co-respondent is or is not a British subject. So far as a co-respondent is concerned, the citation corresponds with what would have been, before the Matrimonial Causes Act, 1857, came into operation, the writ in an action for criminal conversation . . . The claim against a co-respondent in a divorce suit is merely a personal claim for money, and is not complicated with questions of international law arising out of status, as in the case of a petitioner and respondent."

I draw attention to a passage in the judgment of SIR SAMUEL EVANS, P., where he says ([1910] P. 286) :

"Any husband may claim damages against 'any person' on the ground of his adultery with his wife, either in a petition for dissolution of the marriage, or in a petition limited to the claim for damages only, the damages in all cases to be ascertained by the verdict of a jury (s. 33) ; and the adulterer if found guilty as co-respondent may, whether damages are claimed or not, be ordered by the court to pay the costs . . . This remedy was given to an injured spouse in place of the remedy by action for criminal conversation, which ceased to exist in England after the Act came into operation. When the claim is made against a co-respondent, or against the adulterer when not made a co-respondent, 'it shall be heard and tried on the same principles, in the same manner, and subject to the same, or the like rules and regulations' as actions for criminal conversation at common law . . . The action of criminal conversation was, of course, an ordinary action for tort, and if it had not been taken away by the Act the courts here would have inherent jurisdiction over the defendant, altogether irrespective of his domicile, nationality, or residence, if he was in England at the time of the service of the writ, wherever the tort may have been committed, assuming it was an unjustifiable act in the country where the tort complained of was committed."

The learned President is there saying that the action for criminal conversation was an ordinary action for tort and that under s. 33 a claim for damages against a co-respondent can be pursued irrespective of the nationality, domicile, or residence of the co-respondent.

The next case is *Phillips v. Batho* (2), decided by SCRUTTON, J., and I only refer to it because in his judgment SCRUTTON, J., made an observation which at first sight appears to indicate that he took the view that a claim for damages against a co-respondent was necessarily allied with and accessory to a claim for dissolution or judicial separation. The facts were that the husband obtained a decree in the Indian courts against his wife and was awarded a sum of £7,200 by way of damages against a co-respondent. The co-respondent was not in

India, and in due course the husband presented his claim in this country for the £7,200, seeking to enforce over here the award of damages made in his favour by the Bengal High Court. The point which I have to determine was not, of course, in issue before SCRUTTON, J., but in his judgment the learned judge said ([1913] 3 K.B. 32) :

- A “Ancillary and accessory to the judgment as to status is the power to give damages against the person causing the marriage to be dissolved. This power is recognised both by the English courts and the Indian courts. The English courts will recognise and enforce the judgments as to status of the Indian courts in matters within their jurisdiction, and I think they will also recognise and enforce the ancillary orders as to damages, such as they themselves make in similar cases.”
- B Reliance is placed by counsel for the co-respondent on the first words of the passage I have quoted, and I think it is fair to say that SCRUTTON, J., does seem to have regarded a claim for damages in a divorce suit as being necessarily ancillary and accessory to a claim for some other form of relief. In the case before me the relief obtained was dissolution, which involved status, but it is clear from the terms of the Matrimonial Causes Act, 1857, s. 33, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 189, that a claim for damages
- C only is not necessarily ancillary to or accessory to any claim for any other form of relief.

- The next case quoted was *Harris v. Taylor* (3) which was a decision of BRAY, J., on some rather complicated facts to which I need not refer. The judgment of SCRUTTON, J., in *Phillips v. Batho* (2) was cited to him and I think that BRAY, J.,
- D seems to have taken much the same view as SCRUTTON, J., did with regard to a claim for damages being accessory or ancillary to a claim for some other form of relief (111 L.T. 568), but in neither case was there anything that SCRUTTON, J., said or that BRAY, J., said necessary for a decision of the case with which they were dealing.

- The last case I need mention is *Kent v. Atkinson* (4). That case (if it were
- E necessary to do so) makes it clear that a petition for damages is independent of, and not necessarily ancillary to, a petition for divorce. The wife died during the course of the suit, and it was held that her death did not prevent the husband from presenting a petition for damages thereafter. HILL, J., in his judgment, pointed out that the Matrimonial Causes Act, 1857, s. 33, abolished the old action of criminal conversation and re-modelled the law applicable to claims for
- F damages for adultery, making them cognisable by the Divorce Court, and he said ([1923] P. 146) :

- “As I understand the decisions the effect is this. You have to read into the section the principles of the common law as to actions for criminal conversation, and then strike out so much of them as are inconsistent with the provisions of the Divorce Acts which are to be regarded as overriding
- G provisions. Thus no claim for damages can be maintained if the adultery has been condoned, for s. 30 overrides the common law principle : *Bernstein v. Bernstein* (5) ; nor can it be maintained if the adultery is one to which a discretionary bar applies, and the discretion is not exercised in favour of the petitioner : *Cox v. Cox and Warde* (6), for s. 31 overrides any inconsistent common law principle. The issue in the present case therefore depends on
- H two questions : (1) according to the principles of the common law could an action for criminal conversation have been maintained by writ issued after the death of the wife ; (2) if it could, are there overriding provisions of the Divorce Acts which say that it cannot be maintained ? As to (1), the action was for a wrong done, and the cause of action arose when the wrong was done. It was a personal action, such as died with the person ; but the persons concerned were the wronged husband and the wrongdoer, the adulterer. The wife was only the means whereby the wrong was done.”



HILL, J., eventually found that the death of the wife did not affect the husband's right to claim damages against the co-respondent.

So, apart from the two cases of *Phillips v. Batho* (2) and *Harris v. Taylor* (3), which contain observations which are *obiter* and not necessary for their decision, there is no authority in favour of the proposition that it is necessary for a husband who is entitled to maintain a claim for damages only against a co-respondent to be better qualified from the point of view of domicile or residence to make that claim than any other plaintiff in this country in an action for tort. Indeed, in *Bell v. Bell and Cooke* (7) LORD MERRIVALE, P., trying a case with a jury, granted to a petitioner with a Scottish domicile an award of damages against a co-respondent. The petitioner had obtained a decree *nisi* on the ground of his wife's adultery in Scotland and he claimed damages against the co-respondent who was an Englishman domiciled in England. The co-respondent in the Scottish suit pleaded that the Scottish court had no jurisdiction to entertain a claim for damages against any person not domiciled in Scotland and the Scottish court dismissed the claim for damages for lack of jurisdiction. The husband then brought his claim in this country. The case is very shortly reported, and the learned President is not reported in the very brief summary of his summing-up to have made any observation tending to show that it was not competent to a petitioner who was admittedly domiciled abroad to bring a claim of this sort against a co-respondent.

Taking the view that I do of the ordinary meaning of the opening words of s. 33 of the Matrimonial Causes Act, 1857, and s. 189 of the Supreme Court of Judicature (Consolidation) Act, I have little doubt that, where a husband is merely making a claim for damages—that claim having to be decided in this court on the same principles and according to the same rules and regulations as a claim for criminal conversation when brought before the appropriate court before 1857—it is wrong to say that the language of s. 33 requires this court to hold that he must prove that he is domiciled in this country (if he has obtained a divorce), or is resident here (if he has obtained a judicial separation). That being so, I decide this issue in favour of the husband.

*Judgment for husband with costs.*

Solicitors : *Moreton Phillips & Son* (for the co-respondent, plaintiff on the issue) ; *Crossman, Block & Co.*, agents for *Schaeffer & Schaeffer*, Capetown (for the husband, defendant on the issue).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

## WATSON v. LOWE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Hilbery, J.J.).  
December 19, 1949.]

*Highway—Interruption of free passage—Cyclist struck by driver opening door of stationary motor car—Highway Act, 1835 (c. 50), s. 78.*

By s. 78 of the Highway Act, 1835 : "... if any person shall ... by negligence ... interrupt the free passage of any person, waggon, cart, or other carriage ... on any highway ..." he shall be guilty of an offence.

The respondent, who was the driver of a motor car, opened the door of the off-side of the car while it was stationary and struck a cyclist who was passing. He was charged under the Highway Act, 1835, s. 78, that "he did unlawfully by negligence interrupt the free passage of a certain carriage ... on a highway." The magistrate, being of the opinion

that he was bound by the decision in *Shears v. Matthews* ([1948] 2 All E.R. 1064), dismissed the information.

HELD : the respondent was guilty of an offence and should have been convicted.

*Shears v. Matthews* ([1948] 2 All E.R. 1064), distinguished.

[FOR THE HIGHWAY ACT, 1835, s. 78, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 84.]

Case referred to :

(1) *Shears v. Matthews*, [1948] 2 All E.R. 1064 ; 113 J.P. 36 ; 2nd Digest Supp.

CASE STATED by the Leeds Stipendiary Magistrate.

The respondent, the driver of a motor car, opened the off-side door of the car while it was stationary on the highway and struck a cyclist who was passing. On July 14, 1949, the respondent was charged before a court of summary jurisdiction sitting at Leeds on an information under the Highway Act, 1835, s. 78, alleging that "he did unlawfully by negligence interrupt the free passage of a certain carriage, to wit, a pedal cycle, on a highway." The stipendiary magistrate dismissed the information. The Divisional Court now allowed the appeal.

*David Karmel* for the appellant.

The respondent was not represented.

LORD GODDARD, C.J. : In this case the learned magistrate has not fully understood the decision which this court gave in *Shears v. Matthews* (1). In that case the driver of a motor car was charged under s. 78 of the Highway Act, 1835, that he by negligence caused hurt to a person passing on the highway. The court, which consisted of HILBERY and BIRKETT, JJ., and myself, decided that where a man was charged with that offence the acts of which he was alleged to be guilty must be acts in connection with the driving of the car. The man in question had stopped, and it was not the driving of the car that was negligent, but the opening of a door which knocked another person off his bicycle. That is what happened here, but in the present case the respondent was charged, not under that part of s. 78 which has to do with negligent driving, but under the part which deals with interrupting by negligence the free passage of any person on any highway. The respondent was negligent, not in driving, but in opening the door as he did. If in *Shears v. Matthews* (1) the defendant had been charged under the part of the section which is now under consideration, the conviction would have been upheld. In my opinion, the magistrate came to a wrong decision in point of law, and, therefore, this appeal will be allowed.

HUMPHREYS, J. : I agree.

HILBERY, J. : I agree.

*Appeal allowed. No order as to costs.*

Solicitors : *Sharpe, Pritchard & Co.*, agents for *O. A. Radley*, town clerk, Leeds (for the appellant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## R. v. PAYNE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Cassels, JJ.),  
December 12, 1949.]

*Trial—Sentence—Several prisoners charged—One prisoner pleading Guilty—Other prisoners tried later—All prisoners to be sentenced together.*

The appellant and two other men were indicted at quarter sessions on a charge of housebreaking. On the arraignment on the first day of the sessions the appellant pleaded Guilty and the other men Not Guilty. Sentence of two years' imprisonment was passed on the appellant at once, the other men being put back for trial, and on the following day, having been found Guilty, they were sentenced to twelve months' and fifteen months' imprisonment respectively.

**HELD :** where several persons are charged jointly in an indictment and one pleads Guilty and the others Not Guilty sentence should not at once be passed on him who pleads Guilty, but should be postponed until after the others have been tried, so that the court, being by that time in possession of the facts relating to all the prisoners, can properly assess the respective degrees of guilt among them.

*Per curiam :* this direction will not apply in the exceptional case where a man who pleads Guilty is to be called as a witness. Such a prisoner should be sentenced at once so that there can be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence by reason of the evidence he gives.

**[EDITORIAL NOTE.** The direction given by the Court of Criminal Appeal in this case will settle a question on which there has been considerable divergence of opinion among practitioners in the criminal courts. The procedure now approved has been followed for some time at the Central Criminal Court and at the County of London Sessions where, owing to the heavy calendars, three judges sit almost continuously throughout the year. In those courts, if, on arraignment on the first day of sessions, a prisoner who is charged jointly with other persons pleads Guilty, he is detained in custody until the other prisoners have been tried, often before another judge, and is then brought up for sentence with them. Although LORD GODDARD, C.J., in giving the judgment of the court made no mention of cases heard in magistrates' courts, it is submitted that the direction applies also in such courts.]

**APPEAL** against sentence. The appellant was sentenced at Essex Quarter Sessions to two years' imprisonment on a charge of housebreaking. His appeal was now allowed and the sentence reduced to one of fifteen months' imprisonment to date from conviction. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

No counsel appeared.

**LORD GODDARD, C.J.,** delivered the following judgment of the court. The appellant pleaded Guilty at Essex Quarter Sessions to a charge of housebreaking. He was indicted with two other men, and the judge before whom this matter came in chambers gave him leave to appeal because, although he was the youngest of the three men, he was sentenced to two years' imprisonment whereas the other two men were sentenced to imprisonment for fifteen and twelve months respectively.

That came about, apparently, through a practice of the Essex Quarter Sessions which, this court does not hesitate to say, ought to be changed. Because the appellant pleaded Guilty, he was dealt with at once in the first court where the chairman, having heard a statement by counsel for the prosecution, passed sentence on him. The other two men were put back and tried on the following day in the second court before another chairman. The clerk of the peace has written to this court and stated :



"It is a custom at the sessions for this county for all pleas to be taken on the first day and for all pleas of Guilty to be dealt with. This procedure enables the work of the courts to be arranged. If a prisoner is represented and the plea is ascertained beforehand and found to be a plea of Not Guilty, the case is put in a list on a day convenient to the court. If a person is not represented, the taking of the plea on the first day has the advantage of enabling the court to arrange its work and if the accused wishes to apply for a dock brief or for a defence certificate there is an adequate number of counsel present from whom to choose. This is not so on any subsequent day."

It may be a very convenient course to sentence on the first day prisoners who plead Guilty, but that ought not to apply where two or more men are indicted together. If one pleads Guilty and the others Not Guilty, the proper course is to postpone sentence on the man who has pleaded Guilty until the others have been tried and then to bring up all the prisoners to be dealt with together because by that time the court will be in possession of the facts relating to all of them and will be able to assess properly the degree of guilt of each. This man received a heavier sentence than the other two because he was tried in a different court on a different day. This is a most inconvenient practice and it ought to cease. I hope that sessions will discontinue such a practice. It can only lead to different sentences being passed, and will, naturally, leave a sense of grievance in the minds of prisoners.

What I have said does not apply in the exceptional case where a man who pleads Guilty is going to be called as a witness. In those circumstances it is right that he be sentenced there and then so that there can be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence. I do not throw doubt on that very proper practice. I am only speaking of the cases in which those circumstances do not arise. In the present case the court reduces the sentence to one of fifteen months' imprisonment to date from conviction.

*Sentence reduced.*

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

## THE TROILUS

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), November 28, 29, 30, December 16, 1949.]

*Shipping—Salvage—Distinction between towage and salvage—Onus of proof—Presumption of danger—Ship losing propeller—Towed to place of temporary safety—Towed to home port via ports at which repairs could be effected and alternative service available.*

On July 2, 1948, the Troilus lost her propeller when she was in the Indian Ocean about 1,050 miles from Aden, and on July 5 she was taken in tow by the Stentor to an anchorage in the quarantine area at Aden where they arrived on July 12. That service was admittedly salvage. On July 17 the Troilus was towed from Aden by another vessel, the Glenogle, to Suëz, where she was taken in tow by tugs through the Suez Canal to Port Said. At Port Said she was again taken in tow by the Glenogle to her home port in the United Kingdom. The master of the Troilus in his evidence said that he could envisage no prospect of the vessel being endangered at Aden unless a storm was experienced, and he considered the possibility of that was remote, as it was usually possible to rely on a steady direction of wind during

the monsoon season. The nautical assessors, in reply to an inquiry by the Court of Appeal whether the Troilus was in danger while at anchor off Aden, said that there was no immediate danger, but in the event of an unusual gale springing up she would certainly have been in greater danger than a ship with all her main power available. No evidence was given of the possibility of a gale at that season. At Suez, the owners of the Troilus had the choice of discharging the cargo and putting the ship in dry dock, and at Port Said they had the choice of repairing the ship or engaging another ship to tow, but they chose to continue the towage by the Glenogle. The owners of the cargo on board the Troilus, who would be liable to a proportion of salvage charges, claimed that the services rendered to the Troilus after her arrival at Aden were not salvage services but towage. A

HELD : (i) it was a question of fact whether the Troilus was in danger when at anchorage at Aden, and, although generally the onus of proving danger was on the person claiming salvage, where a vessel, having lost her propeller, could not be moved under her own power, the onus of proof shifted and danger was presumed unless the person disputing the salvage could show that the state of danger had come to an end. On the facts, it appeared that the Troilus remained in danger while at anchorage at Aden where she had anchored merely as a temporary measure pending the resumption of the salvage service. B

(ii) a call at one or more intermediate ports, where a disabled vessel might lie in temporary safety in the ordinary sense of the words, did not change the character of a salvage service and convert it into towage, and, therefore, the whole of the services rendered in towing the Troilus from Aden to the home port in the United Kingdom were salvage services. C

*The Syria*, (1874), PRITCHARD'S ADMIRALTY DIGEST, 3rd ed., vol. II, p. 1928 ; SHIPPING AND MERCANTILE GAZETTE, July 7, 1874, *applied*. D

*Dicta* of WILLMER, J., in *The Glaucus* (1948) (81 Ll.L. Rep. 266), *disapproved*.

[AS TO CONDITIONS OF A SALVAGE SERVICE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 886-888, paras. 1185-1190 ; and FOR CASES, see DIGEST, Vol. 41, pp. 827-829, 833-838, Nos. 6859-6887, 6937-6994.] E

Cases referred to :

- (1) *The Minnehaha*, (1861), 1 Lush. 335 ; *sub nom.*, *Ward v. M'Corkill*, *The Minnehaha*, 15 Moo. P.C.C. 133 ; 4 L.T. 810 ; *sub nom.*, *The Storm King and The United Kingdom (Owners) v. The Minnehaha (Owners)*, 30 L.J.P.M. & A. 211 ; 41 Digest 676, 5056. F
- (2) *The Glaucus*, (1948), 81 Ll.L. Rep. 262.
- (3) *The Reward*, (1841), 1 Wm. Rob. 174 ; 8 L.T. 704 ; 41 Digest 833, 6937.
- (4) *The Princess Alice*, (1849), 3 Wm. Rob. 138 ; 6 Notes of Cases, 584 ; 41 Digest 836, 6972.
- (5) *The Batavier*, (1853), 1 Ecc. & Ad. 169 ; 41 Digest 828, 6871. G
- (6) *The Kingalock*, (1854), 1 Ecc. & Ad. 263 ; 41 Digest 838, 6993.
- (7) *The Charlotte*, (1848), 3 Wm. Rob. 68 ; 6 Notes of Cases 279 ; 11 L.T.O.S. 473 ; 41 Digest 862, 7310.
- (8) *The Strathnaver*, (1875), 1 App. Cas. 58 ; 34 L.T. 143 ; 41 Digest 828, 6875.
- (9) *The Wilhelmine*, (1842), 1 Notes of Cases, 376 ; 7 L.T. 441 ; 41 Digest 827, 6859. H
- (10) *The Syria*, (1874), see PRITCHARD'S ADMIRALTY DIGEST, 3rd ed., vol. II, p. 1928 ; and SHIPPING AND MERCANTILE GAZETTE, July 7, 1874.
- (11) *The Idomeneus*, (1925), 22 Ll.L. Rep. 299.
- (12) *The Laomedon*, (1925), 23 Ll.L. Rep. 230.
- (13) *The Industry*, (1835), 3 Hag. Adm. 203 ; 41 Digest p. 1928 ; and SHIPPING AND MERCANTILE GAZETTE, July 7, 1874, 840, 7021.

(14) *Anderson v. Ocean S.S. Co.*, (1884), 10 App. Cas. 107 ; 54 L.J.Q.B. 192 ; 52 L.T. 441 ; 41 Digest 601, 4281.

APPEAL by the owners of cargo lately laden on board the S.S. Troilus against an award of £22,000 by LORD MERRIMAN, P., made on May 12, 1949, in an action brought by the owners, master and crew of the motorship Glenogle for salvage services rendered by them to the Troilus, her cargo and freight. There was no appeal by the owners of the Troilus from the award. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

*Nelson, K.C.*, and *Vere Hunt* for the cargo owners.

*Naisby, K.C.*, and *J. B. Hewson* for the owners, master and crew of the Glenogle.

*Curr. adv. vult.*

Dec. 16. The following judgments were read.

BUCKNILL, L.J. : This is an appeal by the owners of cargo lately laden on board the steamship Troilus against an award of £22,000 by LORD MERRIMAN, P., in an action brought by the owners, master and crew of the motorship Glenogle for salvage services rendered by them to the steamship Troilus, her cargo and freight. The award is in respect of services to the ship, cargo and freight, and the owners of the cargo on board the Troilus are normally liable to pay such part of the total award as is proportionate to the values of the salvaged property. These values were agreed at—Ship £193,350 ; cargo £888,000; and freight at risk £15,410. There is no appeal by the owners of the Troilus from the award of the President.

The material facts were not in dispute. On July 2, 1948, the Troilus when in the Indian Ocean and about 1,050 miles from Aden, bound from Australia to Liverpool with a general cargo, lost her propeller by fracture of the tail shaft at the end of the stern tube. On July 5, the motorship Stentor took the Troilus in tow, and towed her to Aden, and the Troilus dropped anchor in the quarantine anchorage there on the evening of July 12. The position of the Troilus when at anchor was about twelve cables north eastward of the Pinnacle Rock in about five fathoms of water. Messrs. Alfred Holt & Co., Ltd., are the managers of the Troilus and of the Stentor, which are both owned by the Ocean Steamship Co., Ltd. They are also managers of the motor vessel Glenogle owned by the Glen Line Co., Ltd. On July 9, Alfred Holt & Co. by wireless had asked the master of the Glenogle whether he could tow the Troilus from Aden to Liverpool, and the master of the Glenogle replied "Yes." The Glenogle is a twin screw motor ship of 9,513 tons gross register, and was bound from Australia to the United Kingdom with a general cargo. On July 13, the master of the Troilus told the master of the Stentor (who was then ready to resume towage to Suez) that he would not be ready for two days, and on July 14 the owners of the Stentor instructed her master to proceed on his voyage if the master of the Troilus was satisfied to lie at anchor off Aden. On the same day Alfred Holt & Co. sent instructions to the Glenogle to tow the Troilus to the United Kingdom. The Stentor then proceeded on her voyage. The Stentor had a single screw, while the twin screws of the Glenogle presumably made her more efficient for towing purposes. The Stentor also had to call at various ports in the Mediterranean en route for England.

In the present action the owners, master and crew of the Stentor claimed salvage for services rendered to the cargo in the Troilus, and her master and crew also claimed salvage for services to the Troilus herself. The President awarded the sum of £18,000 in respect of these claims. There is no appeal from that award.

On July 16, the Glenogle arrived at Aden, and on July 17, made fast to the Troilus which had remained at anchor in the same position, and started to tow her to Suez. The Troilus, which was an American liberty ship, was not carrying



a spare propellor and tail shaft, but there was a spare of each in England. Alfred Holt & Co. considered the question of sending these spares out to the Troilus, and made inquiries for that purpose. On July 16, they received a cable from Port Said to say that the engineering works there could fit the spare propeller to the Troilus by tilting her stern sufficiently to clear the shaft aperture above the water line, and estimated the time, including the handling of cargo, at a month. On July 20, Alfred Holt & Co. inquired whether a dry dock at Malta was available for the Troilus on about Aug. 1, and the reply was that no docks were available before the end of September. On July 21, they cabled Port Said to ask whether a dry dock was available at Alexandria for the Troilus to be docked with cargo on board, and received the reply on July 22—"suitable dry dock not available before Aug. 15 not guaranteed do not recommend." About July 22, Alfred Holt & Co. also inquired whether there was any suitable tug in the locality which could tow the Troilus to the United Kingdom, and ascertained that the tug Empire John, belonging to William Watkins, Ltd., would be available at Taranto on or about July 30, and would be able to tow the Troilus at approximately four knots, and the owners of the tug gave a quotation of £6,000 to tow the Troilus from off Malta to Liverpool. Alfred Holt & Co., however, were unwilling to entrust the ship to one tug for towage across the Bay of Biscay, and decided that the most satisfactory course, in the interests of all concerned in the safety of ship and cargo, was for the Glenogle to tow the Troilus to Falmouth. The Glenogle towed the Troilus to Suez, which was reached on July 25, at an average speed of 6.8 knots. Tugs then towed the Troilus through the Suez Canal, and on July 29, the Glenogle, having proceeded through the canal ahead of the Troilus, made fast to her outside Port Said, and continued with the towage. On Aug. 3, the vessels were near Malta, and on that day tug and tow were proceeding at a speed of  $8\frac{1}{2}$  knots. On Aug. 8, they passed Gibraltar, and on Aug. 15, they reached Falmouth Bay. The Troilus then anchored and was subsequently towed to Liverpool by two tugs. The average speed of the towage from Port Said to Falmouth, a distance of 2,980 miles, was 7.3 knots. The cargo owners admitted that, if the claim of the Glenogle was salvage, the amount of the award was not excessive.

Before this court the main point taken by counsel for the cargo owners was that the ship and her cargo were in safety when at anchor at Aden, and that, if towage of a ship without a propeller starts when the ship is in safety, it is not, in its inception, at any rate, a salvage service, but merely towage. It may be converted into salvage during the service for the reasons indicated in *The Minnehaha* (1), but it starts as towage. If it is merely towage then, in my opinion, (a) the master and crew of the "tug" have no claim against the "tow" or her cargo; (b) the value of the property towed is immaterial when the court fixes a reasonable remuneration for the towage, and (c) the owners of the "tug" have no direct claim against the owners of the cargo for towage remuneration, but must look for payment to the owners of the "tow" with whom the towage contract has been made. The first question, therefore, is this: Was the Troilus when at anchor in Aden in such a position of safety that removal from that position was merely towage and not salvage? The President, on this point, held that she was not then in a safe position and that she was in danger. He said in his judgment:

"I do not think that there is any dispute so far as the thirteen-hundred miles from Aden to Suez is concerned—there certainly has not been any dispute about it in this court—that that also was a salvage service. For one thing counsel for the cargo owners expressly admitted that in substance he could not distinguish this case from that of *The Glaucus* (2) decided by WILLMER, J. As to that I agree, and I gladly follow that case, not merely because I ought to follow it, unless I see some very good reason to the contrary, but because it seems to me that it is right. Nobody can possibly

pretend that for a ship of the size of the Troilus and in the circumstances of this case, taking them quite broadly, Aden was a safe port of refuge. She was not allowed into the inner harbour there, she had to anchor in the quarantine area, and that was manifestly an arrangement which could only last for a short time. She was not really in a safe position there, and if something bad in the way of weather had occurred she might have been in very great danger."

A I have not been able to find in the statement of the master of the Troilus any reference to a request by him or refusal to him to anchor in the inner harbour, but the President may have been referring to some statement by the master of the Stentor which was before him, but was omitted from the record before us.

B In *The Glaucus* (2), the facts were very similar to the present case, except that the Glaucus did not lose her propeller, but at sea suffered serious damage to both her main boilers, and was unable to steam until she had extensive repairs. The Rhesus towed her to Aden, and she was anchored in the quarantine anchorage on Jan. 9. There were no adequate repair facilities at Aden, and on Jan 16, the Antenor took the Glaucus in tow, and towed her to Suez. The question raised in argument was whether the Glaucus, while at anchor off Aden, was in danger.

C On that point WILLMER, J., said (81 Ll.L.Rep. 266) :

"... it is said that, a position of safety having been reached at Aden, any subsequent services could not in any event be regarded as salvage services. I am not going to deal at great length with that point, having reached a very clear conclusion on the matter... In this case at all material times the Glaucus was a damaged ship; she was incapable of any manoeuvres whatever under her own power; and in those circumstances, it seems to me both as a matter of authority and as a matter of common sense, that I must regard her as being still in a position of danger when she had been taken to Aden."

E The learned judge pointed out that, if a fire had started in the ship, the danger would have been much greater to her because she had only steam available from a donkey boiler as compared with a ship that had steam available for her main boilers. He also pointed out that, if the ship, while at anchor, had been set adrift by some casualty, she would have no power to manoeuvre and get back to a position of safety. The judge finally said (*ibid.*) :

F "... quite apart from the physical danger, there is this to be added, that until somebody got her to a place where the necessary repairs could be executed she was completely immobilised. It is no use saying that this valuable property... is safe, if it is safe in circumstances where nobody can use it."

G In the course of his judgment WILLMER, J., said that the case was governed by the principles stated in KENNEDY on the LAW OF CIVIL SALVAGE, 3rd ed., p. 25. It is there stated that the rule in regard to towage of a ship which has received damage is to be gathered from the judgments of DR. LUSHINGTON in *The Reward* (3) and *The Princess Alice* (4).

H It is, I think, material to consider the facts in these cases. The Reward was driven by a violent gale on to a bank. The next morning, the weather having moderated, she was backed off the sand by means of her sails with the loss of her two best anchors and cables, and the starboard end of the windlass and bulkhead carried away. While proceeding for Sheerness to repair the damage she accepted the services of a tug which towed her to the West India Docks. The report of the judgment of DR. LUSHINGTON on the question as to salvage is as follows (1 Wm. Rob. 177) :

"In the course of the argument it has been contended by the counsel for the owners, that the service which has been rendered in this case is a mere

towage service ; and that the sum of £17. which has been tendered, is a sufficient remuneration being at the rate established for towing a vessel from the Nore to London, according to a printed scale of the company to which the Nelson belongs. In my judgment, the service of the salvors is a service of a higher nature. I apprehend that mere towage service is confined to vessels that have received no injury or damage, and that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident."

It must be pointed out, however, that the Reward had lost her means of anchoring in safety, and was in that respect different from a ship securely anchored when the towage starts.

In *The Princess Alice* (4) it is again necessary to remember the facts which led to the judgment. The Princess Alice, while making for the Tees in a heavy sea, struck heavily on the ground where she remained for some 20 minutes. She then came off the sand and was driving before the sea towards another sandbank when the tug succeeded in making fast to her, pulled her head round clear of the sand, and towed her into the channel. On the other hand, the defendants alleged that the weather was moderate and that there was no danger whatever of the ship being driven on to the sandbank. On these disputed facts Dr. LUSHINGTON found no salvage, and in the course of his judgment said (3 Wm. Rob. 139) :

"What is the question which I have to determine ? It is this, whether the steamer, the Conquest, performed more than a towage service, it being acknowledged that a service to this extent, at least, was rendered. In order to solve this question, I now must consider in the outset what are the principles which distinguish a salvage service from a mere service of towage, as they have been laid down and adopted in former decisions of this court. Without attempting any definition which may be universally applied, a towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating of her progress. Many circumstances, it is obvious, may arise in the course of such employment, which may convert the service into the character of a salvage service. As for example : where the ship in tow is disabled in her hull or rigging, or where she is aground, or where the service itself is necessarily attended with danger, or extraordinary labour to the towing vessel. The distinguishing circumstances in each particular case require careful and minute consideration ; and it is due to the commercial interest in general that they should at all times receive that consideration from the court. On the one hand, to protect the shipowners from unjust and unnecessary payments ; on the other hand, to afford due encouragement to the owners of towing vessels to afford that assistance which is so highly beneficial to the general interests of commerce."

I may also refer to *The Batavier* (5), and to *The Kingalock* (6). In those cases the ship was at sea and had suffered some damage which might have affected her safety if she were left without assistance. There is, to my mind, a crucial difference between a ship at sea which is wholly or partly disabled and a ship lying safely at anchor where her disablement no longer is material to her safety.

In his classic work on the LAW OF CIVIL SALVAGE, KENNEDY, L.J., stated that on the important question of the nature of the circumstances that will constitute that condition of danger which is most essential in salvage, the judicial statement which is most often quoted is that of Dr. LUSHINGTON in *The Charlotte* (7) (3 Wm. Rob. 71). In that case the ship came to anchor by an error of her master in an exposed position off the coast of Co. Cork in bad weather, and started to drag her anchors. Accordingly her crew cut away her masts which went overboard with all



her sails and rigging, and her anchors then held. On the following day the salvors towed her into Long Island Channel where she came to anchor, and was in a place of safety. DR. LUSHINGTON, in his judgment, said (3 Wm. Rob. 71) :

- A “Looking to these facts . . . I cannot but think that the service of bringing this vessel to anchor in Long Island Channel was *prima facie* a service of salvage. According to the principles which are recognised in this court in questions of this description, all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute ; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.”
- B This passage received the approval of the Judicial Committee of the Privy Council in *The Strathnaver* (8) (1 App. Cas. 65). Again, it must be pointed out, that in *The Charlotte* (7) the vessel was taken from an anchorage in which she was clearly not safe to an anchorage where she was safe.

- C I do not criticise adversely the conclusion reached by WILLMER, J., in *The Glaucus* (2) on the particular facts of the case, but I dissent from the general proposition, which, as I understood the argument, was presented to us on behalf of the respondents, that there was an established principle or rule that a steamship which has lost her propeller by an accident remains in a position of danger after she has come to anchor, and, therefore, any volunteer who removes her from that anchorage to a place of safety is entitled to remuneration on a salvage basis. I do not think that there is such a principle or rule. It cannot reasonably
- D be suggested, as I think, that a ship which has lost her propeller remains in danger, however securely she is anchored, moored at buoys, or tied up at a quay in a sheltered harbour. When one is considering solely the question of danger to a ship, there seems to be no material difference between a ship whose propeller has been removed by design, and a ship whose propeller has fallen off by accident.

- E The question whether the Troilus was in danger while at anchor, within the proper meaning of that word as applied to salvage, is surely a question of fact. Such danger need not be immediate. In the present case it is admitted that the Troilus was in danger when taken in tow by the Stentor, although the master of the Troilus said in his statement : “We were in no immediate danger when the services commenced and could have continued to drift almost indefinitely without risk.” The question, therefore, is whether, in the particular circumstances, the Troilus was in danger while at anchor off Aden. Counsel for the cargo owners argued that the onus of proving that the ship was in danger “lay strongly and justly” on the salvors, to use the words of DR. LUSHINGTON in *The Wilhelmine* (9) : see also KENNEDY on the LAW OF CIVIL SALVAGE, 3rd ed., p. 20 ; but I think that in a case such as the present where the ship admittedly became in a state of danger when she lost her propeller, the burden is on the cargo
- G owners to show that that state had come to an end before the Glenogle started to tow her.

- H How does the matter stand in that aspect of the case ? Counsel for the cargo owners argued that the very size of the award to the Stentor indicated that she had taken the Troilus to a place of safety, but I do not think that that argument is convincing because we do not know all the facts about the salvage service of the Stentor. Salvage is awarded to salvors who merely bring the salvaged property to a place of comparative safety provided the property is subsequently brought to a place of complete safety. The evidence as to the danger to the Troilus while at anchor is meagre. No evidence was given of the nature of the holding ground, the number or size of anchors and lengths of cables with which the Troilus was equipped, or as to the state of the weather at Aden after her removal from her anchorage, or as to the number and capacity of any tugs in Aden Harbour, which could, if necessary, have removed her into the harbour. The

only evidence bearing on the point is contained in the written statement of the master of the Troilus and in the admitted paragraphs in the statement of claim on behalf of the Stentor. The following appears to be a summary of the evidence on the point from those sources. The Troilus, when towed by the Stentor, used seventy-five fathoms of her port anchor cable which remained shackled to the anchor. The cable was in its turn shackled to the five-inch towing wire of the Troilus, and the towing wire was made fast to one of the anchor cables of the Stentor which had been disconnected from the anchor and carried aft. A

On the morning of July 12, when approaching Aden and after the anchor cable of the Troilus had been hove in so as to reduce the scope of tow rope, the wire rope parted at the Stentor's end, leaving the wire in the water. Those on board the Troilus had considerable difficulty in getting this wire in, and the master in his statement says : B

"When the bight of our towing wire was made fast at our stern there was still a length of approximately three-hundred feet hanging down astern of us, but it was decided to waste no further time in making an attempt to get this in, but to risk towing with the end of the wire still hanging over our stern." C

When the Stentor started towing again her own towing wire was used, shackled to the end of the Troilus port anchor cable. At 7.52 p.m. on July 12, the Troilus dropped her starboard anchor in a place approved by a local pilot, the Stentor slipped her towing wire, which was still fast to the cable of the Troilus, and proceeded into the inner harbour. On July 13, the master of the Troilus was asked whether he would be ready for the resumption of the tow during that day, but reported he would need further time as the crew were feeling the effects of their exertions during the extremely hot and unpleasant conditions which prevailed. The master says : D

"We had arrived in Aden in darkness and before resuming the tow we needed to carry out the operation of heaving on board the end of our original tow wire which was still hanging over our stern, and in addition we needed to heave in the Stentor's towing wire. The towing wire needed to be unshackled from the length of anchor cable we had used for the latter part of the tow. We then needed to unshackle the anchor itself and hoist it on board so that we would have the full length of anchor cable to lead through the hawse pipe available for towing when the tow was resumed, with the towing wire shackled to the end of the cable from which the anchor had been removed. We also needed to ship a spare anchor which had been sent out to Aden for us . . . The message eventually received was to the effect that the Stentor should proceed provided I was content to remain lying at anchor at Aden until the Glenogle arrived to carry on the tow in her place. I did not in fact anticipate any danger in lying at anchor at Aden for such time as was necessary for the Glenogle to arrive and advised my owners of this fact. I could envisage no prospect of the vessel being endangered unless a freak storm was experienced, and I considered the possibility of this was remote as it is usually possible to rely on a steady direction of wind during the monsoon season. The vessel had her auxiliary engines available so that there was no undue hazard involved by way of fire risk. The main engines were also available and the vessel was perfectly seaworthy apart from the fact that there was no propeller to drive." E F G H

It is clear from this summary that the master of the Troilus regarded the service by the Glenogle as a continuation of the service of the Stentor. The Stentor's towing wire was kept by the Troilus and used by the Glenogle, and the same anchor cable of the Troilus was kept unshackled from the port anchor and ready for use by the Glenogle as part of the tow rope.

In the course of the hearing we asked our assessors : " Was the Troilus in danger while at anchor off Aden ? " Their answer was :

" No immediate danger, but in the event of an unusual gale springing up she would certainly be in greater danger than a ship with all her main power available."

A The question as to the possibility of a gale at this season was not discussed before the President, and no evidence was given on the point.

The Glenogle started to take the Troilus in tow on the morning of July 17, so that she was at anchor four clear days off Aden. In these circumstances was the Troilus in danger, within the meaning given to that word in salvage law, when the Glenogle started to take her in tow ? On the whole I think she was, and that the danger which arose when she lost her propeller had not entirely  
B passed. She appears to have come to anchor merely as a temporary measure pending the resumption of the service, and not to have taken the necessary steps to remain at anchor in a permanent and secure anchorage.

The second point taken by counsel for the cargo owners was that, even if the Troilus was in some danger at Aden, she and her cargo were, at any rate, in absolute safety as soon as she reached Suez and was handed over to the canal  
C tugs, and that the salvage services then ended. There are, however, several decided cases to the contrary effect, the earliest one which was brought to our notice being *The Syria* (10). A summary of the case is given in PRITCHARD'S ADMIRALTY DIGEST, vol. II, 3rd ed., p. 1928, and we were able to obtain from the Admiralty registry a copy of the pleadings and a copy of the report in the SHIPPING AND MERCANTILE GAZETTE of the hearing and  
D judgment. It appears from those records that the owners of the S.S. American brought an action for salvage against the owners of the cargo on board the S.S. Syria, and the owners and the master and officers and crew of the American in the same action also brought an action against the Syria, her cargo and freight. The S.S. Syria, whilst bound from Cape Town to Southampton, broke her main shaft, and sustained other damage, whereby she  
E was totally unable to use her machinery. She then set sail, and after sailing 466 miles reached the Island of Ascension. Then she anchored in the roads and subsequently, with the assistance of a tug, made fast to a buoy, and also let go an anchor. The crew then tried to secure her propeller which revolved when the ship was under sail and did damage to the stern, but these efforts were not successful, and it was decided to take towage assistance. Accordingly, the S.S.  
F American which belonged to the same owners as the Syria, and was bound from South Africa to England, went to Ascension, and, at the request of the master of the Syria to tow his ship away from Ascension, made fast and took her in tow. The two vessels arrived at Gorée on Feb. 4, where the American took in bunkers, and left again on Feb. 6 with the Syria in tow. She towed her to St. Vincent, where the two vessels were placed in quarantine, and  
G remained there for five days, the American taking in more bunkers. Then they proceeded to Madeira, where the American took in more bunkers, and they left the following day for Southampton, and duly arrived off Netley where the Syria was anchored in safety. The statement of claim alleged that it was impossible for the Syria to have got away from Ascension without towage assistance, and if she had been allowed to remain there in her helpless condition in all probability  
H she would have been lost together with all her cargo. The defence, on the other hand, alleged that the Syria and her cargo were not in any imminent danger at the time of the arrival of the American at Ascension, and the ship would probably have remained safely at anchor there for a long time without assistance. They also pleaded that when the Syria had been towed to Gorée she and her cargo were placed in safety, as they were again at St. Vincent and Madeira, and that the services of the plaintiffs, after the arrival of the ships at Gorée, were rendered for the purpose of expediting the Syria on her voyage, and to enable the owners



of the Syria (who were also the owners of the American) to get the Syria home and to earn their freight for the carriage of the Syria's cargo, that the cargo might, if necessary, have been landed or transhipped at Gorée, St. Vincent or Madeira, and that the services, after the arrival at Gorée, were in the nature of towage and not salvage services. In the course of his judgment SIR ROBERT PHILLIMORE said (SHIPPING AND MERCANTILE GAZETTE, July 7, 1874) :

"First of all, the question is whether salvage remuneration is due for towing this vessel (the Syria) the whole distance from Ascension Island to Southampton, or whether salvage remuneration is only due for towing the vessel from Ascension Island to St. Vincent, inasmuch as it is admitted, and proved, that there had been a safe harbour there for her, and that the salvage was towage . . . I have paid all attention to Mr. *Butt's* argument with respect to the first point, that the salvage service ceased at St. Vincent, but I am unable to assent to it. I put out of consideration the fact that both the vessels belonged to the same owners. The principle of law is independent of that fact. This service was simply salvage service, and it was intended to extend to towing this vessel to her port of destination; and the fact that she touched at a port where she might have remained in safety does not seem to alter the original contract, and make the service cease there or begin there. What the question might have been in a case where the master of the towed vessel expressed himself satisfied, and did not wish to be towed further, and made no arrangement by implication or parol, is another consideration altogether. I must consider it as a salvage service extending over the whole six weeks, . . . The defendants have been liberal in their admission that the Syria was not in imminent danger, and that there would have been danger in remaining. I am inclined to think that there was no great peril to her where she was. But I must take it that, though she was in no immediate danger, her continuing to remain there would have placed her in some amount of jeopardy."

The principle applied in *The Syria* (10) was adopted by BATESON, J., in *The Idomeneus* (11). In that case the Idomeneus broke her propeller shaft about ninety miles off Port Sudan. In response to a wireless message, the Perseus went to the Idomeneus and towed her to Port Sudan. There the Perseus picked up cargo, and subsequently towed the Idomeneus to Suez, about 630 miles away. At the trial, counsel for the defendants argued that the towage into Port Sudan was the only real salvage, and that the ships went to Suez for the convenience of the owners of both ships. BATESON, J., in the course of his judgment, said (22 Ll.L.Rep. 300) :

"It is quite true that the principal salvage was getting the Idomeneus into Port Sudan to start with, but for the long tow the Perseus has to be paid as a steamer rendering a service, and it is really an ocean tow, and, therefore, must be properly remunerated as salvage."

In *The Laomedon* (12), HILL, J., decided the same kind of point in the same way as was pointed out by the President in his judgment in the present case.

It seems to me that it would be very inconvenient and prejudicial to the salvage of property at sea and to "the general interests of navigation and commerce" (words used by SIR JOHN NICHOLL in *The Industry* (13) ), if a salvage service was held to come to an end as soon as the salvaged ship in the course of the service was taken into a position of temporary safety. For instance, a tug picks up a disabled ship in Eastern Mediterranean, and is engaged to tow the ship to Marseilles on a "no cure, no pay" basis. Then in the course of the service bad weather sets in and the tug takes the tow into Malta for shelter, and they stay there for a few days. Whilst in Malta the ship is safe from any marine peril, and I presume that her master might change his mind and tell the tug he did not require her services any more. But if he did not do so, and the tug towed him

to Marseilles, I cannot think that the owners of the tow could then say that the salvage service ended at Malta and the rest of the service was mere towage, even though the towage from Malta to Marseilles did not involve tug or tow in any special risks.

A Counsel for the cargo owners also took the point that the salvage of the ship and cargo could have been carried out much more cheaply and just as effectively by discharging the cargo at Suez and putting the ship into dry dock there, or by tipping the ship at Port Said, or by engaging the Empire John, or by dry docking at Alexandria. Our assessors advise us that, in their opinion, it would be imprudent to dry dock this ship without discharging the bulk of the cargo. They also think it would be imprudent, and probably impossible, to tip the ship enough to fit the propeller. In my opinion, these possible alternatives do not affect the question whether the service was a salvage service or a towage service, B once it is established that the service saved the property from danger. The fact that there are alternative and cheaper ways of saving the property may reduce the amount of the award, because such alternative ways may affect the degree of danger. A ship which loses her propeller is obviously in less danger if there are many ships at hand ready and able to save her than she would be if there was no other help available than the ship which saves her. I have no doubt that C the President took these alternative methods into consideration in making his award.

Another point was made by junior counsel for the cargo owners which was not taken before the President and which, I think, strictly speaking, was not open to the cargo owners before us. The point was that the cargo of the Troilus D could have been discharged at Suez or Port Said, and would then be removed from the danger which attached to it whilst in the holds of a helpless ship. But there was no evidence before the court as to the storage facilities of cargo at Suez or Port Said, or the possibility of engaging another ship to bring the cargo on to its destination, or the cost of discharge and re-loading. The damage done to the cargo during these operations might be very considerable, and one E must bear in mind that its total value was £888,000. No one suggested such a course at the time. Another point put forward by counsel for the cargo owners was that it was unreasonable for the agents of the owners of the Troilus to engage the Glenogle to tow the Troilus and her cargo to Falmouth without stipulating that the towage should be at a fixed rate on a towage basis. I cannot see that there is any substance in this point. The arrangement did not stipulate for F any terms, salvage or towage. That was left at large to be decided afterwards. If the owners of the ship had made any arrangement which was binding on the owners of the cargo and which was unreasonable, I think that the owners of the cargo would have their remedy at law against the owners of the ship, but I do not think that the arrangement which was made in this case was unreasonable. For these reasons I think that this appeal should be dismissed.

G **SOMERVELL, L.J. :** I have had the advantage of reading the judgment of BUCKNILL, L.J., and there are very few observations which I wish to make. When a ship becomes disabled at sea, the service which her owners require is that she may be taken to her destination, or to a port where she can be repaired and made seaworthy. I am assuming that her owners wish her to be so repaired. One can, I suppose, imagine a case where the only thing to be done was to get H her to some place where she could be broken up, and her cargo, if any, discharged. There may, of course, be arguments, at any rate between ship and cargo, as to whether there was a port of repair nearer to the scene of the accident to which she ought to have been taken, so diminishing the cost of the salvage. I will assume, however, that there is no dispute that a ship damaged on the high seas at point A has to be got to port Z, which may or may not be her destination, in order to be repaired. I will assume that one vessel performs the entire task of towing her there. On these facts it seems to me in principle and on the authority

of *The Syria* (10), to which BUCKNILL, L.J., has referred, that a call at one or more intermediate ports, where the disabled vessel may lie in complete safety in the ordinary sense of the words for one or more nights, would not change the character of the service and convert it from salvage to towage. The disabled ship, though temporarily safe, is still in distress, because she cannot unaided get to her port of repair. This, I think, is the principle adopted by WILLMER, J., in his final conclusion in *The Glaucus* (2), which has already been quoted. To adopt the other view would, as it seems to me, be very disadvantageous in the interests of all concerned. A salvor might find his position prejudiced if he took the disabled vessel into a port *en route* in order to give her crew much needed rest, or to pick up stores, or because of bad weather, or because the salving vessel had to discharge or pick up cargo there. If, then, the Stentor had taken on the Troilus from Aden, I should have regarded the question whether she was in danger in the place in which she was anchored at Aden as irrelevant.

Does it become relevant because the Stentor left her and the Glenogle picked her up? It is not necessary to decide that point in this case, because I agree with BUCKNILL, L.J., for the reasons he has given, that she was in danger as she was anchored at Aden. I will, however, state the arguments which appealed to me for the proposition that the appeal would have failed even if at Aden she had, in fact, been anchored in some place where she could have, as far as could be foreseen, remained indefinitely safe as a hulk. It is not suggested that she could have been repaired at Aden. I am dealing with a case, such as the present, where the original damage is done on the high seas, so that it is clear that the original transit to the place of safety was salvage. A salvage service can be performed by two successive salvors. If the second stage, in this case from Aden to Suez, is done by a second towing vessel, does the question whether that is salvage depend on whether she was "safe" or in some danger at the intermediate place where the second vessel took over? It is suggested that so to hold would disregard two important points, which I will formulate as follows: first, a disabled vessel at a temporary resting place *en route*, where she cannot be repaired, is still valueless where she is although there may be a safe anchorage for her, as there was for the *Syria* at St. Vincent; secondly, although she is temporarily in safety, the distress caused by the original accident continues in the sense that she cannot without assistance traverse the high seas to her destination or some port of repair. One has also to bear in mind *The Reward* (3) and *The Batavier* (5) and the statement of the law on "towage" in *The Princess Alice* (4), which have already been referred to. I was myself impressed by the argument and feel that it may be illogical to hold that the salvage service continues, notwithstanding a temporary resting place of safety, if the service is done by one vessel, but that a second vessel which completes the service cannot claim to be a salvor because she took over in a place of safety. I have nothing I wish to add to what BUCKNILL, L.J., has said on the other points in the case.

**DENNING, L.J.:** The obligation on ship and cargo to pay for salvage services is imposed by law irrespective of any contract, express or implied, to that effect, whereas the obligation to pay for towage services arises, if at all, from a contract, express or implied, to pay for them. This difference points the way to the true distinction between the nature of the services. Salvage services arise when the ship is in such danger that the master has no real choice in the matter, but must, as a reasonable man, accept them from somebody or lose his ship, or leave it in some remote place, whereas towage services arise when the ship has reached such a position of safety that the shipowner has a freedom of choice either to refuse the services or to have repairs done locally or to contract for towage to get his ship home. To encourage the rescue of ships which are in danger, the law, without the necessity of any contract, provides for handsome remuneration for the salvors if they succeed, but nothing if they do not, and this remuneration is based, not only on the time, labour and risk involved, but



also on the value of that which is saved, and it is charged on it. Remuneration on such a scale cannot, however, be justified when the shipowner has, as a practical matter, a freedom of choice either to accept the proffered services or to adopt some other alternative, for then he would normally in his own interest—and should in the interest of the cargo owners—throw the other alternatives into the scale so as to reduce the remuneration to a figure which represents the time, labour and risk involved to those who render the services. If the shipowner, A having a choice before him, contracts to pay for the services on a salvage basis, that is his affair—it may be so important for him to fulfil his future engagements that he contracts on that basis—but he cannot by so doing make the cargo owner liable for salvage unless the services are really salvage services: *Anderson v. Ocean Steamship Company* (14) (10 App. Cas. 117).

B The correctness of these views can be seen by taking an illustration. Suppose that a disabled ship has been towed into Suez where she is in safety and whence she can be towed by canal tugs to Port Said and that there is available at Port Said an ocean tug ready to tow her at towage rates from Port Said to Falmouth, but that the owner chooses instead to employ another of his own ships to tow her on a salvage basis. Are the cargo owners liable for salvage? The answer, I C should have thought, is plainly that the cargo owners are not liable for salvage, but only for a general average contribution to what towage by the tug would have cost. Suppose now that the ocean tug is not immediately available at Port Said but will be available in about five to seven days time, is the position any different? If the shipowner had no other ships of his own in the vicinity, he D would no doubt have waited for the tug, and the cargo owner would only be liable for a general average contribution. Can the liability of the cargo owner be increased into a liability for salvage because the shipowner happens to have another of his own ships there? The answer I should have thought was that the cargo owners are only liable for salvage when the ship is in danger, and it is not open to a shipowner, when the ship is in safety, to add a further liability to the cargo owner by towing with another of his own ships.

E Applying these principles, I think there is much to be said for the view that the services rendered by the Glenogle were towage services, and not salvage. It seems to me that at Aden, or, at any rate, at Suez or Port Said, the ship was safe and the owners had a freedom of choice, and, if the Glenogle had been under different management, the owners would not have accepted her services at an unknown price on a salvage basis, but would have insisted on a competitive F price at towage rates, especially when they had a competitive offer from the tug Empire John. The cargo owners should not be prejudiced simply because the Glenogle was under the same management as the Troilus, and, accordingly, no one troubled to ask for a quotation beforehand. It all depends, however, on what view one takes of the facts, and I would not venture to differ from the views which my brethren have found on them. The appeal must, therefore, be G dismissed.

*Appeal dismissed with costs.*

Solicitors: *Thomas Cooper & Co.*, agents for *Batesons & Co.*, Liverpool (for the cargo owners); *Bentleys, Stokes & Lowless*, agents for *Alsop, Stevens & Co.*, Liverpool (for the owners, master and crew of the Glenogle).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

*Affirmed.* H.L. [1951] 2 All E.R. 40.

## LEWIS v. THOMAS AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.J.J.), December 16, 20, 1949.]

*Easement—Right of way—Interruption—Interruption in fact—Relevance of intention of interrupter—Rights of Way Act, 1932 (c. 45), s. 1 (1) (2).*

By s. 1 of the Rights of Way Act, 1932 : “(1) Where a way . . . upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway . . . (2) Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.”

In and after 1945 the plaintiff was the owner of property through the grounds of which passed a way leading from one part of a main road to another. There was evidence of continuous user of the way as of right for forty years, but on certain occasions before 1941 the tenant of two adjoining fields, through which the way also passed, with the knowledge of the agent of the then owner of the plaintiff's property had at night locked a gate across the way between the fields to prevent cattle straying into the corn. In an action against the defendants for trespass by using the way,

HELD : “interruption” within the meaning of s. 1 (1) and (2) meant interruption in fact, and the question of the intention of the interrupter was primarily relevant only if the owner, against whom the right of way was asserted, sought to prove no intention to dedicate. On the facts, the locking of the gate did not constitute an interruption of the right of way, and, therefore, the defendant was not guilty of trespass.

[FOR THE RIGHTS OF WAY ACT, 1932, s. 1 (1) (2), see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 217, 218.]

Cases referred to :

- (1) *Hue v. Whiteley*, [1929] 1 Ch. 440 ; 98 L.J.Ch. 227 ; 140 L.T. 531 ; Digest Supp.
- (2) *Merstham Manor, Ltd. v. Coulsdon and Purley Urban District Council*, [1936] 2 All E.R. 422 ; [1937] 2 K.B. 77 ; 106 L.J.K.B. 603 ; 100 J.P. 381 ; Digest Supp.
- (3) *Jones v. Bates*, [1938] 2 All E.R. 237 ; 158 L.T. 507 ; 102 J.P. 291 ; Digest Supp.
- (4) *Moser v. Ambleside Urban District Council*, (1924), 89 J.P. Jo. 59 ; *affmd.*, (1925), 89 J.P. 118 ; 26 Digest 294, 256.
- (5) *Poole v. Huskinson*, (1843), 11 M. & W. 827 ; 26 Digest 286, 194.

APPEAL by the plaintiff from an order of His Honour JUDGE TREVOR MORGAN, K.C., made at Cardigan County Court on July 21, 1949.

The plaintiff alleged trespass by the defendants in the user by them of a way over her property for the passage of agricultural vehicles and cattle. The county court judge held that a public right of way, which admittedly existed in respect of pedestrians, extended also to agricultural vehicles and cattle, and found for the defendants. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

*E. V. Falk* for the plaintiff.

*D. E. P. Evans* for the defendants.

*Cur. adv. vult.*

Dec. 20. SIR RAYMOND EVERSLED, M.R. : This appeal raises a question under s. 1 of the Rights of Way Act, 1932. The plaintiff, who is the owner-occupier of certain property known as the Old Rectory near Brynheullan,

sued three persons for trespass, alleging the user by them of a way over her property and certain other acts which they did in purported exercise of that right of way. The way, before reaching the rectory, goes along the south of two fields (numbered 142 and 148 on the plan which has been put in), which are the property of the first defendant, Thomas. Proceeding westwards after leaving the rectory property, the way passes near a place called Pen-y-feidr and then turns north, eventually re-joining the main road which it left further to the east. The answer of the defendants to the claim of trespass was that they were exercising a public right of way for agricultural vehicles and cattle. So far as foot passengers are concerned, it is conceded by the plaintiff that there is a public right of way over the way I have described, but the issue is whether that right extends to its use for agricultural vehicles and cattle. The sole question is whether the finding of the learned county court judge that there was such a right can stand, that is to say, whether facts have been proved sufficient to establish user within the meaning of s. 1 of the Act of 1932 "as of right and without interruption."

So far as the first of those two phrases is concerned—"as of right"—there is no question that the persons who gave evidence of user stated that they used the way—I borrow the well-known formula of TOMLIN, J. ([1929] 1 Ch. 445), in *Hue v. Whiteley* (1)—"believing themselves to be exercising a public right to pass from one highway to another." The real question, therefore, is whether there has been user "without interruption" for the requisite period, which may be forty years or twenty years, according to whether the case is founded on sub-s. (2) or sub-s. (1). For the present purposes, it does not matter which sub-section applies. Either there has been interruption sufficient to defeat the user under either sub-section, or there has been no interruption at all.

*Prima facie* a question of that kind is one of fact for the judge who saw the witnesses who came before him and gave evidence, and the plaintiff would be out of court were it not for one sentence in the judgment of the county court judge around which the whole argument has ranged. The learned judge states :

"I was satisfied from the evidence of the witnesses, especially that given by the defendants' witnesses, that there had been continuous use of the roadway in question for over forty years without any attempt to question the right to use it . . . I came to the conclusion that on the few occasions when the witness Reynolds locked the gate across the road he did so only when his corn was stacked near the gate of the field near the roadway in question and when he had found that people had left his gate open and consequently cattle wandered into the cornfield. It was on these occasions and for this purpose only that he locked the gate across the road and not because he was endeavouring to show to the public at large that there was no right of way through the roadway in question."

It is on that part of the judge's finding and judgment that counsel for the plaintiff founds his argument. He says that the judge misdirected himself by holding, in effect, that interruption in fact does not matter if there was no intention by the interrupter to challenge the right. Counsel says, first, that that direction is wrong in law and is inconsistent with the view of HILBERY, J., in *Merstham Manor, Ltd. v. Coulsdon and Purley Urban District Council* (2), approved by this court in *Jones v. Bates* (3), and with the judgment of SCOTT, L.J., in the latter case.

The property was originally glebe land, and when the disestablishment of the Welsh Church occurred as a result of the Welsh Church Act, 1914, all the property in question, both the rectory and the fields, became vested in the Commissioners of Church Temporalities in Wales. Later, the property was vested by the Commissioners of Church Temporalities in the Representative Body for the Church of Wales. So long as they held it and the rector was living in the rectory, it is



conceded that his position was that of agent for the freehold owner. In 1942 the Representative Body sold fields 142 and 148 to the Pembrokeshire County Council and in 1947 the council sold them to the first defendant, Thomas. When they sold fields 142 and 148, the Representative Body retained the rectory, which was not sold to the plaintiff until 1945. Reynolds was a tenant of the two fields for a period which ended in 1941, a year before the sale to the Pembrokeshire County Council. During that period on occasion at night Reynolds—it is said with the knowledge of the rector—locked a gate which was across the way on his own property between the two fields, 142 and 148. It is that alleged interruption which forms the main burden of the argument before us.

If the statement of the learned county court judge means what the plaintiff says it means, I think it may well be doubted whether it could be regarded as correct. *Prima facie*, to my mind, “interruption” in s. 1 means interruption in fact. In *Jones v. Bates* (3) SCOTT, L.J., said ([1938] 2 All E.R. 246) :

“The next requirement of the statute, ‘without interruption,’ means that the *enjoyment* of the right must not have been interrupted. If for the statutory period members of the public have used the way as of right, and their exercise of that right has in fact not been interrupted, then the statutory consequence follows.”

I take that as showing that, in the mind of the lord justice, “interruption” means “interruption in fact.” On the other hand, the presence or absence of a challenge may well be a relevant circumstance in determining whether truthfully there has been interruption in fact. The illustration was given during the course of the argument of a road which was interrupted and entirely blocked by some broken-down vehicle so that nobody could pass along it. It is obvious in such a case that no court would hold there was such an interruption as was intended by the section, and, in coming to that conclusion, the circumstances in which the barring of the way took place and the complete absence of any intention to stop anybody going along it would be a relevant circumstance. In my judgment, the county court judge did no more than refer to Reynolds’ state of mind as one of the relevant circumstances in the case, like the occasions and the times when the gate was locked, in arriving at his decision whether there had in fact been interruption. I agree that a barring, and particularly a deliberate barring, of a way for an appreciable period would not necessarily lose its effect merely because no one happened to try to use the way during that period, but here the only user in controversy is user by farm vehicles and cattle (the user by foot passengers being conceded) and such user is very improbable at night. The evidence seems to be that Reynolds only locked the gate at certain periods of the year when his corn was stacked and always saw to it that it was unlocked in the morning.

In all the circumstances, including the considerable evidence of user which the judge heard, I think it was open to him to find, as he did, “no interruption,” and that the locking was done at such times only as would not be likely to, and did not, in fact, interrupt (as it was not intended to interrupt) the user for farm vehicles and cattle. I would, therefore, dismiss the appeal.

COHEN, L.J. : I am of the same opinion. To succeed in the defence that there is a public highway the defendants have to establish (i) enjoyment as of right for the prescribed period, and (ii) no interruption. So far as the first point is concerned the judge found in their favour. There was ample evidence on which he could so find, and I do not think his finding as to enjoyment as of right was challenged by counsel for the plaintiff. The dispute is whether such enjoyment was or was not interrupted. On this point counsel relied on the evidence of Reynolds which has been summarised by the Master of the Rolls. There was no other evidence of interruption. Counsel for the plaintiff contends that the evidence of Reynolds, who was not the owner of the land subject to the alleged right of way, cannot be relevant.

In *Moser v. Ambleside Urban District Council* (4), MACKINNON, J., had to consider the question of intention under the law as it was before the Act of 1932. The question then was whether the evidence justified an inference of dedication. MACKINNON, J., said (89 J.P. Jo. 61):

A “The other principle that I think is as well to bear in mind is this : It was said, very truly, in the passage of PARKE, B., in *Poole v. Huskinson* (5) that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner—I mean by the owner himself—and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge. The fact that the owner, as is so constantly done, locks the gates once a year, and that sort of thing, is, or may be, a periodical intimation by the owner that he is not intending to dedicate a highway, but it must be an effective act of interruption ; it must be by the owner himself, because if you have evidence of an attempted interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or, again, if it is an attempted interruption by a tenant without the assent or authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication . . .”

The decision in that case was affirmed by the Court of Appeal. There is no further reference to the matter of intention in the judgment of this court.

E It is plain that where the question is whether or not there was evidence of dedication, (i) the intention must be relevant, and (ii) the relevant intention must be that of the person presumed to dedicate. Counsel for the plaintiff says that the Act of 1932 has made the fact of interruption, if proved, conclusive unless “there is sufficient evidence that there was no intention during that period to dedicate such way.” To some extent I agree with counsel. It seems to me that the reference to interruption in the sub-s. (1) is to the fact of an interruption and that the question of intention is primarily relevant if, and only if, the owner, against whom the right of way is asserted, seeks to prove no intention to dedicate. I think intention may be involved in the question whether a particular act is or is not interruption. Thus, padlocking a gate is *prima facie* an act of interruption, but I doubt if it could be held to be so if the interruptor fixed on the gate a notice that the key would be found hanging on the gatepost. The question is whether, having regard to the circumstances, the locking of the gate by Reynolds to the extent indicated by his evidence constitutes interruption. The fact that the gate was locked is clearly proved, and it is not proved that any one person while it was locked would find on the gate any information as to where the key could be obtained. On the other hand, although H the rector must be taken to have approved of the affixing of the lock of which he had a key, Reynolds states that the driver of a coal lorry would get a key, presumably from the rectory, and that the gate was normally unlocked. Moreover, there was no evidence of any actual case in which any person seeking to use the way had been interfered with by the erection and locking of the gate. The alleged right of way was in a place where user was only likely by farmers and the like in the vicinity who would know where the key would be. I agree with the Master of the Rolls in reading the evidence as meaning that the gate was

only locked at night. In those circumstances I am not prepared to differ from the view of the learned county court judge that in the circumstances of this case there was no actual interruption of the right of way, and, that being so, it seems to me to follow that the appeal fails.

ASQUITH, L.J. : I agree.

*Appeal dismissed with costs.*

Solicitors : *Rhys Roberts & Co.*, agents for *Walter L. Williams & Sons*, Fishguard (for the plaintiff) ; *Holt, Beever & Co.*, agents for *W. J. Williams & Davies*, Cardigan (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

### *Re* DAVIES (*deceased*). PUBLIC TRUSTEE *v.* DAVIES AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), December 16, 20, 1949.]

*Will*—*Joint tenancy or tenancy in common*—"Pay the income arising to my children in equal shares and after the death of all my children " to grandchildren then living.

By his will a testator who died on July 24, 1916, gave property to his trustees to hold the same "upon trust after payment off of any existing mortgage or mortgages thereon to pay the income arising therefrom to my said children in equal shares after they shall have received their proportionate shares out of my residuary trust fund as aforesaid and after the death of all my said children " on trust for a class of grandchildren then living. It was accepted that the children and the survivors or survivor of them were entitled to the income of the property either as tenants in common for life with implied cross-remainders to the survivors or survivor for life or as joint tenants for life, but it became necessary to ascertain in what capacity the children became so entitled because, if they were tenants in common, the title to the property ought to be vested in the trustee of the will, while, if they were joint tenants, the children together constituted the tenant for life for the purposes of the Settled Land Act, 1925. under s. 19 (2) of that Act.

HELD : the words "in equal shares" plainly signified a tenancy in common and the limitation ought not to be forcibly construed as giving rise to a joint tenancy, and, therefore, the children were entitled as tenants in common for their lives with a gift over to the survivors or survivor for life.

*Re Tate* ([1914] 2 Ch. 182) and *Re Stanley's Settlement* ([1916] 2 Ch. 50). *applied.*

[AS TO CREATION OF TENANCY IN COMMON, see HALSBURY, Hailsham Edn., Vol. 27, pp. 752-757, paras. 1282-1285 ; and FOR CASES, see DIGEST, Vol. 44, pp. 981-991, Nos. 8360-8489.]

Cases referred to :

- (1) *Tuckerman v. Jefferies*, (1706), 11 Mod. Rep. 108 ; *sub nom.*, *Turkerman v. Jeoffrys*, Holt K.B. 370 ; 44 Digest 974, 8290.
- (2) *Armstrong v. Eldridge*, (1791), 3 Bro. C.C. 215 ; 44 Digest 989, 8458.
- (3) *Pearce v. Edmeades*, (1838), 3 Y. & C. Ex. 246 ; 8 L.J. Ex. Eq. 61 ; 3 Jur. 245 ; 44 Digest 994, 8524.



- (4) *Cranswick v. Pearson, Pearson v. Cranswick*, (1862), 31 Beav. 624 ; 9 L.T. 215 ; 9 Jur.N.S. 397 ; *affd.* (1863), 9 L.T. 275 ; 44 Digest 1214, 10497.
- (5) *Re Hobson*, [1912] 1 Ch. 626 ; 106 L.T. 507 ; 44 Digest 1205, 10426.
- (6) *Re Tate*, [1914] 2 Ch. 182 ; 83 L.J.Ch. 593 ; 109 L.T. 621 ; 44 Digest 1215, 10505.
- A (7) *Re Richerson* (No. 2), [1893] 3 Ch. 146 ; 62 L.J.Ch. 708 ; 69 L.T. 590 ; 44 Digest 983, 8393.
- (8) *Re Stanley's Settlement*, [1916] 2 Ch. 50 ; 85 L.J.Ch. 809 ; 114 L.T. 933 ; 40 Digest 563, 1016.

ADJOURNED SUMMONS to determine, *inter alia*, the nature of the beneficial interests of the testator's children in certain property called in the will the Western Road property. It was accepted that the children were entitled to the income of the said property until the death of the survivor of them either as joint tenants or as tenants in common with remainder to the survivors or survivor, so that the extent of each child's interest would be the same whichever was the true nature of his interest. It became necessary, however, to decide the nature of the children's interests in order to ascertain in whom the Western Road property ought to be vested. Consequent on an order made in the matter in 1922, the property had, until the death of the testator's widow (which occurred on Feb. 12, 1945), been vested in the widow and the children, who together exercised the powers of tenant for life by virtue of the Settled Land Act, 1925, s. 19. DANCKWERTS, J., now declared that the children were entitled as tenants in common for life with remainders to the survivors or survivor for life, and, consequently, the Public Trustee, as trustee of the will, was entitled to have the Western Road property vested in him. The relevant part of the will is set out in the judgment and in the headnote.

*H. A. Rose* for the Public Trustee, the trustee of the will.

*Michael Bowles* for the children of the testator.

E *A. F. M. Berkeley* for nieces of the testator, entitled to the capital on failure of the class of grandchildren.

*Swingland* for the grandchildren, contingently entitled to the capital.

DANCKWERTS, J. : The point which I have to decide is one which in one sense is a future question, but which really needs to be decided now, because on the view which may be taken depends the title to the Western Road property and the precise kind of document which may need to be executed to put the title to it in order.

The testator directed his trustees to hold his Western Road property

“upon trust after payment off of any existing mortgage or mortgages thereon to pay the income arising therefrom to my said children in equal shares after they shall have received their proportionate shares out of my residuary trust fund as aforesaid and after the death of all my said children ”

then on trust for a class of grandchildren then living which would, therefore, remain contingent until the death of the last of his said children. The questions raised are whether, on the death of one of the three children concerned, the survivors will take the whole of the income until the time comes for distribution as they die, and also in what capacity they take that income. It is admitted that, one way or another, on the death of one or more of those children, the survivors or survivor must take the whole of the income, but the question is whether they take as tenants in common, with cross-remainders implied in favour of the survivors or survivor, or whether they are joint tenants so that the survivors take by survivorship.

H On this question there is a certain amount of authority. It is obvious, as is admitted, that the survivors must be intended to take because there is an eventual

gift over on the death of the last survivor of the three children. Therefore, one infers that the survivors, before the last one dies, are intended to take in any case, but the precise method by which they take is, as is not usually the case, material in the present case, because, if they are tenants in common with cross-remainders, there is a trust for sale and the Public Trustee will be entitled to have the legal estate vested in him and will hold the property on trust for sale, and, in the other alternative, if they are joint tenants, they will be joint tenants for life, and, accordingly, under the Settled Land Act, 1925, s. 19, they will be tenants for life for the purpose of the Settled Land Act, 1925, and will be entitled to retain the land as it is at present vested in them and to administer the property and manage it as tenants for life under that Act. A

Counsel for the children contended that they were joint tenants for life, and referred me to four cases, *Turkerman v. Jeoffrys* (1), *Armstrong v. Eldridge* (2), *Pearce v. Edmeades* (3) and *Cranswick v. Pearson* (4). It would be fair to say that in each of those cases it did not matter a great deal by what method the result was reached that the survivors took the whole of the income, for whether the limitation were construed as a tenancy in common with cross-remainders or as a joint tenancy, in each case the result was that the survivors took the whole and nothing went to the heir or personal representatives of the one who had died. Those cases certainly, however, indicate a preference for the view that, notwithstanding the words "in equal shares," or some such words which generally are sufficient to indicate a tenancy in common, the persons in question did take as joint tenants. There are some more modern cases, the first of these being *Re Hobson* (5), in which PARKER, J., states the situation and the different methods which have been applied to it in the following words ([1912] 1 Ch. 631): B C

"In my opinion it is quite clear on the authorities that where there is a gift equally between A., B., and C. during their respective lives and after the death of the survivor of them the whole property is given over, the court has implied an intention on the part of the testator that the survivors or survivor of A., B., and C. shall after the death of one or more of them be entitled to the whole income down to the period of distribution, and that conclusion appears to have been arrived at in one of two ways. In the first place and in the earlier cases the judges have said that a gift in equal shares during their respective lives only *prima facie* creates a tenancy in common, and that, if the court can gather an intention on the face of the will that the tenancy was intended to be not a tenancy in common but a joint tenancy, it will treat the words 'in equal shares' or other similar words as not destructive of what would otherwise be a joint tenancy; and that interpretation is one which would in the ordinary course lead to the desired effect. On the death of A., for instance, B. and C. would continue to be joint tenants of the whole, and on the death of B., C. again would become tenant of the whole. That is one way of meeting the difficulty and of avoiding an intestacy; but in other cases the rule has been rested on different grounds in this way. It has been said that where there is a gift to A., B., and C. equally during their respective lives, and after the death of the survivor over, an intention is manifested that A., B., and C., or such of them as shall be living for the time being, shall enjoy the property down to the period of distribution, and that the best way of effecting that intention is to imply a gift over on the death of any of them of his or her share as well original as accruing to the survivors or survivor; and some of the cases have, I think, been decided on what I may describe as a mixture of those two theories." D E F G H

There are two cases, both before SARGANT, J., in which he deals with the same problem. In *Re Tate* (6) he said ([1914] 2 Ch. 185):

"The real question is whether on the language of the will there is a sufficient indication of an intention on the part of the testator to create

what I may call cross-remainders between the three children, including the issue of any deceased child. If the words had been such as they are, only omitting the substitution of the issue of a deceased child for his or her parent, there is, in my opinion, ample authority to shew that cross-remainders for life would have been implied between the children. I need only refer to *Armstrong v. Eldridge* (2), *Pearce v. Edmeades* (3), and *Re Richerson* (No. 2) (7), where CHITTY, J.'s decision in chambers was afterwards confirmed by him in court."

In a later case, *Re Stanley's Settlement* (8), the words of the will were "for and during the terms of their natural lives as tenants in common and not as joint tenants," and SARGANT, J., said ([1916] 2 Ch. 55) :

"Then is there enough in the deed before me from which to imply a life interest to Mrs. Rees? Mrs. Morgans had four children and died many years ago. Mrs. Rees never had any child and died in 1914. In my opinion it is right to hold that Mrs. Rees took a life interest in her sister's share on that sister's death—not on the ground that there was a joint tenancy, because that is expressly excluded, but following the rule of construction laid down on the other and as I think better view of the principle on which in *Armstrong v. Eldridge* (2), *Pearce v. Edmeades* (3), and *Re Richerson* (7) were decided, namely, that a life interest is to be implied in favour of the survivor of the tenants in common. It is better to say that they are tenants in common for life with a life interest in remainder to the survivor. The words 'the same or any part thereof' may be held to point definitely to the times when two are receiving the income, and, subsequently, when one only is receiving it. It is sufficient to say that there is enough on the will to enable me to hold that each sister took a life estate in remainder in the other sister's share on that sister's death."

In one of the cases on which counsel for the children relied, *Turkerman v. Jeoffrys* (1) HOLT, C.J., said (Holt K.B. 371) :

"As to have it a cross-remainder, it is an awkward sort of a thing."

It may be that a cross-remainder is an awkward sort of thing, but at the same time it seems to me it is even more awkward, when you get the words "in equal shares," which plainly signify a tenancy in common, that you should have forcibly to construe that as a joint tenancy. Therefore, like SARGANT, J., I prefer the method of arriving at the result which is to imply a gift over on the death of any of the defendants in question of his or her share as well original as accruing to the survivors or survivor. I think, therefore, that here there is not a joint tenancy, but a tenancy in common with those implied trusts over.

*Order accordingly. The costs of all parties were ordered to be paid out of a fund which was the subject of a separate question in the summons.*

Solicitors : *Blakeney & Marsden Popple*, agents for *Cyril E. Wheeler*, Brighton (for all parties except the nieces) ; *Beaumont & Son* (for the nieces).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]



LAW *v.* DEARNLEY

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.J.J.), November 25, December 15, 16, 1949.]

*Practice—Striking out pleading—Order of Court of Appeal—Reliance on decision at nisi prius—Gaming debt—Action brought as on an account stated—Gaming Act, 1892 (c. 9), s. 1—R.S.C., Ord. 25, r. 4.*

By the Gaming Act, 1892, s. 1 : "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

As a result of betting transactions into which he had entered as agent for the defendant, the plaintiff made certain payments to a bookmaker. In an action brought by the plaintiff against the defendant to recover the money paid, he based his claim (*inter alia*) on an account stated between the parties, relying on two accounts stated, *i.e.*, one as between the bookmaker and himself and the other as between himself and the defendant. The defendant applied under R.S.C., Ord. 25, r. 4, for the statement of claim to be struck out as disclosing no reasonable cause of action and being frivolous and vexatious.

HELD : if the Court of Appeal were satisfied that an action was not maintainable and that to allow it to proceed would be an abuse of the process of the court, the court was bound to say so even if there were no express decision of the Court of Appeal or of the House of Lords to that effect ; in *Alberg v. Chandler* (1948) (64 T.L.R. 394) STREATFEILD, J., had decided (and in the view of the court rightly decided) that where an agreement to pay bets was void under the Gaming Act, 1845, s. 18, an action could not be maintained on an account stated in respect of those bets ; the plaintiff's claim in the present case, being based on such an account, was not maintainable under s. 1 of the Act of 1892 ; and, therefore, the statement of claim should be struck out and the action be dismissed.

*Alberg v. Chandler*, (1948) (64 T.L.R. 394), *approved*.

[AS TO STRIKING OUT PLEADINGS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 253-256, paras. 419, 420 ; and FOR CASES, see DIGEST, Pleading, pp. 71-82, Nos. 623-687.]

AS TO RECOVERY BY AGENT OF MONEY PAID IN RESPECT OF BETTING TRANSACTIONS, see HALSBURY, Hailsham Edn., Vol. 15, pp. 482, 483, para. 881 ; and FOR CASES, see DIGEST, Vol. 25, p. 411, Nos. 144-149.]

Cases referred to :

- (1) *Lawrance v. Norreys* (Lord), (1890), 15 App. Cas. 210 ; 59 L.J.Ch. 681 ; 62 L.T. 706 ; 54 J.P. 708 ; Digest, Pleading 85, 710.
- (2) *Dyson v. A.-G.*, [1911] 1 K.B. 410 ; 81 L.J.K.B. 217 ; 105 L.T. 753 ; Digest, Pleading 75, 645.
- (3) *Gugenheim v. Ladbrooke & Co., Ltd.*, [1947] 1 All E.R. 292 ; 177 L.T. 74 ; 2nd Digest Supp.
- (4) *Kershaw v. Sievier*, (1904), 21 T.L.R. 40 ; 25 Digest 409, 128.
- (5) *Siqueira v. Noronha*, [1934] A.C. 332 ; 103 L.J.P.C. 63 ; 151 L.T. 6 ; Digest Supp.
- (6) *Cocking v. Ward*, (1845), 1 C.B. 858 ; 15 L.J.C.P. 245 ; 12 Digest 164, 1195.
- (7) *Evans (Joseph) & Co. v. Heathcote*, [1918] 1 K.B. 418 ; 87 L.J.K.B. 593 ; 118 L.T. 556 ; 12 Digest 289, 2375.
- (8) *Re Home & Colonial Insurance Co., Ltd.*, [1930] 1 Ch. 102 ; *sub nom.*, *Re Home & Colonial Insurance Co., May v. Barham*, 99 L.J.Ch. 113 ; 142 L.T. 207 ; Digest Supp.

- (9) *Alberg v. Chandler*, (1948), 64 T.L.R. 394 ; 2nd Digest Supp.
- (10) *William Hill (Park Lane), Ltd. v. Rose*, [1948] 2 All E.R. 1107 ; 2nd Digest Supp.
- (11) *Day v. William Hill (Park Lane), Ltd.*, [1949] 1 All E.R. 219 ; [1949] 1 K.B. 632 ; [1949] L.J.R. 689.
- (12) *Hyams v. Stuart King*, [1908] 2 K.B. 696 ; 77 L.J.K.B. 794 ; 99 L.T. 424 ; 25 Digest 401, 58.
- (13) *Re Laycock v. Pickles*, (1863), 4 B. & S. 497 ; 3 New Rep. 73 ; 33 L.J.Q.B. 43 ; 9 L.T. 378 ; 12 Digest 165, 1207.
- (14) *Morgan v. Ashcroft*, [1937] 3 All E.R. 92 ; [1938] 1 K.B. 49 ; 106 L.J.K.B. 544 ; 157 L.T. 87 ; Digest Supp.
- (15) *Hill v. William Hill (Park Lane), Ltd.*, [1949] 2 All E.R. 452 ; [1949] A.C. 530 ; [1949] L.J.R. 1383.
- (16) *Tatam v. Reeve*, [1893] 1 Q.B. 44 ; 67 L.T. 683 ; 57 J.P. 118 ; *sub nom.*, *Tatham v. Reeve*, 62 L.J.Q.B. 30 ; 25 Digest 411, 146.
- (17) *Camillo Tank S.S. Co., Ltd. v. Alexandria Engineering Works*, (1921), 38 T.L.R. 134 ; Digest Supp.
- (18) *Commercial Air Hire, Ltd. v. Wrightways, Ltd.*, [1938] 1 All E.R. 89 ; Digest Supp.

INTERLOCUTORY APPEAL by the plaintiff from an order of SLADE, J., made in chambers and dated July 27, 1949, confirming an order of the registrar of Boston District Registry, made on June 1, 1949, striking out the statements of claim in two actions brought by the plaintiff and directing that the actions be dismissed.

The actions, which were consolidated by an order of FINNEMORE, J., dated Mar. 4, 1949, were brought by the plaintiff to recover the balances of two accounts alleged to have been paid by him to a bookmaker in regard to betting transactions into which he had entered on behalf of the defendant. In each case the plaintiff based his claim on (*inter alia*) an account stated between the parties. The Court of Appeal now held that, assuming that the plaintiff could succeed in showing that the accounts relied on by him were real accounts stated, nevertheless, as the accounts had their origin in betting transactions, under the Gaming Act, 1892, s. 1, the action could not be maintained, and they dismissed the appeal. The facts appear in the judgment of TUCKER, L.J.

*Van Oss* for the plaintiff.

*Swanwick* for the defendant.

**TUCKER, L.J. :** This is an appeal from an order made by SLADE, J., in chambers, dismissing the plaintiff's appeal from an order which had been made by the registrar of the district registry at Boston in two consolidated actions. The registrar had ordered that the statements of claim be struck out under R.S.C., Ord. 25, r. 4, on the ground that they disclosed no reasonable cause of action and were frivolous and vexatious and had directed that the plaintiff's actions be dismissed, and that order was confirmed by SLADE, J. The two actions were brought as a result of certain betting transactions which had taken place between the plaintiff, Mr. Law, and a bookmaker, Mr. Harden. The plaintiff's case was that the obligations that he had entered into with Mr. Harden had been for and on behalf of the defendant, *i.e.*, that the plaintiff had acted as the defendant's agent in placing the bets with Mr. Harden. As a result of the transactions between the plaintiff and Mr. Harden, by the amended statement of claim in the first action (delivered, as amended, on Jan. 25, 1949), the sum of £482 12s. 6d. was alleged to be due to the plaintiff from the defendant, and by the statement of claim in the second action (also delivered on Jan. 25, 1949) another £483 was alleged to be due to the plaintiff from the defendant.

Originally, in the statements of claim the plaintiff claimed against the defendant in two alternative ways. He said, in para. 1 of each of the statements

of claim, that at the oral request of the defendant he had incurred certain debts to Harden for and on behalf of the defendant and had made certain payments to Harden in discharging the debts, and he gave particulars. In para. 2 he said that the defendant by telephone on or about July 8, 1948, refused to reimburse the said sums, and then, in each para. 3, he said :

“ Further or in the alternative the plaintiff claims the said sum on an account stated between the parties.”

By way of particulars he said :

“ On July 8, 1948, the defendant orally admitted to the plaintiff on the telephone and agreed that the said payment was correct as to amount.”

It has been said throughout these proceedings that the actions can only be maintained, if at all, under the alternative claim on an account stated. In the course of the proceedings the plaintiff was asked for further particulars of the debt and payments as between himself and Mr. Harden. On Mar. 22, 1949, he delivered further particulars, and the relevant particulars are as follows :

“ There was in fact only one debt, namely, the sum claimed in this action.

The nature of the said debt was that it was upon an account stated and agreed between the plaintiff and the said Harden on or about June 28, 1948.”

The plaintiff is, therefore, relying on two accounts stated. He says, first, that there was an account stated as between himself and Mr. Harden, and then he says that, as a result of that, there was a further account stated as between himself and the defendant, and that it is in respect of the second account stated that he is bringing the actions and he is entitled to have the issue whether such claims are maintainable tried in a court of law. SLADE, J., when he dismissed the appeals, stated the point quite shortly :

“ Will the action lie to recover the amount agreed by the defendant on an account stated, when admittedly each item of the account is in respect of a debt rendered null and void by the Gaming Act, 1845, s. 18 ? ”

In presenting the appeal to us counsel for the plaintiff drew our attention, first, to what had been said by LORD HERSCHELL in *Lawrance v. Norreys (Lord)* (1). Speaking of this jurisdiction to dismiss actions *in limine*, LORD HERSCHELL said (15 App. Cas. 219) :

“ It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases.”

In *Dyson v. Attorney-General* (2), FLETCHER MOULTON, L.J., said ([1911] 1 K.B. 418) :

“ Now it is unquestionable that, both under the inherent power of the court and also under a specific rule to that effect made under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers. Nothing more clearly indicates



this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this . . . To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

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That is, undoubtedly, the test to be applied, and the language used there is strong language.

Approaching this case from that angle, I pass straight to a decision of this court in *Gugenheim v. Ladbrooke & Co., Ltd.* (3), where the court was faced with this problem. The plaintiff was suing a firm of bookmakers on an account stated.

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The facts set out in the judgment of LAWRENCE, L.J. ([1947] 1 All E.R. 293) were as follows :

"The plaintiff made various bets with the defendants, who are a well known company of bookmakers. The bets were made on credit. After the meeting on July 1, 1946, the plaintiff put forward a claim to a sum of £8,784, which he said was due to him on the bets that he had made. On July 11 the defendants wrote to the plaintiff saying that they understood that he had been reported to the stewards of the Jockey Club as a defaulter on bets and warned off the course in England, and that in those circumstances they proposed to hold his account in abeyance until he had settled certain alleged liabilities, and that they differed in the figures which were put forward, but that that could be adjusted when he had done as they suggested. He denied what they had alleged, and the matter comes before us on an affidavit which, as counsel for the defendants agrees, must be taken as being true for the purposes of this appeal. In that affidavit . . . the plaintiff alleged . . . that on July 27, 1946, his son and another man had an interview with the representatives of the defendants and it was agreed that the lesser items in the account which the plaintiff put forward should be deemed paid and that, after cancelling out the cross-claims, a final balance was due to him of £7,256. In arriving at this figure the plaintiff's son on his behalf agreed to forego the difference between it and the claim for £8,784 as a further consideration for the compromise. The writ was issued on Sept. 24, 1946, and by it the plaintiff claimed £7,256 from the defendants on an account stated."

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Thus, it is clear that what was being relied on in that case was an account stated in the full sense, *i.e.*, an account in which there were items on either side which, it had been agreed, should be considered as to some extent cancelling out each other, and that the balance thus arrived at was agreed. In those circumstances DENNING, J., in chambers, had refused to strike the action out. It came before this court, of which LAWRENCE, L.J., COHEN, L.J., and myself were members. There were cited to us on that appeal all relevant authorities on this point, such as *Kershaw v. Sievier* (4), *Siqueira v. Noronha* (5), *Cocking v. Ward* (6), *Joseph Evans & Co. v. Heathcote* (7) and *Re Home & Colonial Insurance Co., Ltd.* (8), which were referred to in the judgment of LAWRENCE, L.J. As I have said DENNING, J., had refused to strike the action out and LAWRENCE, L.J., was of

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opinion that there was a point capable or worthy of being argued and that, accordingly, the action should be allowed to proceed. I expressed the contrary view, but, having regard to the difference of judicial opinion, I was not prepared to dissent from the order proposed by LAWRENCE, L.J. COHEN, L.J., was disposed to agree with the view which I had expressed, although he added one or two other matters which he thought were relevant. It was clearly impossible to strike out an action *in limine* if two learned judges thought that there was something to be argued. A plaintiff cannot "be driven from the judgment seat"

by a majority judgment. I should have said that, even if only one judge thought that there was something to be argued, the action clearly could not be struck out. As a result of the rather curious position in that case, the action was allowed to go to trial.

If the position had remained the same until the present date, I should have taken the view that this court would have been bound by the decision in *Gugenheim v. Ladbrooke & Co., Ltd.* (3) to take a similar course in the present case, but the position has not remained unchanged. Since that date there have been two or three decisions. The most important, to my mind, is the decision of STREATFIELD, J., in *Alberg v. Chandler* (9). The headnote to that case says :

"Where an agreement to pay debts is void under s. 18 of the Gaming Act, 1845, an action cannot be maintained on an account stated in respect of those bets."

The facts showed that from time to time the defendant had placed bets on greyhounds with the plaintiff, and had settled with the plaintiff at the end of each week. One day he placed some bets and lost £15,000. The plaintiff had laid off those bets with other bookmakers who wanted to be paid, and on the following day he approached the defendant, who already owed him money in respect of the previous week, with a request that the defendant should pay him all the money which he had lost. The defendant then said :

"I will let you have the £3,800 from last week, but I cannot give you the whole of the money I lost to-day. I will give you £10,000 on account and if you call at the usual time to-morrow I will give you the cheques."

The plaintiff called on the defendant the next day, but could not find him. As the defendant did not pay him the money owing, the plaintiff brought an action on an account stated for all the money which the defendant owed to him. In giving judgment STREATFIELD, J., said (64 T.L.R. 394) :

"It is admitted that the basis of the claim for that sum is a series of betting transactions on certain races. It is the kind of transaction which, under s. 18 of the Gaming Act, 1845, is declared to be null and void. The form of the action is framed therefore on an account stated, and the plaintiff contends that, the defendant having incurred this large indebtedness in respect of betting transactions, there was an independent and separate agreement amounting in law to an account stated whereby the defendant promised to pay these sums, and it is submitted that this action is maintainable for that reason. On the facts, the defence is devoid of all merits."

The learned judge then dealt with the case on the basis and assumption that there was an account stated, but he came to the conclusion that, none the less, the action was not maintainable because it was an account stated in respect of betting transactions. He referred to *Joseph Evans & Co. v. Heathcote* (7), which dealt with a different subject-matter, but in which SCRUTTON, L.J., referred ([1918] 1 K.B. 435) to the passage in the judgment of the court delivered by TINDAL, C.J., in *Cocking v. Ward* (6), in which the Chief Justice said (1 C.B. 870) :

"The principle may not, perhaps, be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming : but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it."

After citing this passage, STREATFIELD, J., went on to say (64 T.L.R. 394) :

"It may be that that statement of TINDAL, C.J., was *obiter*, but, having regard to the words of s. 18 itself, 'all contracts or agreements, whether

by parole or in writing, by way of gaming or wagering, shall be null and void,' it seems to me to be impossible, in view of that statement, to hold that, even if there was an account stated, it is enforceable as such, having regard to its wagering basis."

A That decision of STREATFEILD, J., was referred to in this court by DENNING, L.J., in *William Hill (Park Lane), Ltd. v. Rose* (10). In giving his judgment DENNING, L.J., after referring to the decision in *Alberg v. Chandler* (9), said ([1948] 2 All E.R. 1112) :

" If this is correct, as I think it is, then the new promise here to pay the betting debt by instalments was not a good consideration because it added nothing to the original promise, and, if it was not a good consideration, there was no new contract."

B In *Day v. William Hill (Park Lane), Ltd.* (11), the same question arose, but in that case it was clear from both the judgments that the court came to the conclusion that the account stated, or alleged to be stated, was not an account stated in the true sense of the word. The headnote ([1949] 1 K.B. 632) is as follows :

C " A bookmaker's weekly account sent to a client, containing a record of wins and losses made by the client on bets made by him during the week which, when set off against each other, showed a balance due from the bookmaker to the client, followed by the letters 'C.F.' (carried forward), is not an account stated on which the client can sue the bookmaker some months subsequently, since it is not an absolute acknowledgment made by the bookmaker to the client of a debt due from him to the client and payable at the time of action brought."

D Having dealt with the case on that basis, SINGLETON, L.J., at the end of his judgment, said ([1949] 1 All E.R. 223) :

E " Counsel for the defendants submitted that, even if the weekly bookmakers' account could be said to be an account stated, still it was something on which an action could not succeed, and he referred us to certain words of FARWELL, L.J. ([1908] 2 K.B. 724) in the well-known case of *Hyams v. Stuart King* (12), and also to the judgment of PICKFORD, L.J. ([1918] 1 K.B. 426, 427) in *Joseph Evans & Co. v. Heathcote* (7), and to the words of the other lords justices in the same case. He also referred us to *Alberg v. Chandler* (9), a recent decision of STREATFEILD, J., on the subject. I do not think it is necessary to consider this submission in relation to this appeal. I am satisfied, for the reasons I have given, that the appeal ought to be dismissed."

F Thus, the larger question whether, if there is a true account stated in respect of betting transactions, such an action could succeed, was clearly left open. G BUCKNILL, L.J., agreed, and at the conclusion of his judgment he added (*ibid.*, 224) :

H " Counsel for the plaintiff was compelled to admit that, if the plaintiff had made one bet only in respect of any particular week and had received a weekly account showing that he had won, say, £100 on that bet, that could not be said to be an account stated on which an action would lie, but, on the other hand, he argued that, if he made two bets, won on the first bet and lost on the second, and the weekly account shows that there was a balance due to him, that would be an account stated and he could recover on it. That seems to me to be making the Gaming Act, 1845, valueless. This is an obvious attempt to get round that Act. In my view, it ought not to succeed, and the order of the learned judge was right."

In the case now before us it was argued by counsel for the defendant that the concluding observation of BUCKNILL, L.J., indicated that the learned lord justice



had decided the case on the precise ground which SINGLETON, L.J., had expressly refrained from dealing with. I cannot so read the language that BUCKNILL, L.J., used and I am quite satisfied for my part that he never intended to do any such thing. Therefore, in my view, *Day's* case (11) does not really assist the argument in the present case.

Since *Gugenheim's* case (3) the parties have been allowed to litigate this matter in a court of law, which was what LAWRENCE, L.J., thought that they should be allowed to do. In *Alberg v. Chandler* (9), STREATFEILD, J., decided—and there is an expression of concurrence with his judgment by DENNING, L.J., in *William Hill (Park Lane), Ltd. v. Rose* (10)—that an action of this kind, as between a bookmaker and his client where the Act of 1845 applies, *i.e.*, an action on an account stated in respect of betting transactions, is not maintainable. When I say “an action of this kind,” I am not losing sight of the distinctions—on which counsel for the plaintiff relies—between the present action and that action, and I shall refer to them later. If this court is satisfied beyond doubt that the decision in *Alberg v. Chandler* (9) is right and represents the law, then, in my opinion, it is its duty to strike out these statements of claim.

Counsel for the plaintiffs contends that, if that is the position, no one can ever get an important point of law of this kind settled without going to the House of Lords, if he can get there, or to the Court of Appeal, if he can get there, on interlocutory proceedings. That is an argument which has to be carefully considered, but, none the less, if this court is satisfied that an action is quite unmaintainable, and that to allow it to proceed would be an abuse of the process of the court, I think that it is bound to say so, and that it can say so even if there is not any express decision of this court or of the House of Lords to that effect. There are some points of law that are so clear that no express authority can be found for them. I venture to think that this point is tolerably clear, and has been so for a number of years, and that it has now been made still clearer by the judgment of STREATFEILD, J., in *Alberg v. Chandler* (9).

I think, however, that it is necessary to glance at the cases on which STREATFEILD, J., based his judgment, as we are now deciding that his judgment is correct. In that connection I would refer, in the first place, to what was said by MAUGHAM, J., in *Re Home & Colonial Insurance Co.* (8). In that case, which arose under the winding-up of a limited company, among other things it was held :

“... (v) that, where an agreement is wholly void, items alleged to be due in respect of it are not a proper basis for an action on an account stated, and that a proof based on an account stated in such circumstances must be rejected.”

In the course of his judgment MAUGHAM, J., cited ([1930] 1 Ch. 129) a passage from the judgment in *Re Laycock v. Pickles* (13), where BLACKBURN, J., said (4 B. & S. 506) that where there was a real account stated

“... several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts *in presenti*, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient.”

MAUGHAM, J., then said ([1930] 1 Ch. 129) :

“It is contended on behalf of the respondent that there was here a clear moral obligation on each side, and that this brings the case within the statement of BLACKBURN, J., even if the participation agreement was

- wholly null and void. I do not think it necessary to go through and comment on all the cases that were cited to me on this topic, for I am content to follow the observations of the Court of Appeal in the case of *Joseph Evans & Co., Ltd. v. Heathcote* (7). It is true that on the facts in that case the court held that the plaintiffs were entitled to recover upon an account stated, but the learned judges in order to arrive at that conclusion considered it necessary to examine the question whether the agreement between the parties was void or whether it was only such a contract that it could not be directly enforced. PICKFORD, L.J., expressly says ([1918] 1 K.B. 427) : 'I do not think that, where a contract from its nature can give rise to no valid claim, a claim upon it can be used to found an action upon an account stated.' This *dictum* is exactly in point. BANKES, L.J., comes to this conclusion (*ibid.*, 432) : 'The position of the agreement sued on, therefore, under these Acts, is that it is neither void nor voidable, and there is nothing in the Act which prevents the court from accepting the debt created under the agreement as a proper foundation for an account stated'."

- The Acts in question in *Heathcote's* case (7) were not the Gaming Acts, but the Trade Union Acts, 1871 and 1876. After stating that SCRUTTON, L.J., had cited with approval the passage from the judgment of TINDAL, C.J. (1 C.B. 870), in *Cocking v. Ward* (6), to which I have already referred, MAUGHAM, J., continued ([1930] 1 Ch. 130) :

- "... SCRUTTON, L.J., then goes on to point out that since 1871 a contract in restraint of trade between members of a trade union is no longer void but is not directly enforceable. I conclude from these observations that where an agreement is wholly void and *a fortiori* where the entry into it or the taking credit in account in respect of it is an 'offence,' items alleged to be due under such an agreement cannot properly be used to found an action on an account stated."

- In *Morgan v. Ashcroft* (14), in which the taking of an account was claimed, SIR WILFRID GREENE, M.R., said ([1937] 3 All E.R. 94) :

- "In substance, the dispute between the parties is a dispute between a backer and a bookmaker as to the state of the account between them. The fact that the defendant's cross-claim is raised by way of counterclaim and not by way of set-off, does not, in my view, affect the substantial point that, in order to ascertain whether or not an overpayment had been made, which the plaintiff was entitled to recover, it was necessary for the court to examine the state of the account between the parties. Now, this, in my opinion, is a thing which the court is not entitled to do, since by merely taking the account the court would necessarily be recognising wagering transactions as producing legal obligations, and therefore doing the very thing which the Gaming Act, 1845, does not permit to be done."

- The relevance of those observations, as submitted by counsel for the defendant, is that precisely the same sort of considerations might arise in an action brought on an account stated where the defendant is challenging the account, which is alleged to have been stated, on the ground of error, or on some such ground. That would necessitate the court going into the origin and nature of the detailed items in precisely the same way in which it might be called on to do so where an account is being taken.

Finally (and I think most important of all) comes *Hyams v. Stuart King* (12). The actual decision in that case has now been overruled by the recent decision of the House of Lords in *Hill v. William Hill (Park Lane), Ltd.* (15). It is, however, important to notice that the claim in *Hyams v. Stuart King* (12) was originally framed on an account stated. The headnote says :

"The writ in the action was indorsed with a statement of claim upon an account stated, but at the trial the plaintiff set up, and recovered upon, the fresh agreement; no formal amendment of the statement of claim was made at the trial, but all necessary amendments were taken as having been made."

On that part of the case *FLETCHER MOULTON*, L.J., said ([1908] 2 K.B. 719):

"There is no doubt that a cheque may be evidence of an account stated, but that cheque must under that statute [the Gaming Act, 1835] be taken to have been given for an illegal consideration, and an account stated for an illegal consideration is as unenforceable as a cheque given for an illegal consideration. And, apart from the fact that the alleged account stated is a cheque, the mere fact that the account stated is for bets would, under the provisions of the Gaming Act, 1845, which render wagering contracts null and void, suffice to render the action unsustainable. Counsel for the plaintiff realised that his case was hopeless if it had to depend on the cheque, and he faintly suggested that the action was brought not upon the cheque, but upon the balance of account for which that cheque was given—in other words, that it was an action not upon the cheque, but upon the consideration for the cheque. That cause of action is equally bad. It would be a plain case of suing for money won on bets."

*FARWELL*, L.J., said (*ibid.*, 724):

"This is an action for a balance upon an account stated, the full amount stated as being originally due being £108 10s., which is the amount of a cheque drawn by the defendant and given to the plaintiff in payment of a bet made by the defendant's firm with the plaintiff. It is admitted that no action could be successfully brought on the cheque, and it is in my opinion equally clear that no action will lie on an account stated of which the bet or the cheque forms the foundation: such an action is brought on an admission of a sum of money due and is a recognised cause of action, but it does not create a merger or destruction of the items of such account, and if such items are illegal, the action fails..."

No words could be clearer than that. It is, I think, because it has always been recognised that that is the position that there is no report of any case in which an action so framed has ever succeeded.

Although *Hill v. William Hill (Park Lane), Ltd.* (15) was a case under the Gaming Act, 1845, the decision there strengthens the view put forward by counsel for the defendant in the present case. In *Hill's* case (15) it was decided that, although there might be an entirely fresh consideration for the payment of a gaming debt, none the less, if that which was agreed to be paid was, in fact, a gaming debt, the plaintiff could not recover under such a contract. The speeches of the majority emphasised the fact that it is the reality of the transaction with which the courts are concerned. For instance, *VISCOUNT SIMON* said ([1949] 2 All E.R. 461):

"The arrangement, by the very terms of the letter of Aug. 17, is to pay by instalments 'the balance of our account' and the account is an account of betting transactions and of nothing else."

Later he said (*ibid.*, 462):

"But it appears to me that, at any rate on the facts of the present case, it is clear that the sum of money sought to be recovered not only owes its origin to the fact that bets were made but is itself a sum of money so won."

In my view, there is certainly no comfort to be gained from that case by counsel for the plaintiff. The fact that *LORD GREENE* indicated that it was possible that agreements might exist for good consideration which were not in fact agreements



to pay betting debts, although they may have had their origin at the outset in some betting transactions, is an entirely different consideration.

In conclusion, I think it is only necessary to deal with the argument of counsel for the plaintiff that the Act with which we are now concerned, *viz.*, the Gaming Act, 1892, is a different Act from that with which STREATFEILD, J., was dealing in his judgment and with which the House of Lords were dealing in *Hill v. William Hill (Park Lane), Ltd.* (15). The Gaming Act, 1845, s. 18, provides :

A "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void ; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which

B any wager shall have been made . . . "

The Gaming Act, 1892, was passed to deal in terms with the case where there is the intervention of an agent, and s. 1 provides :

C "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

D In *Tatam v. Reeve* (16), the headnote states :

E "The Gaming Act, 1892, s. 1, enacts that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by [the Gaming Act, 1845] shall be null and void, and no action shall be brought or maintained to recover any such sum of money :—*Held*, that money paid by the plaintiff for the defendant at his request to persons with whom the defendant had lost bets was money paid 'in respect of' a gaming contract within the meaning of the Gaming Act, 1892, and therefore that the plaintiff could not recover the sums so paid by him from the defendant."

In my view, the reasoning in all the cases to which I have referred applies equally to the Act of 1892 as to the Act of 1845. In fact, though counsel for the

F plaintiff very properly emphasised that we were here dealing with a different Act, I am not conscious that he advanced any argument in principle showing what the difference was between the two Acts for present purposes. I am clearly of opinion that there is none. He also pointed out that *Alberg's* case (9) was between a bookmaker and a backer, whereas this is a case between the agent of the backer and the backer, and that he is relying on two accounts stated, one

G as between the bookmaker and the plaintiff (the agent), and the other as between the plaintiff and the defendant (the backer). I cannot see how that can make any difference. If accounts stated of this kind, in respect of transactions which are admittedly betting transactions, and relating only to betting transactions, are as void as the transactions themselves, I cannot see how it can help the plaintiff because there were two accounts stated and not merely one.

H Although it has been necessary to examine a number of cases, the result, I think, is quite clear. As I have said before, until the recent effort to get round the Gaming Acts by means of actions of this kind, it had always been recognised that such an obvious "dodge," if I may use the word, was doomed to failure. That being the case, the law now having been definitely settled to that effect by the decision of STREATFEILD, J., in *Alberg v. Chandler* (9) (which I think is clearly right), it is, in my opinion, the duty of this court to see that actions which are in reality actions in respect of betting transactions, and betting transactions

only, but which are given the guise of legitimate transactions by being described as accounts stated, should not be allowed to continue. For these reasons, I think that this appeal fails.

**SINGLETON, L.J. :** Applications to strike out statements of claim under R.S.C., Ord. 25, r. 4, or under the inherent jurisdiction of the court, have been fairly frequent of late. I do not think that they ought to be encouraged. It is quite clear in the present case that the subject-matter of the litigation was betting and nothing else. The statements of claim, which in the alternative (and that is the only part we have to consider) are based as on an account stated, give as particulars :

"On July 8, 1948, the defendant orally admitted to the plaintiff on the telephone and agreed that the said payment was correct as to amount."

Some question was raised by counsel for the defendant whether or not that could constitute an account stated, but, for the purposes of my judgment, I assume that it was an account stated in the strict sense of the word. That pleading led to a request for particulars, and the first particulars which were given were not very satisfactory so, as was to be expected, a further request was made, and further particulars were given, para. 1 (a) of which reads as follows :

"The best particulars that the plaintiff can give of the request by the defendant are that the defendant asked the plaintiff to put some money on horses for him in the plaintiff's name with F. A. Harden & Co. of Spalding."

Then, in para. 1 (b), it is said that thereafter the plaintiff, having received the account from F. A. Harden & Co., agreed the amount which was due, and agreed the items, which were cross items. Thus the plaintiff's claim is founded on an account stated, which counsel on his behalf submitted made the case different from the other cases which had been decided under applications of this kind. In one sense that is right, but there is no getting away from the fact that the plaintiff sued the defendant in respect of bets on horses and on nothing else, whatever one may choose to call it. If a man makes bets in this way, of course, he ought to pay them, and, if he does not pay, it bears rather a nasty look. Therefore, these applications to strike out statements of claim are sometimes made in the hope of avoiding publicity, and, in the ordinary course, if the application succeeds before the master, and there is no appeal, the defendant does avoid publicity. In the present case the registrar struck out the statements of claim, and the plaintiff appealed. SLADE, J., upheld the decision of the registrar, and the plaintiff appeals to this court. The result of all this is that the defendant may have achieved some publicity, notwithstanding his desire to avoid it. He may, indeed, have been the means of others being able to succeed in striking out a statement of claim if a plaintiff is so rash as to bring proceedings of this kind in the future. The fact remains that the courts of this country are not meant to be used for the recovery of gambling debts. That has been recognised for a long time, and for that reason other names or labels are put on cases of this kind when they are brought to court.

There have been several cases of this kind which have reached the Court of Appeal recently, and my Lord has referred to two of them. When *Day v. William Hill (Park Lane), Ltd.* (11) was before this court, I thought that *Gugenheim's* case (3) presented some difficulty, but in the result it did not because, when the document, which was said to be an account stated in *Day's* case (11) was examined, it was not an account stated at all. On this appeal we had presented to us the difficulty—and I think it was a difficulty—raised by *Gugenheim's* case (3). We have had the opportunity given to us of examining, with the help of learned counsel, the authorities dealing with matters of this kind, and in the result I find myself satisfied that the plaintiff in this case could not succeed if his action went to trial. Virtually, what has been done in this case is to try his action.

I do not propose to refer in detail to the numerous authorities which were cited, but the statement in the judgment of FLETCHER MOULTON, L.J. ([1908] 2 K.B. 719), in *Hyams v. Stuart King* (12), followed, as it was, by the statement of FARWELL, L.J. (*ibid.*, 724) in the same case, is one expression—and a very strong expression—of view on claims of this nature. The same view was taken by MAUGHAM, J., in *Re Home & Colonial Insurance Co.* (8), and by STREATFEILD, J., in *Alberg v. Chandler* (9). The judgment of STREATFEILD, J., in *Alberg v. Chandler* (9), was expressly approved by DENNING, L.J., in this court in *William Hill (Park Lane), Ltd. v. Rose* (10). Again in *Hill v. William Hill (Park Lane), Ltd.* (15), a recent decision of the House of Lords, VISCOUNT SIMON said ([1949] 2 All E.R. 461) :

“The arrangement, by the very terms of the letter of Aug. 17, is to pay by instalments ‘the balance of our account’ and the account is an account of betting transactions and of nothing else. The first limb of s. 18 [of the Act of 1845] does not apply to the case because the contract sued on is not ‘by way of gaming or wagering’ but is a new bargain, but, inasmuch as the new bargain was to pay the betting account, an action brought on it, as it seems to me, is nevertheless brought for recovering sums won by betting.”

No good purpose would be served by going into the authorities further, but I am satisfied that the plaintiff could not succeed in this case if it were allowed to go to trial.

What, then, ought this court to do? I think it would have been better and cheaper for everyone if the action had gone for trial. I recognise the position under applications of this kind, and I bear in mind the words of FLETCHER MOULTON, L.J., in *Dyson v. Attorney-General* (2), where he stressed the general principle that the court ought not to strike out a pleading if any cause of action is shown, and that this particular rule was never intended to apply to any pleading which raises a question of general importance or serious questions of law. In the circumstances, however, and after the argument which has taken place in this court, satisfied, as I am, that the plaintiff could not recover, I think it is the duty of this court to say so. To hold otherwise would only add to expense and to waste of time. I agree that this appeal fails on the ground that the plaintiff has no reasonable cause of action.

JENKINS, L.J. : I agree. Assuming that the plaintiff succeeded at the trial in establishing the most favourable possible state of facts, that is to say, assuming that he could succeed in showing, not only that the two accounts were stated accounts as between himself and the bookmaker in the sense that every item on each side of the account had been gone through and agreed and the balance struck, and assuming further that he could prove at the trial similar circumstances as between himself and the defendant, nevertheless it seems to me impossible that his action should succeed.

The plaintiff, having paid the balances of the two accounts to the bookmaker, seeks to recover those balances from the defendant. He is at once faced by the Gaming Act, 1892, s. 1, which provides in effect that “any promise, express or implied,” on which he bases his action against the defendant is null and void if the sums that the plaintiff paid to the bookmaker and now seeks to recover from the defendant were sums paid under or in respect of contracts rendered void by the Gaming Act, 1845. The sums in question here were balances of accounts which are to be assumed for this purpose to be stated accounts. It seems to me, however, abundantly plain (even apart from authority) that the balance of a betting account is a balance in respect of bets and nothing else. The accounts here are simply and solely accounts of betting transactions. The fact that the transactions on each side are set off against each other and a balance one way or the other is arrived at does not alter the character of the balance and make it a balance in respect of something other than bets. I think that that is



clear on the plain language of the section, and is also clear on the authorities to which my Lords have referred. Once one arrives at the conclusion that those sums were sums paid in respect of contracts avoided by the Gaming Act, 1845, s. 18, there is necessarily an end of the case, for the defendant's promise to pay those sums is rendered null and void by the express terms of s. 1 of the Act of 1892. It matters not whether one regards the defendant's promise as an express or implied promise to indemnify the plaintiff as his agent or as a promise arising on a stated account. The former promise must obviously be void *ab initio* because it was nothing more nor less than a promise to pay the plaintiff whatever sums he laid out as agent for the defendant in betting transactions. A promise of the latter type, in my judgment, is in no better position. Once the principle is accepted that the balance of these betting accounts is a balance in respect of betting, then one cannot out of accounts stated as between the plaintiff and the defendant construct a promise which is anything else than a promise to pay sums paid by the plaintiff in respect of a contract avoided by the Act of 1845.

I have nothing to add, except to endorse what my Lords have said about the caution with which the court should view an application to strike out proceedings as disclosing no cause of action. I agree that, before taking that step, the court should be very sure that there is, indeed, no cause of action and the plaintiff should be given the benefit of every possible doubt. In this case, after the very full argument we have heard, I agree with my Lords that it is abundantly plain that the action could not succeed, and it follows that the proper course is to affirm the order of the learned judge.

**TUCKER, L.J. :** I wish to add that I also have dealt with this case on the assumption that both the accounts stated relied on by counsel for the plaintiff are real accounts stated, to use the language of BLACKBURN, J. (4 B. & S. 506), in *Re Laycock v. Pickles* (13), *i.e.*, they are accounts of such a nature that, when the several items of claim are brought into the account on either side and set against one another, and a balance is struck, the consideration for the payment of the balance is a discharge of the items on each side. I wish, however, to make it clear that, in my view, in a case of this kind, it can make no difference whatever which precise form of account stated is in question. In *Camillo Tank Steamship Co., Ltd. v. Alexandria Engineering Works* (17) there will be found much learning on the subject of accounts stated, but my judgment applies equally to any one of the forms of accounts stated which are dealt with in that case which have their origin in betting transactions, and consist of betting items only.

*Appeal dismissed with costs.*

Solicitors : *Gibson & Weldon*, agents for *Cecil Crust & Co.*, Spalding (for the plaintiff) ; *Lee, Bolton & Lee*, agents for *Roythorne & Co.*, Spalding (for the defendant).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

## R. v. MATTHEWS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lewis and Cassels, JJ.), December 16, 1949.]

*Criminal Law—Receiving stolen property—Innocent receipt—Later intention to appropriate property.*

A The appellant admitted receiving stolen property, but he said that his intention at the time of the receipt was to hand it over to the police. He made an appointment with the police, which was kept, but the property was not handed over. The police wished to see him about other matters and he was taken into custody. On the way to the police station in a motor car he placed the stolen property behind a seat where it was found the next day. In his summing-up the chairman of quarter sessions said :  
 B “ You may think that when he telephoned to the police he may have been intending to hand over the stolen property. Assume that he did. If he changed that intention, then we are in this position. He received property which was stolen, which he knew to be stolen, and, having no guilty intent originally, nevertheless he changed that intent and kept [the property], and my instructions are that in those circumstances that is no defence to these charges, because the guilty intent is present when he did not hand it over to the police.” The jury convicted the appellant of receiving the property.  
 C

HELD : where a person became in possession of property wrongfully (as by trespass), though not feloniously and later changed his mind and appropriated the property, that amounted to stealing, but not to receiving:  
 D *R. v. Riley* (1853) (20 L.T.O.S. 228) and *Ruse v. Read* ([1949] 1 All E.R. 398), applied ; the jury had been misdirected ; and the conviction must be quashed.

[AS TO RECEIVING STOLEN GOODS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 550-558, paras. 935-947 ; and FOR CASES, see DIGEST, Vol. 15, pp. 962-973, Nos. 10753-10879 and Digest Supp.]

E Cases referred to :

(1) *Ruse v. Read*, [1949] 1 All E.R. 398 ; [1949] 1 K.B. 377.

(2) *R. v. Riley*, (1853), Dears. C.C. 149 ; 22 L.J.M.C. 48 ; 20 L.T.O.S. 228 ; 17 J.P. 69 ; 15 Digest 878, 9634.

F APPEAL against conviction. The appellant was convicted at Hampshire Quarter Sessions on a charge of receiving stolen property. He also pleaded Guilty to two charges of false pretences and asked that eight other offences might be taken into consideration, and he was sentenced to seven years' preventive detention. The court quashed the conviction, but did not interfere with the sentence. The facts appear in the judgment of the court.

G *H. Summerfield* for the appellant.  
*Fay* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. This appellant was convicted after a trial at the Hampshire Quarter Sessions of receiving stolen property. He also pleaded Guilty to two charges of false pretences, and asked for eight other offences to be taken into consideration. He  
 H was sentenced to seven years' preventive detention, and the court, although they are going to quash the conviction on one count, sees no ground for interfering with the sentence.

The only point is whether the conviction of receiving was right. The appellant undoubtedly received some property which he knew to be stolen. The defence was : “ I received that property from the thief. I knew he was a thief, and I knew he had stolen the property, but my intention when I received it was to hand it over to the police.” Undoubtedly he did send a telephone message to

the police who were at that time anxious to see him with regard to motor cars which had been obtained by false pretences. When the police saw him, however, he did not give up the property to them. He was put into a police car and taken off in custody, and somehow, while in the car, he got the stolen property out of his pocket and slipped it down behind the seat of the car where it was found the next day.

The learned chairman directed the jury in this way :

"On those facts you have got to consider this. You may think that when he telephoned to the police he may have been intending to hand over the stolen property. Assume that he did. If he changed that intention, then we are in this position. He received property which was stolen, which he knew to be stolen, and, having no guilty intent originally, nevertheless he changed that intent and kept [the property], and my instructions are that in those circumstances that is no defence to these charges, because the guilty intent is present when he did not hand it over to the police."

In the opinion of this court, that is a misdirection. If the appellant received the property with the intention at once of handing it over to the police, that would not be a felonious receiving. The court cannot possibly accept the argument which has been addressed to it on behalf of the prosecution that a person who intends at once to hand to the police, or its true owner, stolen property which has come into his possession, is nevertheless guilty of the felony of receiving stolen property. That is so startling that I am surprised the argument can be put, and, if, when the property is received, the receipt is innocent, the fact that the receiver changes his mind and later misappropriates the property does not turn the receipt into a felony. What might happen in such a case? Where a person, having received property innocently, then changed his mind and misappropriated it, it has been more than once attempted to be said that that would amount to larceny. A little time ago in the Divisional Court we considered in *Ruse v. Read* (1) the old case of *R. v. Riley* (2), and we pointed out that, if the original taking is wrongful, though not felonious—that is to say is trespass—then, if the taker subsequently alters his mind and appropriates the property, that does amount to felony. In *R. v. Riley* (2) a man drove his sheep into a field. Next day, driving them out, he found that among his flock was a sheep which he knew did not belong to him. No doubt he was innocent of felonious intent, but it was nevertheless a trespass to goods. When afterwards, having wrongfully, though not feloniously, taken the property, he made up his mind to appropriate the sheep, he became guilty of felony. In *Ruse v. Read* (1) the justices found that a man who, while under the influence of liquor, took a bicycle, rode about on it, and then took it home, had no felonious intent at the time he took it. On the next day, instead of returning the bicycle to the police or to the true owner, he packed it up and addressed it from the west country to himself at some station in the north. We found that that amounted to stealing. It was never said in *R. v. Riley* (2) or in *Ruse v. Read* (1) that the accused had become guilty of receiving. What was said was that he had become guilty of stealing.

In the present case, if the jury had believed the appellant's evidence that he had innocently taken the property in the sense that he was returning it to the true owner or to the police, there would be no trespass, and, therefore, he could not be guilty of the offence of stealing. In any case, there was a complete misdirection by the chairman on the law of receiving, and, therefore, the conviction on this count must be quashed.

*Conviction of receiving stolen property quashed.*

Solicitors : Registrar, Court of Criminal Appeal (for the appellant) ; Talbot & Davies (for the Crown).

[Reported by H. MoL. MORRISON, Barrister-at-Law.]



## BAXTER v. ECKERSLEY.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.J.J.), December 14, 15, 20, 1949.]

*Rent Restriction—Possession—Claim by landlord against tenant's widow—Allegation that tenant a contractual tenant—Claim and acceptance by landlord from tenant of statutory increases of rent—No statutory notice of increase—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).*

In February, 1938, a landlord let a dwelling-house to J.E. at a rent of 11s. per week. In April, 1945, April, 1946, and April, 1947, the landlord orally informed J.E. that the rates had been increased, and that J.E. would have to pay a further 2d. per week, and as a result thereafter J.E. paid 11s. 6d. No statutory notice of the increase was on any occasion given, nor was J.E. at any time given notice to quit. On Apr. 15, 1949, J.E. died intestate, leaving a widow who, it was admitted, would be entitled to remain in possession under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), if J.E. had been a statutory tenant. No letters of administration to J.E.'s estate were taken out, and the landlord served a notice to quit on the President of the Probate, Divorce and Admiralty Division. On the expiration of the notice, the landlord claimed possession from the widow on the ground that J.E. had been a contractual tenant, and payment, at the rate of 11s. 6d. per week, for use and occupation. Judgment was given in the county court for the landlord on both claims. On appeal by the widow, the landlord contended, in support of his claim for possession, that, as no statutory notice of increase had been given, the increases in 1945, 1946 and 1947 were invalid and no statutory tenancy had arisen.

HELD : the landlord, having alleged his right to, and obtained, the increased rent, could not also assert for the purpose of obtaining possession that the increased rent was irrecoverable ; nor could he be heard to say that the increase of the rent was invalid owing to the absence of any statutory notice, since the cause of the invalidity was his own act or default ; and, therefore, he was not entitled to possession.

*New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* ([1919] A.C. 1), *Dexters, Ltd. v. Hill Crest Oil Co. (Bradford) Ltd.* ([1926] 1 K.B. 348), and *Re Savoy Estate Ltd.* ([1949] 2 All E.R. 286), applied.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401 and 1948 Supplement ; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255.]

Cases referred to :

- (1) *Thynne v. Salmon*, [1948] 1 All E.R. 49 ; [1948] 1 K.B. 482 ; [1948] L.J.R. 506 ; 2nd Digest Supp.
- (2) *Dexters, Ltd. v. Hill Crest Oil Co. (Bradford) Ltd.*, [1926] 1 K.B. 348 ; 95 L.J.K.B. 386 ; 134 L.T. 494 ; Digest Supp.
- (3) *Re Savoy Estate Ltd.*, [1949] 2 All E.R. 286 ; [1949] Ch. 622 ; [1949] L.J.R. 1549.
- (4) *Summers v. Donohue*, [1945] 1 All E.R. 599 ; [1945] K.B. 376 ; 114 L.J.K.B. 401 ; 172 L.T. 310 ; 2nd Digest Supp.
- (5) *Smith v. Mather*, [1948] 1 All E.R. 704 ; [1948] 2 K.B. 212 ; [1948] L.J.R. 1209 ; 2nd Digest Supp.
- (6) *Brock v. Wollams*, [1949] 1 All E.R. 715 ; [1949] 2 K.B. 388.
- (7) *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*. [1919] A.C. 1 ; 87 L.J.K.B. 746 ; 118 L.T. 731 ; 7 Digest 335, 20.
- (8) *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20 ; [1941] A.C. 1 ; 109 L.J.K.B. 919 ; 164 L.T. 139 ; 2nd Digest Supp.

APPEAL by the widow of the deceased tenant from an order of His Honour JUDGE WALMSLEY, K.C., made at Bolton County Court on July 20, 1949, giving the landlord possession of a dwelling-house and for payment for the use and occupation thereof by the widow. The widow had paid the amount claimed for use and occupation into court and that amount was paid out to the landlord, there being no appeal against the decision of the county court judge on the question of use and occupation, but her appeal against the order for possession was allowed. The facts appear in the judgment of SOMERVELL, L.J., and are summarised in the headnote. A

*J. Gower* for the widow.

*O. G. Morris (Galphin with him)* for the landlord.

*Cur. adv. vult.*

Dec. 20. **SOMERVELL, L.J.**, read the following judgment. This is an appeal from a decision of His Honour JUDGE WALMSLEY, K.C., making an order for possession in favour of the plaintiff landlord. The defendant is the widow of a previous tenant of the premises. The house was let in 1938 to the defendant's husband. He died on Apr. 15, 1949, and she is claiming to remain in possession under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g). If her husband was at the date of his death a statutory tenant, it is not disputed that she can do so. The learned county court judge held that the husband at the date of his death was a contractual tenant, and, no letters of administration having been taken out and a notice to quit having been served on the President of the Probate, Divorce and Admiralty Division, the defendant cannot, having regard to previous decisions of this court, claim the protection of the section : see *Thynne v. Salmon* (1). The original tenancy of the husband in February, 1938, was at a rent of 11s. per week. In the particulars of claim the rent at the date of the death is alleged to have been 11s. 6d. This sum is claimed in the particulars of claim in respect of use and occupation by the defendant from Apr. 15, 1949, the date of the death, to July 2. There is no evidence whether these premises were controlled prior to the Rent and Mortgage Interest Restrictions Act, 1939. If they were not, the standard rent would be 11s., which was the rent on Sept. 1, 1939. If they were, it is right to assume that 11s. was the standard rent under the earlier Act with any statutory additions, and the increase to 11s. 6d. could only be made on the basis that the statutory conditions precedent to an increase had been complied with. If they had, the tenant would have become a statutory tenant. In respect of the claim for use and occupation made on the basis that the rent was 11s. 6d. at the date of the deceased's death, the sum claimed was paid into court, and the landlord sought at the hearing, and obtained, an order for the payment out of that money to him. B C D E F

The landlord gave evidence. The sum of 11s. 6d. resulted from three increases and one decrease made in the years 1945 to 1948. The landlord's evidence as to what happened was as follows :

"Own 73, Egerton Street, Farnworth. Feb., 1938, let to John Thomas Eckersley. I collected rent weekly. Rent was 11s. Three increases of 2d. each, now 11s. 6d. April, 1945, 1946, 1947. I told the old man the rates had risen and so he would have to pay extra rent. He said all right. I did not say he would have to leave or serve any notice. This happened each year. Apr. 16. Went to house, saw defendant, she said her husband had died day before. She asked to become tenant and I refused. She paid the rent on the Saturday. I also took rent on Apr. 22. None since." G H

It was not suggested that these were not increases which would have been justified if the notice in writing required by the Act had been served.

The question that arises can be formulated in this way. The landlord, in alleging that 11s. 6d. was the rent at the date of the death, is necessarily alleging that as between him and the dead man the statutory conditions entitling him

to claim that sum have been fulfilled. That claim is satisfied by a payment into court. Can he, in support of his other claim, tender evidence to show that the statutory conditions have not been fulfilled? In one and the same proceedings a plaintiff cannot, I think, obtain two forms of relief based on inconsistent premises. It is, of course, clear that a tenant cannot contract out of his rights under the Rent Acts. The payment by a tenant of an increase unauthorised by the statute would not, either as a matter of contract or estoppel, preclude him from asserting his rights to recover rent so overpaid under s. 14 of the Act of 1920, or otherwise affect his rights under the Acts. If the defendant had sought to allege that the deceased was at the date of his death a contractual tenant, that allegation would, so far as I can see, have succeeded. In deciding, as I do, that the landlord cannot, having alleged his right to, and obtained, the increased rent, also assert for the purpose of other relief that that increased rent was irrecoverable, I am applying a principle which was applied in *Dexters Ltd. v. Hill Crest Oil Co. (Bradford) Ltd.* (2), and, in somewhat complicated circumstances, in *Re Savoy Estate Ltd.* (3), both decisions of this court. In *Dexters'* case (2), an award was stated in the form of a Special Case with three alternative awards. On the matter coming before the judge, he decided that the first award was right. The buyers demanded and received payment of the amount of that award. They then appealed and sought to contend that the first award was wrong and the second was right. *BANKES, L.J.*, said ([1926] 1 K.B. 354) :

“... I am quite clear that having taken the £2,000 [the amount of the first award] the appellants cannot now be heard to say that the award under which they took the money was based on a wrong view of the law.”

It seems to me the principle applied in these two cases is applicable here. The rent having been claimed and taken, the landlord cannot obtain possession on the basis that he was not entitled to that sum. I have had the advantage of reading the judgment about to be delivered by *DENNING, L.J.*, and I agree with his application to the facts of this case of the principle that a man cannot take advantage of his own wrong. In my opinion, the appeal should be allowed.

*DENNING, L.J.*, read the following judgment. In my early days at the Bar I was engaged in a large number of Rent Act cases, and never did I hear it suggested that, on the death of a contractual tenant intestate, his widow was not protected by the Acts. The common opinion was that she was protected, just as much as the widow of a statutory tenant. Indeed, *MACKINNON, L.J.*, treated it as self-evident : see *Summers v. Donohue* (4) ([1945] 1 All E.R. 600). This view does, however, give rise to legal problems, and when this court was confronted with them in December, 1947, in *Thynne v. Salmon* (1), the majority of the court felt obliged to hold that, on the death of a contractual tenant, no member of his family is protected by the Acts. Many landlords have taken advantage of the potentialities thus newly opened to them. Any landlord who desires to turn out a widow now anxiously asserts, if he can, that the dead husband was a contractual tenant and not a statutory tenant. Such a landlord, on the husband's death, gets to work quickly before the widow takes out letters of administration. He says that the tenancy is vested in the President of the Probate Division, and serves a notice to quit on him. Thereupon, he is in a position to turn the widow out : *Smith v. Mather* (5). This procedure has become so popular with landlords that the President has had to issue a public notice asking that these notices should be sent to the Treasury Solicitor : see [1949] W.N. 130. These landlords are, however, in some difficulty in getting the widow out if they have increased the rent during the husband's time, because the court will readily presume that the increases were validly made by means of a statutory notice, and that, therefore, the husband was not a contractual tenant but a statutory one : *Brock v. Wollams* (6) ([1949] 1 All E.R. 719).



In this present case the landlord has sought to overcome even that difficulty by asserting, quite unashamedly, that, although he increased the rent by the permitted amount, he did not serve a statutory notice of increase, and that, therefore, the increases were invalid, and the husband remained a contractual tenant. If this argument were allowed to prevail, it would put any widow at the mercy of an unscrupulous landlord who chose to assert that he never served a statutory notice of increase, for, the husband being dead, the widow would have no evidence to the contrary. In my opinion, the argument cannot prevail. The landlord has overlooked a very old principle laid down by LORD COKE (Co. Litt. 206 b) long ago which says that no man can take advantage of his own wrong, or, to put it more precisely, that no man can be heard to say that a transaction is invalid if the cause of the invalidity is his own act or default. The other party may say it is invalid, but he may not : see *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* (7). This principle applies with especial force in this case because the provisions about a notice of increase were passed as a weapon of defence for tenants and it would be strange if they could be turned into a weapon of offence by landlords. A tenant may say that an increase was invalid because there was no notice of increase or no proper notice, but a landlord cannot do so because that would be to allow him to take advantage of his own default. This particular landlord has, indeed, so far had it both ways. He has not only received the increased rent for four years, but he has actually sued for and received the increased rent in this action from the widow—a thing which he could only do on the basis that the husband was a statutory tenant. Nevertheless, he has also got an order to evict the widow—a thing which he can only do on the basis that the husband was a contractual tenant. These are inconsistent rights which he is claiming, and he cannot have both : *Dexters'* case (2), *United Australia, Ltd. v. Barclays Bank, Ltd.* (8) ([1940] 4 All E.R. 37). Having got the increased rent, he cannot now turn round and say that the increases were invalid.

Counsel for the landlord argued that the tenant could not be precluded from saying that the notices were invalid, so why should the landlord be precluded from saying likewise. "Estoppels," he said, "ought to be mutual." That old saying has, however, little application in our modern law of estoppel by words or conduct. It certainly has no application to this case, which is not one of estoppel in the strict sense. I express no opinion whether the widow could hereafter be heard to say that the increases were invalid. All I say is that the landlord should not be allowed for his own ends to say that he omitted to serve a statutory notice. He must be taken to have done so, and the widow is protected by the Acts. The appeal should be allowed.

**BUCKNILL, L.J. :** I also agree.

*Appeal allowed with costs.*

Solicitors : *J. H. Milner & Son*, agents for *Leslie M. Lever & Co.*, Manchester (for the defendant) ; *Wetherfield, Baines & Baines*, agents for *J. W. Francis*, Walkden, Manchester (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

*Re* SCARISBRICK'S WILL TRUSTS.  
SCARISBRICK AND ANOTHER *v.* PUBLIC TRUSTEE  
AND H.M. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Roxburgh, J.), October 27, December 12, 21, 1949.]

*Charity—Charitable purpose—Relief of poverty—Public element—Immediate gift for such relations of sons and daughters as should be in needy circumstances.*

By her will, dated July 27, 1911, a testatrix, who died on Apr. 28, 1915, devised and bequeathed all her real and personal estate not otherwise disposed of to her trustees on trust to pay the income thereof in equal shares to her daughters. A. and E., during their joint lives and to the survivor during her life, and after the death of the survivor of them to pay the same income to her son T., during his life, "and after the death of the survivor of my said daughters and son the trustees . . . shall hold the same on trust for such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances . . ." T. died on May 18, 1933. A. died on July 2, 1940, and E. died on May 12, 1948, without having exercised the power of appointment.

**HELD :** while, in the case of gifts for poor relations having perpetual continuance, the courts had uniformly regarded the recipients, not as a class standing in personal relationship to the testator, but as constituting a particular section of poor people, the present gift was one for distribution within the period allowed by the rule against perpetuities, and the recipients were to be regarded as beneficiaries under a family trust, and, therefore, the gift was not charitable.

*Dicta of SIR WILLIAM GRANT, M.R., in A.-G. v. Price* (1810) (17 Ves. 374), and of LORD GREENE, M.R., in *Re Compton* ([1945] 1 All E.R. 201), applied.

[AS TO HOW FAR "PRIVATE" CHARITIES ARE LEGAL CHARITIES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 127-138, paras. 169-179; and FOR CASES, see DIGEST, Vol. 8, pp. 261-263, Nos. 240-252.]

- (1) *A.-G. v. Buckland*, (1742), cited in Amb. 71; 44 Digest 890, 7478.
- (2) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.

- (3) *Isaac v. Defriez*, (1754), Amb. 595; 17 Ves. 373, n.; 44 Digest 890, 7479.
- (4) *A.-G. v. Price*, (1810), 17 Ves. 371; 8 Digest 242, 12.

- (5) *White v. White*, (1802), 7 Ves. 423; 8 Digest 242, 10.

- (6) *Bernal v. Bernal*, (1838), as reported in 3 My. & Cr. 559, n.; 44 Digest 533, 3499.

- (7) *Brown v. Whalley*, [1866] W.N. 386.

- (8) *Gillam v. Taylor*, (1873), L.R. 16 Eq. 581; 42 L.J.Ch. 674; 28 L.T. 833; 8 Digest 242, 14.

- (9) *A.-G. v. Northumberland (Duke)*, (1877), 7 Ch.D. 745; 47 L.J.Ch. 569; varied without affecting this point, (1878), 38 L.T. 245; 8 Digest 306, 856.

- (10) *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 18; [1949] Ch. 572; [1949] L.J.R. 1228; affirmed in part and reversed in part, [1949] 2 All E.R. 985.

- (11) *Spiller v. Maude*, (1881), 32 Ch.D. 158, n.; 8 Digest 262, 245.

- (12) *Re Gosling*, (1900), 48 W.R. 300; 8 Digest 244, 27.

- (13) *Re Buck*, [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 8 Digest 262, 246.

- (14) *Re Sir Robert Laidlaw's Will Trusts*, (1935), unreported.

ADJOURNED SUMMONS to determine whether an immediate gift by will of part of a trust fund to relations in needy circumstances constituted a valid charitable trust. ROXBURGH, J., held that the gift was not charitable. The

facts appear in the judgment. The relevant words of the will are set out in the headnote.

*R. L. Edwards* for the plaintiffs, the trustees of the will of the testatrix.

*Wilfrid M. Hunt* for the Public Trustee, executor of the will of the son of the testatrix.

*D. B. Buckley* for the Attorney-General.

*Cur. adv. vult.* A

Dec. 21. **ROXBURGH, J.**, read the following judgment. Lady Scarisbrick, who died on Apr. 28, 1915, by her will, dated July 27, 1911, appointed her son, Sir Tom Talbot Leyland Scarisbrick, and her daughters, Alexandra Emma Von Lang Puchof and Erneste Beatrice Kraemer, to be the executors and trustees of her will. By cl. 11 she devised and bequeathed all her real and personal estate in the United Kingdom of Great Britain and Ireland and in the British Dominions beyond the seas not otherwise disposed of unto her trustees on trust to pay the income thereof in equal shares to her daughters during their joint lives and to the survivor of them during her life, and after the death of the survivor of them to pay the same income to her son, Sir Tom Talbot Leyland Scarisbrick, Bart., during his life, and after the death of the survivor of her daughters and son the trustees for the time being of her will were to hold the same on trust for such relations of her son and daughters as, in the opinion of the survivor of her son and daughters, should be in needy circumstances, and for such charitable objects, either in Germany or in the United Kingdom of Great Britain and Ireland (preferably charitable objects connected with the Roman Catholic Church and faith), for such interests, and in such proportions and manner in every respect as the survivor of her son and daughters should by deed or will appoint. The testatrix's son, Sir Tom, died on May 18, 1933. Mrs. Puchof died on July 2, 1940, and Mrs. Kraemer died on May 12, 1948. The power of appointment was not exercised.

It appeared early in the argument that there might be some conflict between the heir at law, who was represented by counsel, and other persons, who were not represented, as to the destination of any part of the fund not effectually given to charity, and it was thereupon agreed that my decision should be confined to the question whether the whole, or, if not, how much, of the fund was thus effectually given. The bequest plainly falls into two parts, and the second part is admittedly charitable. The essential features of the first part of the bequest are that its objects are relations of the son and the two daughters of the testatrix "in needy circumstances," that the survivor of the son and daughters is to determine which relations are in fact objects of the bounty and also which members of that class are to receive it, and that distribution is to be made on the death of the survivor once and for all. I cannot escape by way of construction from the maze of authority which lies ahead.

The trend of authorities down to 1929 is well summarised in **TUDOR ON CHARITIES**, 5th ed., where it is said (p. 26) :

"Trusts for the benefit of poor relations, kinsmen, or descendants exceeding the limit allowed by the rules of remoteness, are upheld as charities."

The author also says (*ibid.*, 27) :

"As regards gifts intended for immediate distribution, the decisions are conflicting. In some cases it has been held that a gift for 'poor kindred' or poor relations, like a gift for 'relations,' is to be confined to the statutory next of kin, on the footing that such a gift, not being charitable, would be void for uncertainty were it not so restricted. On the other hand, there have been several cases in which such gifts have been charitable and not confined to statutory next of kin. And **LORD HARDWICKE** is said to have observed in *A.-G. v. Buckland* (1), that where a bequest is to relations it



is to be confined to next of kin, but where it is to 'poor' relations, the construction has been more large, and has been extended to those who were of kin and objects of charity. The sounder view is thought to be that a gift for immediate distribution among poor relations, kindred, and so forth, is charitable except in cases where the intention of the donor, derived from the construction of the documents, is to confine the benefit of the gift to statutory next of kin. Outside this limit no line can be drawn, and the objects ought not to be treated as less extensive where the gift is for immediate distribution than where a perpetual trust is intended."

This view, however, was expressed before the decision of the Court of Appeal in *Re Compton* (2). If I am free to apply the principles laid down in *Re Compton* (2), and expressly stated to apply to all categories of charity, I shall be in no doubt. In that case LORD GREENE, M.R., said ([1945] 1 All E.R. 201) :

"... no gift can be charitable in the legal sense unless it is of the necessary public character. The proposition is true of all charitable gifts... When I come to deal with the 'poor relations' cases it will be found that 150 years ago the essential nature of this requirement was perhaps not as clearly appreciated as it is to-day."

LORD GREENE then gives illustrations of gifts which are wanting in the necessary public character, and one of the illustrations seems to me to be this case, that is (*ibid.*) :

"... when the claimants, in order to establish their status, have to assert and prove... that they stand in some specified relationship to the individuals A.B., C.D., and E.F... In such a case... a purely personal element enters into and is an essential part of the qualification which is defined by reference to something, *i.e.*, a personal relationship to individuals or an individual which is in its essence non-public."

The whole court agreed with this judgment, which in principle decides the point before me against charity. The same principle would, however, decide all "poor relations" cases against charity, and, in a later part of his judgment, LORD GREENE discusses some of these cases in a passage which I must read in full. His Lordship says (*ibid.*, 205) :

"I must now turn to the 'poor relations' cases on the analogy of which COHEN, J., felt himself constrained against his own view to decide against the appellants. The authorities relied on by the respondents are as follows. In *Isaac v. Defriez* (3) the gifts were (i) a gift of two annuities to the poorest relations of the testator and of his wife ; (ii) a gift of income to one poor relation of the testator 'for a portion in the way of marriage and putting him or her out in the world' ; and (iii) a similar gift of income to one poor relation of his wife. These gifts were upheld as good charitable gifts but no reasons for the decision appear in the report. This case was followed in *A.-G. v. Price* (4), where the gift was in favour of the testator's 'poor kinsmen and kinswomen and their offspring and issue which shall dwell in the county of Brecon.' SIR WILLIAM GRANT, M.R., followed *Isaac v. Defriez* (3), saying (17 Ves. 374) : 'This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance, in favour of a particular description of poor ; and is not like an immediate bequest of a sum to be distributed among poor relations.' In an earlier case *White v. White* (5), SIR WILLIAM GRANT had supported as charitable a gift by a testatrix for the purpose of putting out 'our poor relations' apprentices. By a codicil this gift was confined to two families. SIR WILLIAM GRANT appears to have thought that the case was similar to an earlier case of his own where 'a great number of Jews were the objects' ; such a gift would no doubt be regarded to-day as satisfying the well-

established rule that a good charitable gift must be for the benefit of the public or a section of the public, a test which SIR WILLIAM GRANT does not appear to have taken into consideration in *White v. White* (5) or in *A.-G. v. Price* (4). *Bernal v. Bernal* (6) was a case in which the only matter decided arose on the construction of a will providing for poor relations who were in fact (as the will was construed) the male descendants of certain named relatives of the testator. It appears from the petition that the gift was established as a charity under a decree of Dec. 9, 1728. What the reasons were for the decision in that behalf does not appear and when the question of construction was raised in 1838 before LORD COTTENHAM, L.C., there was no issue as to the charitable nature of the bequest. In *Brown v. Whalley* (7) where the gift was for the relations of the testator 'who might happen to be in want or fall to decay' the charity had similarly been established by a decree of the year 1763. In *Gillam v. Taylor* (8) the gift was in favour of such of the lineal descendants of the testator's maternal uncle as they might severally need. This was held to be a good charitable gift on the authority of *Isaac v. Defriez* (3) and *A.-G. v. Price* (4). In *A.-G. v. Duke of Northumberland* (9), the will as construed by SIR GEORGE JESSEL, M.R., was in favour of poor persons generally with a preference for poor persons who were kindred of the testator, and in that respect the case was similar to the 'founder's kin' cases. But SIR GEORGE JESSEL in his judgment referred to *Isaac v. Defriez* (3) and *A.-G. v. Price* (4) and did not cast any doubt on the correctness of those decisions.

From this review of the authorities it will be seen that they are really all derived from *Isaac v. Defriez* (3) and *A.-G. v. Price* (4). We are invited to overrule them. I agree that they are far from satisfactory and the original decisions were given at a time when the public character of a charitable gift had not been as clearly laid down as it has been in more modern authorities. If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently since I should have thought that their purpose was a private family purpose lacking the necessary public character. But it is in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations on the faith that they were charitable and many testators have no doubt been guided by these decisions. The cases must at this date be regarded as good law although they are, perhaps, anomalous.

In these circumstances the question arises whether we ought to extend the analogy of these decisions so as to cover a trust of the kind now in controversy. Taking the view which I do, as already expressed, I do not think that we are bound or ought to do so. There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded: whereas in the case of an educational trust where there is no poverty qualification, the funds may at any time be applied for the purpose of educating a member of the family for whose education ample means are already available, thus providing a purely personal benefit and one freed, incidentally, from the burden of income tax. Failing such a ground of distinction, I can only regard the 'poor relations' cases as anomalous and I prefer to let them remain as such rather than to extend the anomaly to a different class of case."

Though LORD GREENE cited the judgment of SIR WILLIAM GRANT, M.R., in *A.-G. v. Price* (4), where he said (17 Ves. 374):

"It is to have perpetual continuance, in favour of a particular description

of poor ; and is not like an immediate bequest of a sum to be distributed among poor relations,"

it was not necessary for him to discuss the validity of this distinction or the conflict of authority existing with regard to the second class of case, and he did not do so. He declined to overrule the cases cited to him, all of which seem to belong to the first class, mainly by applying the principle of "*stare decisis*."

A No such principle can be applied to the present case. The decisions where there is no perpetuity have long been conflicting. Many of these have been cited in argument, but I need not recapitulate them because their general purport is accurately stated in the passage which I have read from *TUDOR ON CHARITIES*, and little, if any, further light can be obtained from a study of the reports. All that is clear is that the decisions are conflicting. Accordingly, there is here no room for the principle of "*stare decisis*."

B LORD GREENE did not, however, finally decide that the perpetual trusts for poor relations cited to him could only be allowed to stand on this principle. He said ([1945] 1 All E.R. 206) :

C "There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded."

D LORD GREENE said "may be," not "is." It seems that none of the "poor relations" cases has ever been avowedly based on any such principle, but HARMAN, J., in *Gibson v. South American Stores (Gath and Chaves), Ltd.* (10), formally adopted it. In the Court of Appeal, on the other hand, SIR RAYMOND EVERSHED, M.R., expressed reservations in which the whole court concurred. He said ([1949] 2 All E.R. 996) :

E "... I feel it right, if the matter shall hereafter be considered in a higher court, to say that I must not be taken to accept the view that the ground for justifying such decisions as the poor relations cases is, as HARMAN, J., expressed it ([1949] 2 All E.R. 23) : 'The explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories.' I think, as LORD GREENE, M.R., stated in *Re Compton* (2), that may be an explanation. On the other hand, it may be that they simply must be regarded now as a well-established anomaly. F I find it unnecessary in the circumstances to say any more or to express a view one way or another whether the principle HARMAN, J., found should be treated as well-established, or whether the three cases, *Spiller v. Maude* (11), *Re Gosling* (12) and *Re Buck* (13), ought now to be regarded as rightly decided. I think, so far as I am concerned, this question [the question before the court in the *South American Stores* case (10)] has been determined G by *Re Sir Robert Laidlaw's Will Trusts* (14), on grounds which are not apparent, and I follow them without affirming or disaffirming any of the grounds relied on by HARMAN, J."

H Neither the Court of Appeal in *Re Compton* (2), nor HARMAN, J., nor the Court of Appeal in *Gibson v. South American Stores (Gath and Chaves), Ltd.* (10), when considering whether gifts for the relief of poverty have some special quality, took account of the distinction drawn by SIR WILLIAM GRANT in *A.-G. v. Price* (4) between trusts to have perpetual continuance in favour of a particular description of poor and immediate bequests for distribution among poor relations. Yet this distinction has stood without challenge almost as long as the poor relations cases themselves, and it is only trusts of the former class which have enjoyed uniformity of decision. As I have a case akin to the latter class, I have to decide whether I am going to reject the distinction drawn by SIR WILLIAM GRANT and assimilate the two classes of case, or whether I am going to apply



to the latter class the principles laid down in *Re Compton* (2) and thus resolve the conflict of authority.

It seems to me impossible to hold that in all cases of gifts for immediate distribution among poor relations the relief of poverty has some special quality which provides the necessary public character. It could not, for instance, convert a trust for the testator's children in needy circumstances into a public trust. Accordingly, a line must be drawn somewhere. This counsel for the Attorney-General concedes, and he also concedes that the decision in *Gibson v. South American Stores (Gath and Chaves), Ltd.* (10) would not necessarily render charitable a gift by the will of a proprietor of a business for immediate distribution among poor employees, but he will have nothing to do with the distinction drawn by SIR WILLIAM GRANT. He draws attention to the difference in emphasis between a gift to a limited class of very near relations where (as he submits) the motive of personal relationship must be paramount to the motive of the relief of poverty, and a gift to an uncertain class extending to distant relations where (as he submits) the motive of relief of poverty must be paramount, and out of this difference of emphasis he evolves a principle of construction, namely, that the court will decree any gift to poor relations (whether immediate or perpetual) to be charitable if the relief of poverty appears to be the dominant motive.

I do not see how the necessary public character of a trust could depend on any principle of construction, least of all on one based on the presumed motive of the donor. Moreover, counsel's argument runs counter, not only to SIR WILLIAM GRANT's distinction between perpetual gifts and gifts for immediate distribution, but also to the reasoning of LORD GREENE in *Re Compton* (2), because LORD GREENE deliberately refused to found any distinction in principle on the difference in emphasis to which counsel refers. LORD GREENE says ([1945] 1 All E.R. 202) :

"The fact that in cases where a personal element forms an essential part of the qualification the numbers involved may be large does not appear to me to make any difference to the principle to be applied. Once that element is present numbers can make no difference. The gift is in such a case a personal gift. It may, of course, fail for uncertainty, but that is neither here nor there."

The whole Court of Appeal concurred, and, therefore, counsel's argument must fail in this court. I cannot accept his proposed test, merely observing in passing that, if I had to apply such a test, I should not in the present case hold that relief of poverty was the paramount motive.

It is, indeed, doubtful whether the distinction drawn by SIR WILLIAM GRANT is as a whole consistent with the reasoning of LORD GREENE, but, at any rate, that part of it which relates to immediate bequests is in full accord. In the case of gifts for poor relations having perpetual continuance the courts have (rightly or wrongly) uniformly regarded the necessarily fluctuating body of recipients, not as a class standing in a personal relationship to the testator, but as constituting a particular section of poor people, but where the distribution among poor relations is to be completed within the period allowed by the rule against perpetuities, there is no such uniformity, and to regard such recipients, not as beneficiaries under a family trust, but as a particular section of the poor, would, in my judgment, be to defy, not only SIR WILLIAM GRANT, but also the Court of Appeal in *Re Compton* (2). It has been conceded that, if this should be my decision, one half of the residuary estate, and no more, is effectively devoted to charity, and I so declare.

*Order accordingly. Costs to be taxed and paid out of the estate in due course of administration.*

Solicitors : *Pritchard, Englefield & Co.* (for the plaintiffs and the Public Trustee) ; *Treasury Solicitor* (for the Attorney-General).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

## HALES v. BOLTON LEATHERS, LTD.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), December 12, 13, 20, 1949.]

*Industrial Injury—Industrial disease—Dermatitis—Attack before July 5, 1948—Recurrence after that date—Workman insured under National Insurance (Industrial Injuries) Act, 1946—Right of workman to workmen's compensation—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 89 (1), proviso (a).*

By s. 89 (1) of the National Insurance (Industrial Injuries) Act, 1946, workmen's compensation is not payable in respect of any employment on or after the appointed day (July 5, 1948), provided that "(a) the [*inter alia*, Workmen's Compensation Act, 1925] shall continue to apply to cases . . . where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of a disease or injury prescribed for the purposes of Part IV of [the National Insurance (Industrial Injuries) Act, 1946], the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury."

On Nov. 27, 1947 (before the appointed day) a workman was certified to be suffering from dermatitis, a disease coming within the Workmen's Compensation Act, 1925, and Part IV of the National Insurance (Industrial Injuries) Act, 1946. He obtained compensation under the Act of 1925 in respect of total incapacity until Dec. 12, 1947, when he returned to work and remained at work until Aug. 13, 1948 (after the appointed day), from and after which date he was at times totally and at times partially incapacitated. The later attacks were recurrences of the original attack. The workman had been insured under the Act of 1946 against the disease and had obtained the benefits provided by the Act of 1946 in respect of his later incapacity, and he also claimed compensation under the Workmen's Compensation Act, 1925.

**HELD :** the right to compensation in respect of the incapacity as from Aug. 13, 1948, arose after the appointed day, and, therefore, in accordance with the exception in proviso (a) to s. 89 (1) (a) of the Act of 1946, the workman was not entitled to workmen's compensation.

[FOR THE NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946, s. 89 (1), see HALSBURY'S STATUTES, Vol. 39, p. 400.]

Case referred to :

(1) *Eaton v. Wimpey & Co., Ltd.*, [1937] 4 All E.R. 583 ; [1938] 1 K.B. 353 ; 107 L.J.K.B. 259 ; 158 L.T. 6 ; Digest Supp.

APPEAL by the employers from an award by His Honour JUDGE WALMSLEY, K.C., sitting at Bolton County Court, dated July 15, 1949, of compensation under the Workmen's Compensation Act, 1925. The learned judge held that in the case of an industrial disease the right to compensation arose once for all as soon as the workman was certified to be suffering therefrom, so that in the present case the right had arisen before the appointed day and was not excluded by the National Insurance (Industrial Injuries) Act, 1946. The Court of Appeal reversed the decision of the learned judge, allowed the appeal, and ordered the matter to be remitted to the county court to enter an award for the employers.

*Beney, K.C.*, and *R. Lambert* for the employers.

*Melford Stevenson, K.C.*, and *C. M. W. Elliott* for the workman.

*Cur. adv. vult.*

Dec. 20. **SOMERVELL, L.J.**, read the following judgment of the court. This case concerns the transition from the statutory scheme for dealing with industrial accidents or disease embodied in the Workmen's Compensation Acts,

1925 to 1945, to the scheme which has taken its place and is to be found in the National Insurance (Industrial Injuries) Act, 1946. The latter Act came into force on the appointed day which was July 5, 1948.

In the present proceedings the workman claims compensation under the Workmen's Compensation Acts in respect of total incapacity from dermatitis from Aug. 13, 1948, to Dec. 8, 1948, partial from that date to Dec. 30, 1948, and from that date total to Mar. 15, 1949, and partial thereafter. These dates, as will be seen, are after the appointed day. On Nov. 27, 1947, before the appointed day, the workman, while in the employ of the present employers, was certified under s. 43 (1) (i) of the Workmen's Compensation Act, 1925, to be suffering from dermatitis produced by dust or liquids, a disease coming within sched. III to the Act, as amended by the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (S.R. & O., 1929, No. 2), art. 1, and to be thereby disabled as from Nov. 26 from earning full wages at the work at which he had been employed. He was under total incapacity until Dec. 12, 1947, on which date he returned to his old work, being the employment to the nature of which the disease was due. He remained at that work until the outbreaks of dermatitis which are the subject of the present claim. A doctor gave evidence, which was accepted, that there was a direct connection between all the attacks starting with that in 1947. The latter attacks were recurrences of the original attack, the workman never having been cured, but having again been exposed to the same irritants.

It is agreed that, if the Act of 1946 is applicable, the dermatitis from which the workman suffered is a disease covered by that Act and the regulations thereunder. That Act applies, subject to any special provisions, to persons employed in insurable employment after the appointed day. The workman was so employed. The workman applied for and obtained the benefits as provided for by that Act in respect of the periods covered by the present claim on the basis that that Act was applicable in respect of his incapacity during those periods. The question is whether by the Act of 1946 the provisions of the Workmen's Compensation Acts are continued so as to give a right to compensation under those Acts in respect of the periods for which the claim is brought. The learned county court judge decided in favour of the workman and from that decision the employers appeal.

The construction of the provisions of the Act of 1946 on which this appeal has to be decided depend on the legal position under the Workmen's Compensation Act, 1925, generally, and in particular with regard to industrial diseases. The general position is familiar, but it is necessary to summarise it. Section 1 of the Act of 1925 provides :

"(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation . . ."

The employer is obviously the employer at the time of the accident. There is a proviso to s. 1 (1) that the employer shall not be liable in respect of an injury which does not disable the workman for a period of at least three days. We are not concerned with cases where the accident results in death. Section 9 (1) lays down in other cases that the compensation is payable where total or partial incapacity for work results from the injury. The compensation is to be a weekly payment during the incapacity calculated in accordance with certain rules. We have to construe later the words in s. 89 (1) (a) of the Act of 1946 "a right to compensation arises or has arisen in respect of employment." It seems to us fairly plain that a right to compensation arises if and when the workman can establish total or partial incapacity resulting from the injury by accident. There may be an interval between the accident and the incapacity. There may be a temporary recovery and then further incapacity resulting from the injury. All these will arise "in respect of the employment" at the time of



A the injury by accident. Section 43 (1) of the Workmen's Compensation Act, 1925, applies the Act to certain industrial diseases, including that in question here, when the disease is due to the nature of the workman's employment. Industrial diseases result normally, perhaps always, from exposure over a period of time to certain conditions. They do not, like accidents, result from a definite event at a definite time. A man has been working at, what we will call for brevity, a disease-producing employment with A. for six months, with B. for six months, with C. for six months, and then with D. After three months with D. the disease develops so as to disable the workman. In such a case s. 43 (1) provides that the disease, when certified, is to be regarded as a personal injury by accident. The last employer in the disease-producing employment—in the case put, D.—is liable, but, by sub-s. (1) (c) (iii), if the disease is of such a nature as to be contracted by a gradual process, other employers who have employed the workman in the disease-producing employment within the previous twelve months can be called on to contribute. In the case put, C. and B. could be called on, but not A.

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H The evidence in this case and in other reported cases shows that where a man has once had an industrial disease it is liable to recur if he continues in the disease-producing employment. This was recognised by s. 43 (1) (b) which deprives a workman of his compensation if he wilfully and falsely represents in writing at the time of entering a new disease-producing employment that he has not previously suffered from the disease. Apart from this provision, s. 43, as we read it, draws no distinction between an original attack and a recurrence provided that at the time of the recurrence or within the previous twelve months the workman has been employed in the disease-producing employment and the recurrence is due to that employment. In such a case the last employer is liable on the basis stated above. It is irrelevant that the man is more susceptible because he has had an attack of the disease before. This is clearly brought out, we think, in *Eaton v. Wimpey & Co., Ltd.* (1). In that case the workman suffered from dermatitis and received compensation from the employer from 1933 till June, 1935, when he compounded all claims against his then employer for a lump sum. He left that employer, and in May, 1936, became employed by the respondents in the case. In that employment he had to handle dry cement which led to a recurrence in July, 1936, of dermatitis. The county court judge found that, by reason of the attacks of dermatitis in 1933 to 1935, the workman had become susceptible to the disease and had not completely recovered from those attacks. The respondents contended that the attack of the disease in 1936 was merely a recurrence of the original "accident" in 1933. This court held that the respondents were, within the meaning of s. 43 (1) (c), the employers who last employed the workman during the twelve months before July, 1936, in the employment to the nature of which the disease was due, and that they were liable. This case shows that a recurrence of an industrial disease, due in part to the original attack and in part to the continued employment in the relevant process, gives a right to compensation against the second employer, the susceptibility arising from the original attack being irrelevant, although, if the employer at that time had employed the man within the twelve months, whether the man had had an attack or not, he could have been called on to contribute. This, as will appear, is important in considering the learned county court judge's reasons for his decision in the present case.

H We will now turn to the National Insurance (Industrial Injuries) Act, 1946. Section 1 (1) deals with accidents in the ordinary sense and insures all persons employed in insurable employment

"... in manner provided by this Act against personal injury caused on or after the appointed day by accident arising out of and in the course of such employment."

This seems clear. One would expect to find that, if the accident occurred before

the appointed day, the workman, having no rights under this Act, would have his rights under the Workmen's Compensation Acts preserved in respect of incapacities continuing or arising after the appointed day, and that those suffering accidents after the appointed day would be entitled to benefits under the new scheme but not under the old. Part IV of the Act of 1946 extends by s. 55 (1), the insurance, *inter alia*, to prescribed diseases of which dermatitis is one, being a disease due to the nature of the insurable employment and "developed on or after the appointed day." Bearing in mind the manner in which s. 43 of the Act of 1925 dealt with industrial diseases and the decision in *Eaton's case* (1), we would have said that the present workman's dermatitis in August, 1948, developed after the appointed day. The repeals and transitional provisions are contained in s. 89 of the Act of 1946, and it is on the construction of that section that this appeal depends. Section 89 (1) says :

"Workmen's compensation shall not be payable in respect of any employment on or after the appointed day, and accordingly the enactments set out in sched. IX to this Act are hereby repealed as from that day to the extent mentioned in the third column of that schedule : provided that— (a) the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of a disease or injury prescribed for the purposes of Part IV of this Act, the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury . . ."

The opening words refer back to the opening words of s. 1 (1) of the Workmen's Compensation Act, 1925, which I have cited. If in any employment "on or after the appointed day" there is personal injury by accident, no claim under the Workmen's Compensation Acts arises, and the case falls under the Act of 1946. The enactments set out in sched. IX include the whole of the Act of 1925. The legislation obviously could not stop there. It must make provision for dealing with the effects continuing after the appointed day resulting from injury by accidents in any employment before the appointed day. If incapacity existed on the appointed day the employer must have a right to maintain that it had later ceased and the workman to maintain in respect of accidents before the appointed day that incapacity had arisen or increased after that day. At least, so one would anticipate. The enactments, including the Act of 1925, are, under the opening words of the proviso, to continue to apply to cases "where a right to compensation arises or has arisen in respect of employment before the appointed day."

We will take a case, put by BUCKNILL, L.J., in the course of the argument, of a groom kicked by a horse before the appointed day. The groom is not "disabled" at the time and is able to carry on with his work. After the appointed day injury develops and he has to go to hospital. His right to compensation, as it seems to us, "arises" at the time of his disability or incapacity. The Act of 1925 gives compensation, not for pain and suffering, but for total or partial incapacity, but in the case put, this right, though arising after the appointed day, is in respect of employment before the appointed day, and the proviso to s. 89 (1) preserves his rights under the Workmen's Compensation Acts. The case where incapacity is continuing at the appointed day is plainly covered. There is also, as it seems to us, no difficulty about the case where there has been a temporary recovery at the appointed day, but later incapacity, the result of the pre-appointed day injury, re-develops. This re-development gives a right to compensation which "arises" after the appointed day, but it is in respect of employment before the appointed day. If this is right, then the words "the right to compensation" are given what seem to us their natural construction, and, so far as ordinary accidents are concerned, the provisions clearly mean what

one would expect them to. The following words show that this provision is not to apply completely, at any rate, to the case of industrial diseases. The words themselves seem to us to confirm the construction which we have placed on the earlier words. If it is necessary in the case of a disease to exclude from the continuance of the Workmen's Compensation Acts cases where the right does not arise before the appointed day, this implies that in the case of ordinary accidents the Acts may continue and apply where the right does not arise before, that is, arises after the appointed day, but in respect of employment before it, as in the first and third cases we have considered above.

In the present case, in our opinion, the right to compensation in respect of the incapacity as from August, 1948, arose after the appointed day. The Workmen's Compensation Acts do not, therefore, apply if the workman has been insured under the Act of 1946 against that disease. It is agreed that this condition is fulfilled. The learned county court judge held that in the case of an industrial disease the right to compensation arises once for all as soon as the workman is certified to be suffering from a disease mentioned in sched. III to the Act of 1925 and to be thereby disabled. In the present case he held this was on Nov. 27, 1947. This may well be right if thereafter the workman is never employed in what we have called the disease-producing work. What we have said above with regard to s. 43 and to *Eaton's* case (1) seems to us to show that this is not the position if there is subsequent employment in the work which leads to the disease and there is a recurrence. The learned county court judge was referred, as we were, to various paragraphs in the regulations made under the Act. He took the view that these regulations could not affect the construction of the Act. The regulation-making power is conferred by s. 89 (1) (b), and is as follows :

"regulations may make such transitional or consequential provisions as appear to the Minister to be necessary or expedient, having regard to the repeal of the said enactments in relation to diseases and to injuries not caused by accident, including provision for modifying or winding-up any scheme made thereunder."

We agree that these regulations could not contradict the Act. They might, we think, properly be referred to as working out in detail the provisions of the Act consistently with their terms. So far as they are relevant to the present issue, they seem to us to set out in greater particularity the effect which, so far as the present case is concerned, follows from the words of s. 89 (1) (a). The only provision of the old scheme which is disregarded in the transitional provisions is the spread of liability over the twelve months. We can illustrate what we mean by the case of a man who developed an industrial disease for the first time three months after the appointed day, having been employed in the disease-producing work for the previous twelve months up to the appointed day by A. and thereafter by B. He would clearly be entitled to the benefits under the Act of 1946, and would have no claim under the Workmen's Compensation Acts. A., who could have been called on to contribute under s. 43, is free of all liability. The general basis of the two schemes is so different that one can well understand not further complicating the change over. We think the appeal should be allowed.

*Appeal allowed. Case remitted to county court.*

Solicitors : Gregory, Rowcliffe & Co., agents for John Taylor & Co., Manchester (for the employers) ; Corbin, Greener & Cook, agents for Morrish & Co., Leeds (for the workman).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]



**SURREY COUNTY VALUATION COMMITTEE v.  
CHESSINGTON ZOO, LTD.**

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Cassels, J.J.).  
December 13, 14, 15, 21, 1949.]

*Rates—Assessment—Zoological gardens—Valuation on profits basis—Exceptional hereditament—Factors to be considered—Receipts from employment of tenant's capital—Gains from hiring out animals—Profits tax.* A

The zoological garden of the ratepayers included a mansion with a park, brick and timber buildings suitable for a circus, cages for animals, an amusement park, and licensed and unlicensed refreshment rooms. It was favourably situated near London and well served by railway and omnibus services, and there was no comparable zoological garden in the south of England. On appeal to quarter sessions the appeals committee valued the hereditament by estimating from the ratepayers' trading profit in 1947 the profits for the five following years and deducting therefrom sums for directors' emoluments, audit fees, sale of produce, and depreciation. The resulting figure of £24,557, the net trading receipts before deduction of rates, was then divided into the tenant's share (£12,278, or half) and an equal amount further divided between the landlord and the rating authority, giving after deduction of rates, a gross valuation of £7,230 and a rateable value of £6,507. B C

**HELD :** (CASSELS, J., *dissentiente* and HILBERY, J., *dubitante*) (i) the hypothetical tenant must be regarded as taking the hereditament equipped for a zoological garden and amusement park ready for use in his business, and it should not be valued by ascertaining the rent which the mansion and park would command as a private residence and adding thereto a percentage on the cost of cages and buildings and of laying out the premises and something for the favourable transport facilities. D

(ii) the premises, being an exceptional hereditament never likely to be let and not capable of being valued by comparison with other similar properties, quarter sessions, if satisfied that there was no other way of arriving at a hypothetical rental value, were entitled to value the premises by reference to the trading profit. E

(iii) the valuation made was not wrong merely because quarter sessions had taken into account the earnings of tenant's capital and receipts from letting animals to owners of smaller shows touring the country or because liability to profits tax was disregarded. F

*Per CASSELS, J.* Where the profits basis has to be considered as an element in assessment for rating, what items are to be included in a calculation made for the purpose of ascertaining the rent which a prospective tenant would be prepared to pay for the exclusive right to attempt to earn the same profit on the hereditament? I think these profits should be considered at their lowest, that nothing should be included which could reasonably be excluded both in receipts and expenditure, that due allowance should be made for the change of personality in control, for the speculative character of the business, for the risks dependent on times and weather if the undertaking is affected thereby, and for the fluctuating costs and difficulties of labour and material. I would send the case back to the appeals committee with instructions to give further consideration to the items I have mentioned and to leave out of their calculation of profits those profits relating to the letting out of animals. As I am in a minority, the result is that both appeals are dismissed. G H

[AS TO VALUATION OF SPECIAL CLASSES OF PROPERTY generally, see HALSBURY, Vol. 27, pp. 396-434, paras. 829-870 ; and FOR CASES, see DIGEST, Vol. 38, pp. 534-567, Nos. 796-1055, and Digest Supp.]

Cases referred to :

- (1) *Mersey Docks v. Liverpool Overseers*, (1873), L.R. 9 Q.B. 84 ; 43 L.J.M.C. 33 ; 29 L.T. 454 ; 38 J.P. 21 ; 38 Digest 563, 1016.
- (2) *Kingston Union v. Metropolitan Water Board*, [1926] A.C. 331 ; 95 L.J.K.B. 605 ; 134 L.T. 483 ; 90 J.P. 69 ; 38 Digest 547, 901.
- (3) *R. v. Verrall*, (1875), 1 Q.B.D. 9 ; 45 L.J.M.C. 29 ; *sub nom.*, *Verrall v. Croydon Union*, 33 L.T. 379 ; *sub nom.*, *Croydon Union v. Verrall*, 40 J.P. 550 ; 38 Digest 526, 732.
- (4) *Clark v. Fisherton-Angar*, (1880), 6 Q.B.D. 139 ; *sub nom.*, *Clark v. Alderbury Union Assessment Committee*, 50 L.J.M.C. 33 ; 45 J.P. 358 ; 38 Digest 608, 1344.
- (5) *Dodds v. South Shields Poor Law Union Assessment Committee*, [1895] 2 Q.B. 133 ; 64 L.J.Q.B. 508 ; 72 L.T. 645 ; 59 J.P. 452 ; 38 Digest 565, 1041.
- (6) *Cartwright v. Sculcoates Union*, [1900] A.C. 150 ; 69 L.J.Q.B. 403 ; 82 L.T. 157 ; 64 J.P. 229 ; 38 Digest 564, 1025.
- (7) *Racecourse Betting Control Board v. Brighton Corporation*, [1941] 2 All E.R. 595 ; [1941] 2 K.B. 287 ; 111 L.J.K.B. 9 ; 165 L.T. 230 ; 105 J.P. 365 ; *affmd.*, [1942] 1 All E.R. 611 ; [1942] 2 K.B. 90 ; 111 L.J.K.B. 542 ; 167 L.T. 250 ; 106 J.P. 177 ; 2nd Digest Supp.
- (8) *Edinburgh Street Tramways Co. v. Edinburgh Corpn.*, [1894] A.C. 456 ; 63 L.J.Q.B. 769 ; 71 L.T. 301 ; 43 Digest 354, 113.
- (9) *Yeovil Rural District Council v. South Somerset and District Electricity Co., Ltd.*, [1947] 1 All E.R. 669 ; [1948] 1 K.B. 130 ; [1948] L.J.R. 746 ; 177 L.T. 319 ; 111 J.P. 287 ; 2nd Digest Supp.
- (10) *Mersey Docks and Harbour Board v. Lucas*, (1881), 51 L.J.Q.B. 114 ; 46 J.P. 388 ; 1 Tax Cas. 385 ; *on appeal*, (1883), 8 App. Cas. 891 ; 53 L.J.Q.B. 4 ; 49 L.T. 781 ; 48 J.P. 212 ; 2 Tax Cas. 25 ; 42 Digest 691, 1058.
- (11) *Re Spanish Prospecting Co., Ltd.*, [1911] 1 Ch. 92 ; 80 L.J.Ch. 210 ; 103 L.T. 609 ; 36 Digest 447, 1127.

CASE STATED by the Rating Appeals Committee of Surrey Quarter Sessions.

The ratepayers, Chessington Zoo, Ltd., were the occupiers of a hereditament included in the valuation list for the borough of Surbiton and described as zoological gardens, restaurant, offices, stores, lodges, car park, buildings, land and premises. Until June 14, 1948, it was assessed at £800 gross value and £663 rateable value. On Feb. 10, 1948, proposals were made by the rating authority to increase the assessment to £3,000 gross value and £2,497 rateable value, and, on Mar. 24, 1948, by the Surrey County Valuation Committee to increase it to £8,889 gross value and £8,000 rateable value. The proposals were heard on June 14, 1948, by the Surrey (North Eastern Area) Assessment Committee who increased the assessment to £3,170 gross value and £2,853 rateable value. The Surrey County Valuation Committee appealed against the decision to Surrey Quarter Sessions, who heard the appeal on Nov. 22 and 23 and Dec. 13, 1948, and Jan. 10, 1949, and increased the assessment to £7,230 gross value and £6,507 rateable value. Both the Surrey County Valuation Committee (whose appeal during the hearing before the Divisional Court was not pursued and was finally treated as withdrawn) and the ratepayers applied for a Case to be stated for the opinion of the High Court.

The valuation committee had valued the hereditament on a form of the profits basis. They contended that it was proper and necessary to consider the probable profit-earning potentiality of the hereditament; that the ratepayers' filed report, profit and loss account, and balance sheet for the year ending in 1947 (from estimates based on which the committee's valuation had been made) would have been considered by a prospective tenant; that by reason of the time necessarily involved in building and equipping a similar hereditament elsewhere

owing to shortages and restrictions the hereditament enjoyed a monopoly or quasi-monopoly ; that quarter sessions were not precluded in law from considering the profits ; and that any estimate of rental value not reflecting profit-earning capacity would be erroneous. The ratepayers contended that the hereditament was not a monopoly or quasi-monopoly and had no capacity of making a profit not personal to the tenant ; that it was illegal to base an assessment on the trading profits attributable to the skill and ability of the tenant and to the use of his assets ; that the same profits could be earned on other hereditaments subject to the expenditure of money on their acquisition and adaptation ; that the rental value should not as a matter of law be ascertained by reference to the profits ; that no tenant would pay a greater rent than a normal rate of interest on the capital value of the hereditament ; and that, if the profits basis were applied, a tenant's share should be properly calculated, repairs should be treated as a deductible expense, and revenue earned outside the hereditament should be excluded from the profits. Quarter sessions found that the hereditament enjoyed a quasi-monopoly and that a prospective tenant would have had regard to the profits which he could earn, but that the valuation committee's estimates of profits were too optimistic. They held that the contractor's basis was not appropriate because it took no account of the exceptionally attractive situation of the hereditament in relation to omnibus and railway services. The Divisional Court (CASSELS, J., dissenting) now dismissed the ratepayers' appeal against that decision. The facts appear in the judgment of LORD GODDARD, C.J.

*Lamb, K.C.*, and *Widgery* for the ratepayers.

*Geoffrey Lawrence* for the county valuation committee.

*Cur. adv. vult.*

Dec. 21. The following judgments were read.

**LORD GODDARD, C.J. :** This is a Case stated by the rating appeals committee for the quarter sessions for the county of Surrey who, in January, 1949, on appeal by the Surrey County Valuation Committee, fixed the gross and rateable values of a hereditament in the occupation of the ratepayers at £7,230 and £6,507 respectively. The hereditament in question is known as the Chessington Zoo. I need not describe the premises in detail as the facts relating thereto are fully set out in the Case. Suffice it to say that it includes a mansion and a good many other brick and timber buildings suitable for a circus, cages for animals, an amusement park containing various attractions commonly found in such places, and licensed and unlicensed refreshment rooms. It is said to be situated in a peculiarly favourable situation for such a place. Not only is it near London, but also it is served by a railway station almost at the entrance to the park and by a line of omnibuses. In fact, there is no place comparable to this hereditament anywhere near London nor in the south of England. Its popularity seems to have increased enormously since the war, and the year 1947 was the peak year so far as earnings were concerned.

The questions which are put to the court in the Case are : (i) Whether the appeals committee were wrong in law in deciding to apply the profits basis in order to arrive at the value of the said hereditament. (ii) If they were justified in so doing, whether they erred in point of law in their application of the " profits basis " to the facts of this Case. It is well known, and has often been pointed out in rating cases, that in rating hereditaments of an exceptional character, by which I mean those that are neither houses, shops, nor factories in an industrial area, rating surveyors have, ever since the Parochial Assessments Act, 1836, had to find various formulae and methods to enable them to answer the questions to which the Rating Acts require an answer. They have to find a rent for premises which are not let at a rent and probably never would be let at a rent, and in some cases, such as public utility undertakings, could never be let at a rent. To take one familiar instance, railways were hardly known at the time the Parochial



Assessments Act, 1836, was passed, but as the country became covered with a network of railways it became necessary to find some method by which the requirements of the Acts could be met. So, too, with the case of large public utility undertakings such as gas and water works, and, later, electricity power stations. Various formulae and devices were adopted, many of which have passed into common use and have received the approval of the courts. Two of the best known are what are called the contractor's basis and the profits basis, but, whatever method is applied and whatever formula is adopted, the aim and object must always be the same—to find a notional rent which a tenant would be likely to pay if there could be a letting. How that is to be ascertained must depend largely on the nature of the hereditament which is to be the subject of the assessment. One principle that has been laid down, and from which no departure is allowed, is that profits must not be rated as profits. The leading authority on that subject is the judgment of BLACKBURN, J., in *Mersey Docks v. Liverpool Overseers* (1), so often cited and so well known that I need not quote passages from it. If one has a terrace of houses or a street of shops all more or less the same size, whether they are let at a rack rent or not, there is no difficulty as a rule in ascertaining what a tenant would pay by way of rent. The fact that one shopkeeper may be making a large profit while his next door neighbour may be making a small one or even running at a loss is immaterial in assessing the rent which a tenant could reasonably be expected to pay for the premises in question. The matter becomes much more difficult when one has to consider the case of a property such as this. There is nothing with which to compare it, but it is, no doubt, being run as a commercial proposition. The question which has to be answered is : If there were a landlord and a tenant, what would the landlord be likely to demand and the tenant to pay ?

In a case where the property is owned and occupied by the same person, it seems to me that there must be considered not only the case of a hypothetical tenant but also that of a hypothetical landlord. The one has premises to let and the other desires to take them to carry on a particular business. We must, I think, approach this case on the hypothesis that a landlord has premises to let which are not only appropriate for, but are fitted up as, a zoological garden and amusement park. The tenant at the present time is to be regarded as taking a place where he can carry on his business, fitted as it is with cages suitable for wild animals, with other things such as bathing pools, restaurants, and so forth, already provided and ready for use. For such a place it seems to me that no assistance whatever can be got by ascertaining what a tenant would be likely to pay as rent for a country mansion with park attached which he intended to use as a private residence or even as a school or other institution. Nor does it seem to me right to say : " Well, start by finding out the figure which would be paid as rent where the premises are used for domestic, even if institutional, purposes and then consider how much it would cost to erect the cages, restaurants, and other buildings, and to lay out the place, and charge so much on the tenant's capital, and then take those figures and add something for the peculiarly favourable transport facilities to which I have referred." I think we ought to look at the position as though a landowner had a place to offer equipped for a zoo and amusement park which a person desirous of carrying on that class of business desired to take.

The appeals committee have told us that they arrived at their figures on the profits basis and the ratepayers have strongly contended that, if that is so, their decision must be wrong because the profits basis has never been applied to a commercial, but only to a public utility, undertaking. This, in my opinion, depends very largely on what the appeals committee meant by saying they proceeded on the profits basis. The profits basis as applied to public utility undertakings is best described in the speech of LORD CAVE in *Kingston Union v. Metropolitan Water Board* (2). Since that case, it is regarded as settled

law that public utility undertakings are always to be rated on the basis which is to be found stated in that case. It is quite clear that the appeals committee did not purport to apply the formula usually known as the profits basis, and described in the case to which I have referred, to this hereditament. They started by taking the trading profits. If they had applied the profits basis applicable to public utility undertakings, they would have had to start by taking the gross receipts. It would, I think, have been more accurate if the appeals committee had said that they had applied *a* profits basis. The profits basis, as it is generally understood, is that to which I have just referred. That they have had regard to the trading profits as the main basis of their assessment is beyond question and nobody disputes it, and they attach to their Case a document, which sets out concisely the way at which they arrived at their figures. They started with the actual trading profit which was made taken from the company's published profit and loss account for the year 1947. For the five succeeding years they have estimated the profits on a descending, and, indeed, sharply descending, scale. Those figures were, we were told, in fact taken from the ratepayers' evidence in the sense that they stated that they expected the profits would be reduced in succeeding years by the percentages as shown. It seems to be agreed that amusement caterers and entrepreneurs regarded 1947 as the peak year for profits and anticipated a fairly sharp diminution, and in a descending scale, for the years following that one. Considering the trading profit, for the years 1947 to 1952 inclusive, they estimated them at £170,961, giving an average of £28,493. From that trading profit they have made deductions for directors' emoluments, audit fee, sale of produce, and depreciation, all of which are, of course, matters of estimate. Having arrived at £24,557, which is the sum of the net trading receipts before deduction of rates, they have divided that balance as to £12,278 tenant's share and an equal amount between the landlord and the rating authority, and, if the rates are deducted from that, it leaves £7,230 gross and £6,507 rateable, which are the figures fixed by the appeals committee.

The ratepayers attack this method *in toto*. They submit that that is rating profits pure and simple, and, therefore, in direct disregard of the principles laid down in *Mersey Docks v. Liverpool Overseers* (1) and since then consistently followed. On the other hand, the appeals committee profess to have adopted this plan as the only method open to them which would enable them to fix a rent. The ratepayers do not contend that it is not open to the committee to take into account profits as one element, but they say that it is inadmissible to rely on profits as the only evidence. I do not propose to refer to all the cases which were cited before us, but I will to some of them. It is, I think, clear that, while in what have been called ordinary cases questions as to gross receipts or net receipts or profits cannot be investigated, there are cases which have been regarded by courts as exceptional, and there the rating authority can have regard to the profits that have been made, and, indeed, as it seems to me, in many cases, can have no other basis for fixing the rent. In *R. v. Verrall* (3), where the hereditament was the Epsom racecourse, the court held that books of the ratepayers were clearly elements for the consideration of the justices in arriving at the value, and in *Clark v. Fisherton-Angar* (4) the court allowed an enquiry into the receipts of the tenant of a railway refreshment room as being the best method of ascertaining what rent he would be willing to pay. On the other hand, in *Dodds v. South Shields Poor Law Union Assessment Committee* (5), the appeal was against the valuation of a public house, and there were many other public houses in the town which could be compared with the one in question. The court refused to admit evidence in that case of the average weekly takings on the grounds that there was nothing exceptional in the case of a public house and the ordinary methods of valuation should be adopted. It seems to me clear in that case that the Court of Appeal recognised that, if there was a hereditament

which could be classed as exceptional in the sense that there was nothing with which the hereditament in question could be compared, the evidence would be admissible. In *Cartwright v. Scolcoates Union* (6) the House of Lords held that, in assessing the value of a public house, the existence of the licence and the amount of trade were elements to be considered in order to arrive at the rent and that evidence of these facts was always admissible and might be necessary where the ordinary evidence of market value by comparison with other public houses was not to be had. They also held that evidence of profits was admissible though that enquiry should be avoided where possible because it was regarded as oppressive. It is true that LORD DAVEY in that case repudiated the distinction between exceptional and ordinary cases which had been made in *Dodds v. South Shields Poor Law Union Assessment Committee* (5), but he went on to say ([1900] A.C. 159) :

"You have in each case to find out in the best way you can what is the rent which a tenant may reasonably be expected to give, and if the best way under the particular circumstances is to ascertain the use which a tenant might expect to be able to make of the premises, the facility afforded by the premises for the carrying on of a trade appears to me to be a primary and elementary consideration in the case . . . It is not that you rate the profits, it is not that you rate the man's skill and judgment or discretion in the mode of carrying on the business, but you have to ascertain what sort of a trade the hypothetical tenant, as he is called, may reasonably expect to be able to carry on on those premises as an element in determining the rent he would be willing to offer."

The ratepayers do not contend that profits are not an element, but they say they are only one element. What is to happen if the appeals committee find that it is the only element on which they can rely ? I have already given my reasons for thinking, as the appeals committee obviously did, that the rent that might be paid for Chessington Park if used as a residence or school affords no criterion at all, and that we ought to look on the case as one in which the property is let with all the facilities and amenities for the business there carried on. In this connection, I desire to refer to and express my agreement with the passage in the judgment of WROTTESELEY, J., in *Racecourse Betting Control Board v. Brighton Rating Authority* (7), where he, a judge of great experience in these cases, said ([1941] 2 All E.R. 600) :

"What happens in the market is the best evidence of the value of the commodities dealt with in the market, and, where the best evidence is at hand, the courts of law refuse to admit any other. However, at any rate in the case of premises used for making profits, 'It is a mistake to suppose that valuation by rental is dissociated from the idea of profit,' to use the language of LORD WATSON in *Edinburgh Street Tramways Co. v. Edinburgh Corpn.* (8) ([1894] A.C. 475). In the case of premises used only for the purpose of making a profit, such as the premises in this case, and not capable of being valued by comparison with other similar premises, the proposed tenant and the landlord would alike be thrown back on the question of the amount of possible profits to flow from the occupation."

If, then, there is such a property, as I think there is here, and if the appeals committee are satisfied that there is no other way by which they can arrive at a rent than by looking at the trading profits—to ascertain, that is, what the value of the use is to the tenant—I cannot see that they can be said to have applied a wrong principle. They obviously have clearly in mind that their duty is to arrive at a rent, and they have done so in this case by estimating the net profit and then apportioning it between the tenant, the landlord, and the rating authority. Assuming they were entitled to proceed on this basis, it is not, I think, for this court to alter their figures or express disapproval of the



assessment of those shares, for that, after all is a question of fact. In my opinion, therefore, the appeals committee were entitled to proceed on the basis that they did.

It is now said that, at any rate, their figures must be wrong in some respects. In the first place, it is said that they must have taken into account the tenant's capital which they had no right to do. It may be that, in arriving at the trading profits, it is inevitable that the tenant's capital enters into the calculations as do landlord's fixtures, but the basis of the assessment, and, as I think, the only basis the appeals committee could find is by taking the profits made on the hereditament as a whole, and, if I am right in what I have said earlier that this must be looked at as though a hypothetical landlord was letting these premises with all these erections on it, I do not think that the appeals committee have there applied a wrong principle. Another point which was strongly urged on us by counsel for the ratepayers was that the method adopted has had the inevitable result of taking into account the profits earned off the hereditament in question. That arises because it seems to have been the practice of the ratepayers to let out from time to time some of the animals and other things, such as would be used by circus proprietors, to the owners of smaller shows touring throughout the country. It seems to me that the answer to that is that that is just one of the things, or rather one of the opportunities of making a profit, which a tenant would take into account because these premises give peculiar facilities. To enable them to earn the profit they must have a place, not merely for storage, but also where they can keep their wild beasts and so forth which from time to time they may let to another circus proprietor to show, but, when one is considering a matter of this sort, it seems to me to make no difference whether a certain sum is earned by letting people look at the animals in their cages at Chessington or in a cage outside the actual hereditament. It is all part of the trading profit which these premises give the opportunity to the ratepayers to earn. Other questions were raised with regard to whether or not the profits tax was taken into account. I think it is clear, and, indeed, it was not disputed, that questions with regard to the profits tax were raised before the appeals committee. As I have said, if they have applied the right principle, I do not think it is open to the court to examine meticulously every figure if they have had fully before them all the considerations which ought to enter into their calculations and to which they ought to pay regard. The case is, no doubt, one of considerable importance, and it is satisfactory to know that our judgment is open to review elsewhere. For myself, I answer both the questions submitted in the negative, and would, accordingly, dismiss the appeal.

**HILBERY, J. :** I have finally, but reluctantly and not without some hesitation, come to the same conclusion as my Lord, and for the same reasons. I would only add that, in my opinion, it is not possible to say as a matter of law that the appeals committee were wrong in not taking into consideration the profits tax as reducing the trading profits which a hypothetical tenant might regard the premises as capable of producing. Profits tax is quite different from the excess profits tax. The latter tax took away from the trader occupying the premises the whole of his profits which were in excess of certain standard profits. That excess could not be of any beneficial value to the tenant. Furthermore, its amount depended on a standard figure particular to the person liable to pay it. The profits tax is a tax levied on profits generally and is not confined to a part of the profits in excess of a standard figure. For the purposes of this case, therefore, I am of opinion that the appeals committee were entitled to disregard profits tax for the same reasons that income tax, which a prospective or hypothetical tenant will have to pay out of profits made out of an occupation of the premises in question, has to be disregarded.

**CASSELS, J. :** With diffidence I find myself unable to agree with the conclusions at which my Lords have arrived. Proposals for the assessment of

this hereditament for the purpose of rating show a steep vertical rise which is remarkable. Chessington Zoo was established eighteen years ago. Its founder died at the end of 1946, nine months after the formation of the private company of that name which is now before the court and a party to these proceedings. During all that time, and, indeed, until June, 1948, the hereditament was never assessed at more than £800 gross value and £663 rateable value. On Feb. 10, 1948, Surbiton Rating Authority proposed by reason of additions and alterations, and, so far as I know, with no reference to the profits basis, to increase the gross value to £3,000 and the rateable value to £2,497. Surrey County Valuation Committee and the ratepayers both objected, the former proposing increases of the gross value to £8,889 and of the rateable value to £8,000. This proposal went before the assessment committee of the North Eastern Area of Surrey who increased the gross value to £3,170 and the rateable value to £2,853. These figures do not indicate that the profits basis prevailed. Surrey County Valuation Committee appealed to Surrey Quarter Sessions Appeals Committee who allowed the appeal and fixed the gross value at £7,230 and the rateable value at £6,507. Between June, 1948, and January, 1949, the gross value has gone from £800 to £3,000, £3,170 and £7,230, and the rateable value from £663 to £2,497, £2,853 and £6,507. With rates at 15s. 6d. in the £ these final figures are startling.

It may be some consolation to the ratepayers to know that this court does not propose further to increase the assessment. Surrey County Valuation Committee by their notice of appeal wanted to restore their figure of £8,889, but they did not press it, and this case has been heard on the objection of the ratepayers to the final figure of the appeals committee, namely, gross value of £7,230, which is more than nine times the gross value of £800, and rateable value of £6,507, which is nearly ten times the rateable value of £663 which existed prior to June, 1948. Before quarter sessions the Surrey County Valuation Committee contended for the profits basis, and the appeals committee have allowed that contention to prevail on the ground that the use to which this hereditament is put is unique and in the nature of a monopoly or quasi-monopoly, that in present conditions it cannot move or set itself up elsewhere, and that its rental value must reflect its profit-earning capacity. I have no doubt that profits are an element to be taken into consideration and the ratepayers have not contended otherwise, but, if profits are alone to be considered to the exclusion of all other factors, then it is a strong proposition and may be very oppressive in its results, as, indeed, in my opinion, it turns out to be in this case.

I realise that the profits basis has been applied to public utility undertakings such as electricity (*Yeovil Rural District Council v. South Somerset and District Electricity Co., Ltd.* (9)); and water (*Kingston Union v. Metropolitan Water Board* (2)); to a public house (*Cartwright v. Sculcoates Union* (6)), although the contrary view was held in *Dodds v. South Shields Poor Law Union Assessment Committee* (5); and to a totalisator (*Racecourse Betting Control Board v. Brighton Corpn.* (7)), where the courts found adequate reasons for applying the profits basis. Until it is unlawful for trade to make profits all cases in which the profits basis is taken for assessment for local rates should be examined with some care lest injustice, hardship, and great inequality should result. If rating authorities, whoever they may be, propose to rate according to a calculation based on trading profits, and thus enable the rate collector to get his clutching hands into the till, so to speak, it may be that one day they will have to take into consideration, not the profits of the business but the losses, and, although there may still remain a beneficial occupation to be rated, the local community, having enjoyed the advantage of the success of the venture, will be called on to share the disadvantages of the failure. A ratepayer in occupation of refreshment rooms at a railway station has been held to be entitled to bring forward his account books to show a loss in order to obtain a reduction of his rate: see *Clark v. Fisherton-Angar* (4).

Suppose, for example, that on land adjacent to, and of the same acreage as, this hereditament, there should be buildings of the same size and number as on this hereditament and an industry should be conducted thereon in the production of things which are manufactured in similar factories elsewhere and for which there is a general demand. It is an alarming thought that by reason of this hereditament being a "zoo" and that next door being such a factory the rateable value of this hereditament should be £6,507 and that of its neighbour £2,497. I am taking the figure of the Surbiton Rating Authority. It was said that the use to which this hereditament was put was unique, and that there was no comparable hereditament. Yet there are a few other "zoos" throughout the country and none was cited to this court as being assessed on the profits basis. If this assessment prevails, how long will it be before the same method is applied to them? How many "zoos" have there to be before any one ceases to be exceptional or unique? I realise that it may well be long before Chessington Zoo has a competitor on the opposite side of the road or in the neighbourhood, and that a quasi-monopoly, whatever that may mean, is enjoyed, but it has been created by the genius of one man and that can be said of other industries which are not assessed on the profits basis.

What are profits? Profits may have as many meanings as value, and everything must depend on the purpose for which profits are taken into consideration. There are gross profits as well as net profits. There are actual profits. There is the profit shown in a balance sheet on a profit and loss account. There are profits assessable to income tax, and profits available for dividend and division. SIR GEORGE JESSEL, M.R., in *Mersey Docks and Harbour Board v. Lucas* (10) (51 L.J.Q.B. 116), said

"...profits is the amount got from the property *minus* the cost of getting it."

Another way in which it has been put is "excess earnings over expenditure." Some interesting observations on the meaning of the word "profits" were made by FLETCHER MOULTON, L.J., in *Re Spanish Prospecting Co., Ltd.* (11) ([1911] 1 Ch. 98). I need not cite the passage at length, but the learned lord justice drew attention to the importance of depreciation in the value of buildings, plant, and stock, and said that though the fundamental meaning was the amount of gain made by the business during the year this strict meaning was rarely observed in drawing up the accounts of firms or companies. These he described as domestic documents.

Where the profits basis has to be considered as an element in assessment for rating, what items are to be included in a calculation made for the purpose of ascertaining the rent which a prospective tenant would be prepared to pay for the exclusive right to attempt to earn the same profit on the hereditament? I think these profits should be considered at their lowest, that nothing should be included which could reasonably be excluded both in receipts and expenditure, that due allowance should be made for the change of personality in control, for the speculative character of the business, for the risks dependent on times and weather if the undertaking is affected thereby, and for the fluctuating costs and difficulties of labour and material. I do not think that the appeals committee gave due and proper consideration to these items. Speaking for myself, I should not have included in the calculation the considerable sums earned by the ratepayers in letting out animals during the course of the year. These animals earned the money away from the hereditament. Further, the prospective tenant, in making his offer to rent the hereditament, might not be considering the continuation of that side-line of activity, or the landlord might not be including it in the tenancy. The figures demonstrate that the profits of the ratepayers are dwindling and will continue to do so. To the enormous increase in rates will be added the burden of the costs of this case, also chargeable



against profits. The satisfaction of the county valuation committee in their success may not be long lived. Financially, the "zoo" is going down hill. The valuation committee have chosen these uncertain times to speed it on its way. I would send the case back to the appeals committee with instructions to give further consideration to the items I have mentioned and to leave out of their calculation of profits those profits relating to the letting out of animals.

A As I am in a minority, the result is that both appeals are dismissed.  
*Appeal dismissed with costs, excluding any costs incurred owing to the cross-appeal. Respondents' appeal treated as withdrawn.*

Solicitors : *Frere, Cholmeley & Nicholsons* (for the appellants) ; *Wyatt & Co.*, Kingston-on-Thames, agents for *Dudley Auckland*, Kingston-on-Thames (for the respondents).

B [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

*Affirmed.* C.A. [1950] 2 All E.R. 282.

C R. v. MINISTER OF TOWN AND COUNTRY PLANNING.  
*Ex parte C. B. NORTH, LTD. AND OTHERS.*

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Hilbery, JJ.), December 19, 1949.]

D *Town and Country Planning—War damage—Compulsory purchase order—Direction by Minister that application for order under Act of 1944 be continued after Act of 1947 came into force—Direction given before Act of 1947 came into force—Validity—Interpretation Act, 1889 (c. 63), s. 37—Town and Country Planning Act, 1944 (c. 47), s. 1 (1)—Town and Country Planning Act, 1947 (c. 51), sched. X, para. 16.*

E The applicants were owners of land in areas in respect of which the local planning authorities had applied to the Minister of Town and Country Planning for orders under s. 1 (1) of the Town and Country Planning Act, 1944, declaring the land subject to compulsory purchase for dealing with war damage. On Aug. 6, 1947, before proceedings on the applications were complete, the Town and Country Planning Act, 1947, was passed, and, by s. 113 (2) and sched. IX, pt. II, it repealed s. 1 (1) of the Act of 1944, as from the "appointed day," July 1, 1948, the date on which sched. X to the Act of 1947 came into operation. Before July 1, 1948, the Minister, in exercise of powers under sched. X, para. 16, of the Act of 1947, directed that the proceedings on the applications should be continued after the appointed day. The applications were proceeded with and orders made after the Act of 1947 came into force. The applicants contended that the Minister had no power to give such a direction since, when the direction was made, sched. X, para. 16, of the Act of 1947 had not come into force, and, therefore, the orders made were bad in law.

G HELD : under s. 37 of the Interpretation Act, 1889, the Minister had power to make the directions under sched. X, para. 16, before the Act of 1947 came into force, and the orders made were valid.

H [FOR THE INTERPRETATION ACT, 1889, s. 37, see HALSBURY'S STATUTES, Vol. 18, p. 1005 ; FOR THE TOWN AND COUNTRY PLANNING ACT, 1944, s. 1 (1), see *ibid.*, Vol. 37, p. 423 ; FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, sched. X, para. 16, see *ibid.*, Vol. 40, p. 882.]

MOTIONS for orders in the nature of *certiorari*, to quash three orders of the Minister of Town and Country Planning made under s. 1 (1) of the Town and

Country Planning Act, 1944. The Divisional Court refused the motions. The facts appear in the headnote.

*C. L. Henderson, K.C.*, and *Glidewell* for the applicants.

*The Attorney-General (Sir Hartley Shawcross, K.C.)* and *H. L. Parker* for the Minister of Town and Country Planning.

*Maurice Lyell* for Hull Corporation.

*P. M. O'Connor* for Liverpool Corporation.

A

**LORD GODDARD, C.J. :** These are applications for orders in the nature of *certiorari* to bring up certain orders of the Minister of Town and Country Planning to be quashed. If s. 37 of the Interpretation Act, 1889, had been brought to the attention of the court at the time these applications were made it is doubtful whether they would have been granted, because it seems to me that s. 37 is a complete and absolute answer to them.

B

Certain applications had been made to the Minister for orders under s. 1 of the Town and Country Planning Act, 1944, which provided :

"Where the Minister of Town and Country Planning (in this Act referred to as 'the Minister') is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage or of such land together with other land contiguous or adjacent thereto, should be laid out afresh and re-developed as a whole, an order declaring all or any of the land in such a part of their area to be land subject to compulsory purchase for dealing with war damage may be made by the Minister if an application in that behalf is made to him . . ."

C

D

There are a great many procedural provisions in the Act, and while the operation of these provisions were pending the Town and Country Planning Act, 1947, was passed. By s. 113 (2) and sched. IX, pt. II, of the latter Act, s. 1 of the Act of 1944 was repealed on the coming into force of the Act of 1947, *viz.*, on the "appointed day," July 1, 1948. Section 1 of the Act of 1944 would expire immediately before the Act of 1947 came into force, *i.e.*, at midnight on June 30, 1948, and the Act of 1947 would come into force at that time. There would, however, be a moment of time when the Act of 1944 would cease to have effect and the Act of 1947 had still to take effect.

E

In para. 16 of sched. X to the Act of 1947 it is provided :

"Where, at any time before the appointed day, application has been made to the Minister for an order under s. 1 of the Act of 1944 declaring any land to be subject to compulsory purchase under Part I of that Act, the Minister may, if he thinks fit, direct that proceedings on the application shall be continued under that Act after that day."

F

When s. 1 of the Act of 1944 was repealed, such an application would have fallen with the Act and there would have been nothing to continue. Therefore, it was necessary, to save the vast amount of trouble and expense which would otherwise have been caused, to keep those applications alive during the time between the repeal of the one Act and the coming into force of the other. That is done by applying s. 37 of the Interpretation Act, 1889, which visualised this situation. That Act was passed to clear away doubts as to the effect of certain provisions in various Acts of Parliament, and it set up the procedure to be adopted where an Act was passed which was not to come into operation until a certain day if it was necessary to take certain steps before the Act came into operation. Accordingly, s. 37 of the Interpretation Act, 1889, provides :

G

H

"Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof and confers power to make any appointment, to make, grant, or issue any instrument, that is to say,

any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation . . . ”

- A It was necessary to bring the powers contained in sched. X, para. 16, to the Act of 1947 into force before the Act itself came into force. The Act was in a state of what I may call suspended animation until July 1, 1948, but it was necessary that something should be done to keep alive these applications which had been made under the Act of 1944 so that, when the Act did come into operation, the Minister could give a direction that they should be confirmed and come into force. In those circumstances it seems to me that the Minister acted within his powers, and that these applications fail and must be dismissed with costs.

**HUMPHREYS, J. :** I agree.

**HILBERY, J. :** I agree.

*Application dismissed with costs.*

- C Solicitors : *Warren, Murton & Co.*, agents for *T. Priestman, Sons & Slack*, Hull (for the applicant, *C. B. North, Ltd.*) ; *Warren, Murton & Co.*, agents for *H. A. Dodman*, Leeds (for the applicant, *Montague Burton, Ltd.*) ; *Warren, Murton & Co.* (for the applicant, *Burton* and others) ; *Treasury Solicitor* (for the Minister of Town and Country Planning) ; *Sharpe, Pritchard & Co.*, agents for *E. H. Bullock*, town clerk, Hull (for Hull Corporation) ; *Sharpe, Pritchard & Co.*, agents for *Thomas Alker*, town clerk, Liverpool (for Liverpool Corporation).  
D [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

*Applied.* JONAS v. ROSENBERG.  
*Post* p. 296.

## **HUTCHINSON v. JAUNCEY.**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.), December 16, 19, 20, 1949.]

*Statute—Retrospective effect—Pending proceedings—Disturbance of existing rights.*

- F *Rent Restriction—Separate dwelling-house—Common use of scullery between tenant and sub-tenant—Proceedings for possession commenced by landlord before June 2, 1949—Effect of Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 9 ; s. 10.*

On May 25, 1949, the landlord issued a plaint claiming possession of a dwelling-house to which the Rent Restrictions Acts, 1920 to 1939, applied on the ground that the tenant shared his scullery for cooking purposes with another tenant, and, therefore, by reason of the decision in *Neale v. Del Soto* ([1945] 1 All E.R. 191), the tenancy was not protected. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into operation altering the law as it was stated in *Neale v. Del Soto*. The county court judge made an order for possession against the tenant, accepting the contention of the landlord that he had acquired rights pursuant to the law as it stood before the passing of the Act of 1949 and that such rights were unaffected by either the express language of ss. 9 and 10 of the Act or by a necessary implication to be drawn from them. Section 10 of the Act provides: “The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period.”



**HELD :** (i) if the necessary intendment of an Act is to affect pending causes of action then the court will give effect to the intention of the legislature even though there is no express reference to pending actions.

*Re Joseph Suche & Co., Ltd.* (1875) (1 Ch.D. 48), criticised.

(ii) the effect of ss. 9 and 10 of the Landlord and Tenant (Rent Control) Act, 1949, was to make the tenant retrospectively a protected tenant although at the date of the issue of the proceedings he was not entitled to remain in possession of the premises, and, accordingly, the order for possession granted to the landlord must be set aside.

*Remon v. City of London Real Property Co.* ([1921] 1 K.B. 49), distinguished.

[AS TO THE RETROSPECTIVE EFFECT OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513-517, paras. 670-672 ; and FOR CASES, see DIGEST, Vol. 42, pp. 701-707, Nos. 1169-1249.]

AS TO SEPARATE DWELLINGS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 368-373 ; and FOR CASES, see DIGEST, Vol. 31, p. 557. Nos. 7044-7048 and Digest Supp.

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 9, s. 10, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1106, 1107.]

Cases referred to :

- (1) *Remon v. City of London Real Property Co.*, [1921] 1 K.B. 49 ; 89 L.J.K.B. 1105 ; 123 L.T. 617 ; 31 Digest 556, 7032.
- (2) *Neale v. Del Soto*, [1945] 1 All E.R. 191 ; [1945] K.B. 144 ; 114 L.J.K.B. 138 ; 172 L.T. 65 ; 2nd Digest Supp.
- (3) *Re Joseph Suche & Co., Ltd.*, (1875), 1 Ch.D. 48 ; 45 L.J.Ch. 12 ; 33 L.T. 774 ; 42 Digest 706, 1236.
- (4) *Wright v. Hale*, (1860), 6 H. & N. 227 ; 30 L.J.Ex. 40 ; 3 L.T. 444 ; 42 Digest 706, 1231.
- (5) *Grimwood v. Moss*, (1872), L.R. 7 C.P. 360 ; 41 L.J.C.P. 239 ; 27 L.T. 268 ; 36 J.P. 663 ; 31 Digest 506, 6537.
- (6) *Cruise v. Terrell*, [1922] 1 K.B. 664 ; 91 L.J.K.B. 499 ; 126 L.T. 750 ; 31 Digest 578, 7268.
- (7) *Prout v. Hunter*, [1924] 2 K.B. 736 ; 93 L.J.K.B. 993 ; 132 L.T. 193 ; 31 Digest 557, 7040.
- (8) *Leslie & Co. v. Cumming*, [1926] 2 K.B. 417 ; 95 L.J.K.B. 1007 ; 135 L.T. 443 ; 31 Digest 557, 7041.
- (9) *Turner v. Baker*, [1949] 1 All E.R. 560 ; [1949] 1 K.B. 605.

**APPEAL** by the tenant from an order of His Honour JUDGE GRANVILLE-SMITH, made at the Edmonton County Court and dated July 22, 1949, for possession on the ground that the Landlord and Tenant (Rent Control) Act, 1949, did not retrospectively apply to premises where proceedings for possession had been commenced before the Act came into operation. The Court of Appeal now allowed the appeal. The facts and the relevant sections of the Act appear in the judgment of SIR RAYMOND EVERSHED, M.R.

*Sifer* for the tenant.

*C. St.J. de V. Shortt* for the landlord.

**SIR RAYMOND EVERSHED, M.R. :** This appeal raises a point under the Landlord and Tenant (Rent Control) Act, 1949, namely, whether the application of the Act to this case is excluded by reason of the circumstance that the plaint by the landlord claiming possession against the tenant was issued before the Act came into force. I think it must be clear that, having regard to *Remon v. City of London Real Property Co.* (1), if it had not been for the issue of the summons before the Act came into operation, the tenant must have been entitled to claim the benefit of s. 9 of the Act of 1949 notwithstanding the service of an effective notice to quit. The real question here is : What difference does the issue of the plaint make ?

Before Mar. 21, 1949, the tenant was tenant of the whole house 137, Angel Road, Edmonton (which, having regard to its rateable value, is within the scope of the Rent Restrictions Acts), at a rent of 11s. 1d. per week from a person who was not the present landlord. About October, 1945, the tenant sublet two rooms on the first floor together with the use of a scullery in common with himself for cooking purposes at a rent of 7s. per week, the tenant retaining for his own use two rooms on the ground floor. On Mar. 21, 1949, the landlord purchased the premises subject to the tenant's tenancy. On Apr. 11, 1949, a valid notice to quit expiring on Apr. 25, 1949, was given by the landlord to the tenant. On May 25, 1949, proceedings for possession were started by the landlord and on that day a summons for possession was issued. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into force. Had it not been for that Act it has been conceded, that, in view of the fact that the scullery was used in common for cooking purposes, the case would have fallen within the principle of *Neale v. Del Soto* (2), so that the premises would have been outside the protection of the Rent Restrictions Acts. One of the obvious purposes of the Act of 1949 was to alter the law as it had been stated in *Neale v. Del Soto* (2). Section 9 provides :

- C “Where the tenant of any premises, being a house or part of a house, has sublet a part, but not the whole, of the premises, then as against his landlord or any superior landlord (but without prejudice to the rights against and liabilities to each other of the tenant and any person claiming under him, or of any two such persons) no part of the premises shall be treated as not being a dwelling-house to which the [Rent Restrictions Acts] apply by reason only—(a) that the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons . . .”
- D

Section 10 provides :

- E “The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period.”

- F Counsel for the landlord has rightly relied on the well-established principles *prima facie* applicable to the interpretation of a statute. He has read to us passages from MAXWELL ON THE INTERPRETATION OF STATUTES, 9th ed., and has made numerous citations from authorities. I shall not be thought unappreciative of his argument or disrespectful to the authorities cited if I forbear from reference to all of them, because the principle is not in dispute, and I assume in counsel's favour that the onus of establishing something contrary to the principle lies on those who so assert. It would be an onus which is not lightly to be discharged. So far as the present case is concerned, as I have already indicated, the vital element in it is the fact that proceedings for possession were started on a date, namely, May 25, before the coming into operation of the Act of 1949. It is said that, nevertheless, by the issue of the plaint the landlord has acquired a vested right, a cause of action has accrued, and he should not be deprived by the court of that right unless in plain terms that conclusion flows from the language of the new Act. I quote from MAXWELL
- G
- H ON THE INTERPRETATION OF STATUTES, 9th ed., p. 229 :

“In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.”

Two of the cases seem to indicate that there should be found express reference to causes of action pending. For example, in *Re Joseph Suche & Co., Ltd.* (3)

SIR GEORGE JESSEL, M.R., sitting at first instance, decided a case on this ground of principle. He stated his conclusion thus (1 Ch. D. 50) :

"I so decide because it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

Something of the same kind, I think, may fairly be said to emerge from the language of WILDE, B., in *Wright v. Hale* (4). A

Having examined the many cases that the industry of counsel for the landlord has enabled him to lay before us, I doubt whether the principle ought to be expressed in quite so precise language as SIR GEORGE JESSEL, M.R., stated it in *Re Joseph Suche & Co., Ltd.* (3). It seems to me that, if the necessary intendment of the Act is to affect pending causes of action, the court will give effect to the intention of the legislature even though there is no express reference to pending actions. The question, therefore, is : Since a summons had been issued before the Act came into force, did the landlord acquire rights pursuant to the law as it stood under the decision in *Neale v. Del Soto* (2), and are those rights unaffected by either the express language or by the necessary implication to be drawn by ss. 9 and 10 of the Landlord and Tenant (Rent Control) Act, 1949 ? Apart from *Remon v. City of London Real Property Co.* (1) I think the point might have been one of serious difficulty, and I do not think that it is an easy one now, but that case seems to me to have laid down the application of a principle to this class of legislation generally, and I think, therefore, that citations from authorities relating to wholly different subject-matters may not be so pertinent to cases of this character. B C D

*Remon v. City of London Real Property Co.* (1) was a case in which two rooms—not, until the passing of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, covered by the Rent Acts because they were used for business purposes—were, on the coming into force of the Act, in the occupation of a person who was remaining in possession *in invitum* so far as the landlord was concerned after the expiration of the notice to quit. No proceedings had actually been started when the Act of 1920 came into force. There is no doubt that the Act of 1920 brought premises of that character, namely, business premises, for a short period under what has been called the "umbrella" of the Act. The question raised was whether, since the tenant was still actually there when the Act came into force, he could as against his landlord pray in aid the Act of 1920 and resist the landlord's claim for possession. This court held that he could. At first sight the result appears not to be in accordance with the older principles relating to real property law (illustrated by *Grimwood v. Moss* (5) ), to the effect that once the necessary step has been taken by the landlord to put an end to the tenancy the person in occupation would cease to be a tenant, but it is, I think, plain from the decision in *Remon v. City of London Real Property Co.* (1) (and it has been subsequently expressly affirmed by SCRUTTON, L.J., in *Cruise v. Terrell* (6) ([1922] 1 K.B. 673)) that those principles do not strictly apply in the case of premises which are brought within, and intended to be protected by, this legislation. Thus, BANKES, L.J., said ([1921] 1 K.B. 54) : E F G

"It is however clear that in all the Rent Restrictions Acts the expression 'tenant' has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, some one whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him. The respondent therefore on the coming into operation of the new Act was a tenant within the meaning of that expression in the Act . . ." H

It is on that principle that the case was decided. In the present case the difference is that a plaintiff had been issued. Is the result that the tenant has ceased to be



a tenant within the meaning of this legislation or is otherwise outside the protection which s. 9 of the new Act intends to give him ?

I turn again to s. 9, but, before doing so, I observe that the county court judge in his careful judgment, after stating the facts, proceeds as follows :

"I have no doubt whatever that the relevant contract to be considered is the letting of the two rooms with the use of scullery in 1945."

A I entirely agree with that premise to the argument following in the judgment. In other words, if I look at s. 9 of the Act I read these words :

"Where the tenant of any premises, being a house or part of a house, has sublet a part . . ."

It seems to me that when this matter comes before the court those conditions, B *prima facie*, are satisfied. The tenant has (in the past) sublet a part, and, following *Remon v. City of London Real Property Co.* (1), the tenant here is, *prima facie*, a tenant occupying part of premises within the general scope of the Act. He is an ex-tenant sitting there against the will of his landlord and claiming that the Rent Restrictions Acts protect him. Whether they do or do not might perhaps depend on the exact facts in regard to the scullery and its use, but his position C is that of a person claiming the protection of the Acts. Section 9 goes on :

"... no part of the premises shall be treated as not being a dwelling-house to which the principal Acts apply by reason only . . ."

Counsel for the landlord says "shall" is a future word, and, therefore, he relied on the principles already referred to in the passages I have mentioned as establishing that the section is not applicable to some cause of action which has D already crystallised on the issue of the summons before this Act operated at all. If the matter stood there alone, I think there might be force in that argument, but one must go to s. 10, which says that the last foregoing section

"... shall apply whether the letting in question began before or after the commencement of this Act . . ."

E Now what is the letting in question ? Following the decision in *Remon v. City of London Real Property Co.* (1) the tenant seems to me to be *prima facie* a tenant, and he was such when the summons was issued. He was a tenant and the contract of letting, as the county court judge said, was that of 1945 pursuant to which he purported to remain in possession. I think it follows, therefore, that s. 9 is made in the clearest possible terms to apply to this tenancy. If it applies to F this tenancy, by the peculiar provisions of these Acts the court is told : "You shall not make an order for possession save in certain circumstances." *Prima facie*, it seems to me the tenant must be entitled so to say.

There only remain the last three lines of qualification to s. 10 :

G "... but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period."

The obvious purpose and meaning of that qualification is that it disentitles the tenant from saying : "In the past we have assumed, because of *Neale v. Del Soto* (2), that I was not protected by the Acts. You have charged me more than the standard rent and I claim to recover the excess." The landlord might have successfully got him out of possession by some order of the court, but the H rent paid and the acts and omissions mentioned are not to be open to review. The express reference to "rent," however, seems to me to show that those words "anything done" cannot refer to such a step taken as the mere issuing of a summons. Clearly they cannot refer to the notice to quit. I think it is impossible on a fair reading of this section together with s. 9 (always bearing in mind the peculiar character of this rent restriction legislation) to say that s. 10 means that s. 9 should not apply to any pending cause of action. It would, of course, have been easy to say that if it had been

intended. I think it must, and can only, mean in its context some act performed whereby the tenant has either gone out, or has paid something or done something, on the footing that he was unprotected before the Act came into force. The tenant here has suffered none of these things. He has resolutely remained in possession under the terms of his tenancy asserting the protection of the Acts. Had it not been for the Landlord and Tenant (Rent Control) Act, 1949, he might well have failed in making good that assertion. It seems to me he is now entitled to say : " My letting is now exempted from the disqualifying effect of *Neale v. Del Soto* (2)." When the county court judge came to deal with that part of the case, he said :

" For the proposition that the crucial time for consideration is the date of the issue of the writ or plaint I refer to *Prout v. Hunter* (7), *Leslie & Co., Ltd. v. Cumming* (8) and *Turner v. Baker* (9)."

With all respect to the county court judge I do not think that is a good point. The question raised in those cases was the question on what date it was relevant to discover whether there was a letting within the properly applicable legislation ? As counsel for the tenant pointed out, what we are concerned with here is : What is the law applicable at the hearing ? We have to look at the statute, and, if my view of it be right, it says plainly that it has a retrospective effect. That being so, the only question is—and I come back to the same point—whether s. 10 by the last few lines has the effect that the Act applies to pre-existing tenancies with all the consequences which flow from that application, but that, nevertheless, something which has been done is to be unaffected, and whether it must then be said that the cause of action crystallising on the issue of the summons is something done, the full effect of which must in no way be minimised or otherwise affected by the Act. The issue of the summons (if that be a thing done) is not, as such, in any circumstances, affected. The landlord must go on to say that when the summons comes to be heard (a thing not done when the Act was passed) that hearing must proceed as though the Act of 1949 had not been passed.

I do not think that that is a fair or possible construction of ss. 9 and 10. Differing, therefore, as I do with diffidence, from the county court judge on any matter in which county court judges are so peculiarly experienced, I have come to the conclusion that he wrongly applied the principle of *Prout v. Hunter* (7) and the other cases and that the right answer is that which I have suggested, namely, that this Act retrospectively applies to protect and save the tenant in this case.

**COHEN, L.J. :** I am of the same opinion. The county court judge came to the conclusion that the fact that the plaint had been issued before the law was altered by the Landlord and Tenant (Rent Control) Act, 1949, made the principle of *Remon v. City of London Real Property Co.* (1) inapplicable to the present case. He bases his conclusion on *Turner v. Baker* (9) and the other cases which my Lord has mentioned. In my opinion, those cases do not assist us in the decision of the present case. They establish that, in considering the problem then before the court, the law must be applied to the state of facts existing at the date of issue of the plaint. They are not relevant to the question before us, which is whether the law to be applied is that in force at the date of the issue of the plaint or that effected by a subsequent alteration of the law. In the case before us the question is whether ss. 9 and 10 of the Landlord and Tenant (Rent Control) Act, 1949, had the effect of making the tenant a protected tenant although, had the law not been altered, the landlord would have been entitled to possession. In other words, having regard to s. 10, has s. 9 retrospective effect, and, if so, how far ? For the reasons given by my Lord, with which I entirely agree, I think that the intention of the section is plainly that the alteration of the law shall have retrospective effect. The issue of a plaint is, no doubt, an act done within s. 10, but it is not equivalent to judgment. *Remon*

v. *City of London Real Property Co.* (1). I think, shows that nothing but delivery of possession or an order for possession can effectively deprive the occupying tenant of his possession. The plaint, therefore, stands as an act done, but when the county court judge, in dealing with that plaint, has to apply the law he must, in my opinion, give retrospective effect to s. 9 and he should have dismissed the action. For these reasons I would allow the appeal.

A ASQUITH, L.J. : I agree. In particular, it does not seem to me that it can possibly be argued that the application by s. 10 of s. 9 to this letting would affect anything done within the concluding words of s. 10. It is said the issue of the plaint is something done, but, assuming it is, the application of s. 9 to that letting does not invalidate or in any way affect the issue of the plaint. For these and the other reasons given by my Lords I agree with the order proposed.

B *Appeal allowed, with costs.*

Solicitors : *H. B. Wedlake, Saint & Co.* (for the landlord) ; *Avery, Son & Fairbairn* (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

C

*Affirmed.* H.L. [1951] 1 All E.R.  
1102.

### HARRISON v. NATIONAL COAL BOARD.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), November 24, 28, 29, 30, December 21, 1949.]

D

*Mine—Coal mine—Shot firing—Breach of statutory duty by shot firer—Liability of mine-owner, manager, and under manager—General Regulations, 1913 (S.R. & O., 1913, No. 748), reg. 1, made under Coal Mines Act, 1911 (c. 50), s. 86 (1)—Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), cl. 2 (e).*

E

By the Coal Mines Act, 1911, s. 90 : " If any person who is bound to observe the regulations of any mine, acts in contravention of or fails to comply with any of them, he shall be guilty of an offence against this Act, and also the owner, agent, and manager of such mine shall each be guilty of an offence . . . unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the regulations, to prevent such contravention or non-compliance." Regulation 1 of the General Regulations (dated July 10, 1913), made under s. 86 (1) of the Act provides : " It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every Order in force under the Act regulating the . . . use . . . of explosives, and it shall be the duty of all persons employed in or about the mine to comply with the provisions of the said Orders." By cl. 2 (e) of the Explosives in Coal Mines Order, 1934 : " The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable steps to prevent any person approaching the shot."

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The plaintiff, who was employed by the defendants in their coal mine, was injured as a result of a breach of cl. 2 (e) of the Order of 1934 by a shot-firer, S., who was also an employee of the defendants. The plaintiff was driving a drift from one seam to another and, it being necessary to loosen some stone, requested S. to fire a shot which he did without warning the plaintiff or ensuring that the plaintiff was in a place of safety. The defendants had taken all reasonable means, by publishing the regulations, to enforce and secure compliance with the regulations. In a claim by the plaintiff for damages for breach of statutory duty, by the defendants, their servants or agents.



**HELD :** on the true construction of reg. 1 of the General Regulations, 1913 and of cl. 2 (e) of the Order of 1934 there was no duty imposed on the defendants, or on the manager and under-manager of the mine, to carry out the provisions of cl. 2 (e); the failure to comply with cl. 2 (e) was that of S. alone; the defence of common employment applied; and the plaintiff's claim must fail.

*Yelland v. Powell Duffryn Associated Collieries, Ltd.* ([1941] 1 All E.R. 278), **A**  
*distinguished.*

*Per JENKINS, L.J.* The better opinion, both in principle and on the authorities, appears to be that there may be a breach of statutory duty entitling an injured party to damages although the breach in question may not amount to a criminal offence.

*Decision of JONES, J.* ([1949] 2 All E.R. 58), *affirmed.* **B**

[AS TO REGULATIONS GOVERNING THE USE OF EXPLOSIVES IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 803, para. 1656; and FOR CASES, see DIGEST, Vol. 34, pp. 301-303, 744, 745, Nos. 2498-2505, 1190-1195.]

Cases referred to :

(1) *David v. Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146; 78 L.J.K.B. 659; 100 L.T. 678; *affmd.*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 34 Digest 740, 1168. **C**

(2) *Yelland v. Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278; [1941] 1 K.B. 154; 110 L.J.K.B. 401; 164 L.T. 401; 2nd Digest Supp. **D**

(3) *Howells v. Landore Steel Co.*, (1874), L.R. 10 Q.B. 62; 44 L.J.Q.B. 25; 31 L.T. 433; 32 L.T. 19; 38 J.P. 806; 34 Digest 214, 1767. **D**

(4) *Watkins v. Naval Colliery Co.*, (1897), *Ltd.*, [1912] A.C. 693; 81 L.J.K.B. 1056; 107 L.T. 321; 34 Digest 741, 1173.

(5) *Black v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 97; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 740, 1166.

(6) *Potts v. Reid*, [1942] 2 All E.R. 161; [1943] A.C. 1; 111 L.J.P.C. 65; 167 L.T. 301; 2nd Digest Supp. **E**

**APPEAL** by the plaintiff from an order of JONES, J., ([1949] 2 All E.R. 58) made at Leeds Assizes on May 9, 1949, whereby he gave judgment for the defendants in an action by the plaintiff in respect of injuries sustained by him on Jan. 27, 1948, in the North Gawber Colliery, in which he was working as a collier in the employment of the defendants. The plaintiff alleged that the accident was due to negligence or breach of statutory duty under cl. 2 (e) of the Explosives in Coal Mines Order, 1934, by the defendants, their servants or agents. The defendants pleaded that the negligence (if any) was the negligence of one, Spence, a shot-firer in common employment with the plaintiff, and that the statutory duty was only imposed on the shot-firer and not the defendants. JONES, J., held that there was no breach of statutory duty by the defendants. The Court of Appeal now affirmed this decision and dismissed the appeal. The facts appear in the judgment of TUCKER, L.J. **F**

*Beney, K.C.*, and *McLusky* for the plaintiff.

*Fenwick, K.C.*, and *Wrangham* for the defendants. **G**

*Cur. adv. vult.* **H**

Dec. 21. The following judgments were read.

**TUCKER, L.J. :** This is an appeal from a decision of JONES, J., given at Leeds Assizes on May 9, 1949, whereby he gave judgment for the defendants, the National Coal Board, in an action brought against them by the plaintiff in respect of personal injuries suffered by him as the result of an accident in the North Gawber Colliery, in which he was working as a collier in the employ of the defendants. The accident occurred on Jan 27, 1948, and the plaintiff alleged

that it was due to negligence or breach of statutory duty on the part of the defendants.

A The facts found by the learned judge were shortly as follows. The plaintiff was driving a drift from one seam to another and the time arrived when it was necessary to have a shot fired to loosen the stone through which the drift was being driven. The plaintiff had bored three holes in which the shots were to be placed. He sent his son, who was assisting him, to inform the deputy, a man named Spence, who was the person entrusted that day with the duty of shot-firing in that part of the mine. About half an hour later Spence arrived. The plaintiff and his son proceeded to make the necessary arrangements for the firing of the shots by laying down iron sheets called flags, removing their tools, and taking a pony to safety. While the plaintiff was bending down and before B he had taken shelter, Spence, who had put in the shots and coupled his shot firing gear to the detonator wires, turned the key in the battery and caused the shot to be fired, whereby the plaintiff suffered injuries.

Clause 2 (e) of the Explosives in Coal Mines Order, 1934, made under s. 61 of the Coal Mines Act, 1911, provides :

C "The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter . . ."

It was admitted at the trial that Spence had acted in breach of his statutory duty under cl. 2 (e) and that he had been guilty of negligence. But for the doctrine of common employment, the defendants would, of course, on these facts have clearly been liable to the plaintiff for the injuries which he received as a result of Spence's negligence and breach of statutory duty. The defendants D relied on this defence and pleaded that the plaintiff was in common employment with Spence.

E So far as negligence is concerned, it was not disputed that this defence must prevail, but, in so far as Spence's omission consisted of a breach of statutory duty, it was contended that the defence of common employment had no application. It was said that it would be an extension of the doctrine to hold that a workman impliedly agrees to take the risk of breaches by his fellow servants of regulations enacted for his safety and having statutory force. As to this, I think that all authority points to the contrary. In *David v. Britannic Merthyr Coal Co.* (1) COZENS-HARDY, M.R., said ([1909] 2 K.B. 152) :

F "The principles of law which ought to govern this case do not seem to be open to serious doubt, although the application of those principles presents to my mind very great difficulties. The principles may be shortly stated thus : A master is not liable to one servant for the consequences of an accident caused to that servant by the negligence or breach of statutory duty of another servant. This is often spoken of as the doctrine of common employment. But, on the other hand, a master is liable to his servant for the consequences of an accident caused to that servant by the breach of G a statutory duty imposed directly and absolutely upon the master . . ."

This was a dissenting judgment, but it is clear that the other members of the court must have agreed with this statement of the law, otherwise the defendants in that case would have been clearly liable and the elaborate judgments of FLETCHER-MOULTON, L.J., and BUCKLEY, L.J., would have been unnecessary. H More recently in *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (2) DU PARCQ, L.J., said ([1941] 1 All E.R. 284) :

" . . . but the mere fact that the negligence of a fellow-servant was a breach of a statutory obligation imposed upon him is not sufficient to deprive the master of the benefit of the doctrine of common employment."

In that case also it would have been unnecessary to consider whether there was a direct and absolute obligation imposed on the defendants if they were in any event liable for the breach of statutory duty imposed on their servant. In this

state of authority—and in the absence of authority I should have reached the same conclusion—the defence of common employment is, in my view, a complete answer to the plaintiff's claim, unless he can establish that there was in addition a direct and absolute obligation on the defendants, or on some servant or agent of theirs for whose acts or omissions, in the course of his employment, they are liable and who was not in common employment with the plaintiff.

I will deal, first, with the question whether, on the judge's findings, there was a breach of statutory duty imposed on some person other than Spence. It was argued in this court that there was a breach by the manager and under-manager, by virtue of the provisions of reg. 1 of the General Regulations made under s. 86 (1) of the Coal Mines Act, 1911. No such breach was alleged in the statement of claim. The learned judge in his judgment made a passing reference to this regulation as follows ([1949] 2 All E.R. 60) :

“ Regulation 1 of the General Regulations of 1913 (S.R. & O., 1913, No. 748), made under s. 86 of the Act of 1911, provides : ‘ It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every Order . . . regulating the . . . use . . . of explosives.’ Therefore, it is the duty of the manager and under-manager to carry out and enforce to the best of their ability para. 2 (e) of the Order of 1934.”

The learned judge did not proceed to consider whether the defendants were thereby made liable, or whether the defence of common employment would in this connection avail them. As I have said above, no such allegation had been made in the statement of claim and, consequently, the plea of common employment was only directed to Spence. In this state of affairs I do not think that it would be right for this court to assume, in the absence of evidence directed to this issue, that a defence which might have been pleaded had the statement of claim been differently framed would, if pleaded, have necessarily failed, especially having regard to the decision in *Howells v. Landore Steel Co.* (3). As the matter was, however, argued before us without objection, I will state my view as to the proper construction of reg. 1 of the General Regulations of 1913. The question turns on the meaning of the words “ carry out ” used in conjunction with the words which follow, namely, “ and to the best of their ability enforce.” *Prima facie* I should have thought that this language envisaged that some provisions of the relevant orders could and must be actually performed by the manager and under-manager either personally or by some person on their behalf, and that other provisions imposed duties on specified persons who were alone qualified and entitled to perform them and as to which the manager and under-manager were required to the best of their ability to enforce the performance.

Applying this construction to the duties of a shot-firer, I find that para. 6 (a) of the Order of 1934 provides :

“ Competent persons (in this Order called shot-firers) shall be appointed in writing by the manager for the purpose of firing shots, and no shot shall be fired except by a shot-firer.”

Paragraph 2 lays down the procedure to be followed by the shot-firer. He is the only person entitled to carry out those operations, the performance of which is entrusted to him and him alone. Sub-paragraph (e), which is the one now in question, lays down that “ the person firing the shot ” shall take certain steps. Only one person can fire the shot and it seems to me to be straining the use of words to say that it is the duty of the manager and under-manager “ to carry out ” the provisions of this paragraph of the Order. They must, no doubt, enforce the performance to the best of their ability, but to say that they must “ carry out ” something which they are expressly forbidden to do, with the result that they become liable to criminal proceedings for not “ carrying out ” these



provisions, seems to me to produce a result which cannot have been intended by those who framed this Order.

Before reaching a final conclusion on this point it is, however, necessary to give careful consideration to the judgment of DU PARCQ, L.J., in *Yelland's* case (2). That case concerned the duties of an electrician under Part III of the regulations of 1913. Regulation 131 (a) provides :

A “No person except an electrician or a competent person acting under his supervision shall undertake any work where technical knowledge or experience is required in order adequately to avoid danger.”

Regulation 131 (b) provides :

B “An electrician shall be appointed in writing by the manager to supervise the apparatus.”

The regulation which had not been complied with in that case was reg. 131 (e), which reads as follows :

“Should there be a fault in any circuit the part affected shall be made dead without delay, and shall remain so until the fault has been remedied.”

C These regulations are preceded by reg. 117, which says :

“It shall be the duty of the mine owner, agent, and manager to comply with and enforce the following regulations, and it shall be the duty of all workmen and persons employed to conduct their work in accordance with the regulations.”

D DU PARCQ, L.J., held that by reason of the electrician's breach of reg. 131 (e) the mine-owner had failed to “comply with” that regulation, but he could not be said to have failed to enforce it. The learned lord justice said ([1941] 1 All E.R. 286) :

E “It is not necessary to decide whether the owner is bound to ‘comply with’ every one of the regulations to which reg. 117 refers. It may be that there are some with which, from their very nature, it is impossible that the owner should comply, and that his only duty with regard to these is to ‘enforce’ them. Further, it must, I think, be true to say that a breach of duty by some person who has not been entrusted by the mine-owner with the performance of the duty on his behalf is no evidence of a failure by the owner to comply with the Act. I find no difficulty, however, in holding that the mine-owner is under an obligation to ‘comply with’ reg. 131 (e), and that in the present case the defendants have failed in that duty. The person immediately responsible for the performance of this obligation is the electrician, or assistant electrician, who has to be appointed by the manager. (regs. 118 and 131 (b)). His duties are set out in reg. 131 (e), and, in my opinion, he must be regarded as the mine-owner's agent to perform those duties, and as the agent through whom the owner must act, and in this case did act. The mine-owner, through the manager, has entrusted him with the performance of the duty. It follows that the law attributes to the owner his acts and omissions, and regards them as the mine-owner's own acts and omissions, for which he is directly responsible. Proof of the facts which were established in this case in my opinion fully supported the pleaded allegation that ‘the defendants failed to comply with the Electricity Regulations.’”

H In that case the lord justice was considering the words “comply with” and not the words “carry out.” Furthermore, he was dealing with those words in a regulation which placed a duty on the mine-owner. MACKINNON, L.J., did not in terms refer to reg. 117, but I think that in reading his judgment it must always be borne in mind that the plaintiff's case was mainly based on this regulation. LUXMOORE, L.J., agreed with the judgments delivered by both the other members of the court, which he evidently did not regard as being in any way conflicting.

There is nothing in *Yelland's* case (2) which impels me to the view that I must construe the words "carry out" as imposing a liability on the manager and under-manager for the shot-firer's failure to perform the duties imposed on him under cl. 2 (e) of the Order of 1934. In this connection it is, perhaps, worth observing that DU PARCQ, L.J., himself uses the words "comply with" in contrast to "carry out" in a passage of his judgment, where he says (*ibid.*, 285) :

"Even if the mine-owner were a natural person, and not, as in this case, a limited liability company, he would hardly be able to comply with any of the regulations, and certainly would be unable to comply with them all, in the sense of himself carrying them out, or even in the sense of constantly seeing to it that they were carried out."

In my view, in order to succeed on this appeal the plaintiff must satisfy us that cl. 2 (e) imposes a direct and absolute obligation on the mine-owners as well as on the shot-firer. This appears to have been the only issue raised at the trial and it was put in the forefront of the plaintiff's argument in this court. JONES, J., was of opinion that not much assistance was to be gained from *David v. Britannic Merthyr Coal Co.* (1), decided under the rules contained in s. 49 of the Coal Mines Regulation Act, 1887, and that *Yelland's* case (2) was distinguishable as having been decided under reg. 117, which expressly imposed a duty on the mine-owners. He was of opinion ([1949] 2 All E.R. 61) :

"... in the circumstances of the case and on the true construction of the material regulations there was not a duty on the mine-owners to carry out the provisions of para. 2 (e) of the Order of 1934, and that there was no breach of statutory duty by them."

After due consideration of the arguments advanced by counsel to the contrary and the authorities cited by him, I have arrived at the same conclusion as JONES, J.

The cases principally relied on were those already referred to, namely, *David's* case (1) and *Yelland's* case (2). It is difficult to derive much assistance from *David's* case (1). The rule with which that case was mainly concerned was s. 49, r. 12 (f), of the Coal Mines Regulation Act, 1887, which, so far as is material, provided:

"... no shot shall be fired except by or under the direction of a competent person appointed by the owner agent or manager of the mine."

The shot had, in fact, been fired by two unauthorised persons, though a regular shot-firer had been duly appointed. Section 50 of the Act of 1887 provided :

"Every person who contravenes or does not comply with any of the General Rules in this Act, shall be guilty of an offence against this Act ; and in the event of any contravention of or non-compliance with any of the said General Rules in the case of any mine to which this Act applies, by any person whomsoever, the owner agent and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance."

At the trial CHANNELL, J., directed the jury that the duty imposed on the mine-owners was, first, to publish the rules, and, in the next place, to enforce them to the best of their power, and, if they did this, they were not liable if one of their servants committed a breach of the rules and another servant was thereby injured. He further directed the jury that the onus was on the plaintiff to prove that the defendants had neglected their duties as laid down above. COZENS-HARDY, M.R., in a dissenting judgment agreed with the direction

given by CHANNELL, J. FLETCHER-MOULTON, L.J., was of opinion that there had been misdirection by the trial judge. He said ([1909] 2 K.B. 162) :

"I come, therefore, to the conclusion that, although every 'offence against the Act' for which a penalty is provided undoubtedly constitutes a breach of a statutory duty, the converse is not necessarily the case, and there may be statutory duties under the Act the breach of which is not made an 'offence under the Act' so as to be mulcted by a penalty ; and further—a conclusion that has a more direct bearing on the questions in this action—that statutory defences to proceedings of a criminal nature in respect of 'offences under the Act' are only defences to such proceedings, and are not statutory defences in civil proceedings based on the non-performance of the statutory duty. Penalties are not in lieu of civil liability ; they are additional to and independent of it. It follows, therefore, that in my opinion the learned judge misdirected the jury in telling them that 'there is not in this statute an absolute liability upon the owners to ensure compliance with these rules by their servants, but if they, to the best of their power, do their best to enforce these rules, then they are not liable in law for damage done by reason of their servants not performing the rules.' I hold that in the rules which form part of this Act there are many statutory duties imposed on the owners of the mines, and that with regard to these there is no exception to the ordinary rule that civil responsibility follows if these rules are broken and damage is occasioned to third parties, whether the actual act or default is due to the owner or his servants or agents."

As I read the judgment of the lord justice he was of opinion that on the facts proved the judge should have directed the jury that liability on the part of the defendants had been established, and I do not know, on this view of the case, what evidence the defendants could call on the new trial in order to escape liability. BUCKLEY, L.J., was of opinion (*ibid.*, 168) that the defendants might escape liability by proving that they had taken all reasonable means to prevent the breach, but that the onus was on them to prove this in order to escape their *prima facie* liability for breach. On this view a new trial was clearly required.

On appeal to the House of Lords the judgment of the majority of the Court of Appeal was upheld, but LORD HALSBURY and LORD GORELL said that they could not agree with some of the reasoning of the judges in the Court of Appeal. LORD HALDANE in *Watkins v. Naval Colliery Co.*, (1897), *Ltd.* (4) explained ([1912] A.C. 703) the order for a new trial in *David v. Britannic Merthyr Coal Co.* (1) on the ground that a new trial was all that was asked for, but COZENS-HARDY, M.R., in the report of the latter case said ([1909] 2 K.B. 152) :

"The plaintiff has appealed and claims either judgment or a new trial on the ground of misdirection."

In these circumstances I feel great difficulty in ascertaining what direction the judge was required to give to the jury at the new trial. Was it that indicated by BUCKLEY, L.J., or that which is implicit in the judgment of FLETCHER-MOULTON, L.J. ? It is for this reason that I find difficulty in extracting much assistance from this case. Taking, however, the view most favourable to the plaintiff in the present case, namely, that expressed by FLETCHER-MOULTON, L.J., the fact remains that he was construing a totally different rule, namely, one expressed in the words: "No shot shall be fired . . ." If I may respectfully say so, I can quite understand the view that these words impose an absolute and inescapable obligation on the mine-owner. The clause of the order in question in the present case is worded differently. It is dealing with the steps to be taken by the duly appointed shot-firer before he fires the shot. He shall "see that all persons in the vicinity have taken proper shelter." This is an obligation expressly imposed on him, he being the only person who is permitted to fire the shot. I cannot read this provision as imposing a direct and absolute obligation



on the mine-owner, whether he be a natural person or a corporate body which can only act by an agent.

I agree with JONES, J., that reg. 117, which formed the basis of the judgment of DU PARCQ, L.J., in *Yelland's* case (2) and which must, I think, have been present throughout to the mind of MACKINNON, L.J. (though not expressly mentioned), distinguishes that case from the present. I feel that it would be straining the language of the order and regulations to decide in the present case that there was an absolute and direct obligation on the mine-owners and thereby escape from the consequences of the doctrine of common employment which at the date of this accident precluded the plaintiff from recovering damages for the admitted negligence and breach of statutory duty by Spence, for which, but for this doctrine, the defendants would have been clearly liable.

As I am of opinion, for the reasons stated above, that the defendants are not liable to the plaintiff, it is not necessary to this judgment to decide whether the defendants could have succeeded on the ground that their civil liability is to be measured in terms of their criminal liability under s. 90 of the Coal Mines Act, 1911. As to this there have been conflicting *dicta* of high authority with regard to these provisions and similar provisions in other statutes. On the one hand, BUCKLEY, L.J., and COZENS-HARDY, M.R., in *David's* case (1) and LORD KINNEAR in *Black v. Fife Coal Co., Ltd.* (5), and LORD ATKINSON in *Watkins v. Naval Colliery Co., (1897), Ltd.* (4), all took the view that a defence available in criminal proceedings would also afford an answer to civil proceedings. On the other hand, FLETCHER-MOULTON, L.J., in *David's* case (1), DU PARCQ, L.J., in *Yelland's* case (2) and LORDS THANKERTON, WRIGHT and PORTER in *Potts v. Reid* (6), which was a case under the Factories Act, 1937, took the contrary view that provisions with regard to criminal liability and containing no reference to civil liability do not affect the existence of a contravention of the Act or regulations giving rise to civil liability. Notwithstanding this difference of opinion and recognising that such questions must in every case depend on the precise language of the statute in question, I have no hesitation in saying that, had it been necessary, I should have accepted the view expressed by DU PARCQ, L.J., in *Yelland's* case (2) in dealing with the Act now in question and the reasoning of LORD PORTER in *Pott's* case (6). For the reasons stated above, I would dismiss this appeal. I desire to add that in cases such as this, which involve difficult questions of law and are likely to be taken to appeal it is always desirable that the trial judge, whether or not he is specifically requested by counsel so to do, should assess the damages provisionally, if his decision is adverse to the plaintiff. Failure to do so frequently results in unnecessary further expense to the parties.

SINGLETON, L.J. : I agree.

JENKINS, L.J. : I agree and have very little to add. Accepting the evidence of the agent, manager and under-manager of the mine, the learned judge found that all precautions had been taken by the officials of the mine that shot-firing in the mine should be carried out with care, and he further found that the defendants took all reasonable means, by publishing the regulations, to enforce this and secure compliance with the regulations. This finding, as I understand it, has the effect of absolving the defendants and also their agent, manager and under-manager from being guilty of an offence under s. 75, or, alternatively, s. 90, of the Coal Mines Act, 1911, by reason of the shot-firer, Spence's, contravention of, or failure to comply with, the provisions of the Explosives in Coal Mines Order, 1934. If on the facts the defendants had been guilty of an offence under either of those sections, it would, no doubt, have followed that the plaintiff would have been entitled to recover damages from the defendants on the ground that the offence constituted a breach of statutory duty by which he had been injured. On the other hand, I agree with my Lord that

A the absence of any offence involving criminal liability does not conclude the matter as the better opinion both in principle and on the authorities appears to be that there may be a breach of statutory duty entitling an injured party to damages although the breach in question may not amount to a criminal offence. It by no means follows, however, that every breach of the Explosives in Coal Mines Order, 1934, or of the General Regulations of 1913 made under s. 86 of the Coal Mines Act, 1911, necessarily constitutes a breach of statutory duty on the part of the owner of the mine simply because he is the owner, without regard to the terms of the provision in question, the nature of the duty which it imposes, or the person it charges with the performance of that duty. There are, of course, some provisions of the Order and regulations which do impose statutory duties on the owner in express terms. There may well be others which should be construed as doing so, even though the owner is not expressly mentioned as the person responsible, and, in general, I think a regulation to the effect that this or that shall or shall not be done in any coal mine, without any reference to the person by whom it is to be done or prevented, would *prima facie* cast on the owner, acting personally or through his agents, the duty of doing or preventing the act in question. The duties with which this case is concerned, however, were duties in terms laid on the shot-firer, by whom alone they were capable of being performed, and there is no regulation purporting to lay them on the owner as well. The only other persons expressly charged with any duty in this particular matter are the manager and under-manager, who, by reg. 1 of the General Regulations, are enjoined to "carry out and to the best of their ability enforce" the provisions of the order.

D In contrast to reg. 1, reg. 117 (which the court had to consider in *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (2) ), provides that

"It shall be the duty of the mine-owner, agent, and manager to comply with and enforce the following regulations [relating to electricity] . . ."

E The reason why the owner should have been included in reg. 117 and omitted from reg. 1 is not apparent, but, if it had been intended to make the owner responsible in both cases, he must surely have been referred to in both regulations or else (on the principle that he as owner was by implication fixed with an overriding and universal responsibility) omitted from both. Applying the ordinary principles of construction, the only conclusion I can draw from the omission of the owner from reg. 1, in contrast to his inclusion in reg. 117 is that it was intended, for some reason or other, to lay a general duty on him in regard to the matters covered by reg. 117, but not in regard to the matters covered by reg. 1. The owner is excluded from the technical management of the mine by s. 2 (4) of the Act of 1911, and he, therefore, clearly has no power to control the proceedings of a shot-firer, even if it were otherwise practicable for him to do so. Accordingly, I do not think he should be held to have committed a breach of statutory duty by reason only of the shot-firer's default unless the terms of the Act and regulations either expressly or by necessary implication produce that result. So far from that being the case (ss. 75 and 90 of the Act being out of the way), the language of reg. 1, especially when contrasted with that of reg. 117, points clearly in the other direction.

G As to the alternative argument advanced in this court to the effect that there was a breach of statutory duty on the part of the manager and under-manager under reg. 1, for which the defendants as their employers must be held responsible to the plaintiff, assuming it to be open to the plaintiff, I think it must fail for the reasons which my Lord has expressed. To those reasons I would only add this. The duty imposed on the manager and under-manager is "to carry out and to the best of their ability enforce" the Order. If the words "to carry out" are construed as imposing an unqualified obligation to secure compliance with the order, then the qualification of the obligation to "enforce" it, imported by the words "to the best of their ability," seems to me to be meaningless.

There can hardly be a failure "to enforce" the order unless there has been a failure on somebody's part to comply with it. Therefore, if the duty "to carry out" was broken every time there was a non-compliance by anyone, it would be no defence for the manager and under-manager to show that they had enforced the order in regard to the particular matter in question "to the best of their ability," and those words would, accordingly, be deprived of all effect. I agree that all three judgments in *Yelland's* case (2) must be treated as founded on the express imposition of a duty on the owner by reg. 117, which explicitly formed the basis of the judgment of DU PARCQ, L.J., and, accordingly, that there is nothing in that decision to conflict with the view, in which I concur, that in the present case the learned judge came to a right conclusion, and that the appeal fails and should be dismissed.

*Appeal dismissed with costs.*

Solicitors : *Corbin, Greener & Co.*, agents for *Raley & Pratt*, Barnsley (for the plaintiff) ; *Solicitor to the National Coal Board*, agent for *C. M. H. Glover*, Doncaster (for the defendants).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

## HORTON v. LONDON GRAVING DOCK COMPANY, LTD.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.J.J.), November 30, December 1, 2, 21, 1949.]

*Negligence—Invitee—Duty of occupier—Protection against "unusual danger"—Workman falling from staging—Workman's knowledge that staging faulty—No contributory negligence—Defence of volenti non fit injuria not available on evidence.*

The plaintiff, a welder, was employed by sub-contractors to weld strips of steel on the ribs of a trawler which the defendants, the head contractors, were reconditioning. While working in the fish house (part of the hold), the welders had to work in pairs on a staging, provided by the contractors and comprising four boards, five feet apart, each about twenty feet long, eleven inches wide and three inches deep, supported on iron beams on angle-irons placed across the fish house at a height of five feet five inches from a cement lining at the bottom of the trawler. There were no cross boards to the staging, and the only means of getting from one board to another was by stepping on an angle-iron. The staging was under the exclusive control of the contractors, and the sub-contractors' workmen had no right to interfere with it, but they had complained of its insufficiency to the contractors' charge-hand, who had promised that something would be done to remedy the defect. Nothing, however, had been done. While working on the staging, the welder placed one foot on the middle deal and the other foot on an angle-iron to pass a tool-box to a fellow welder, and, in trying to get both feet on the middle deal, he slipped and was injured. In an action brought by him against the contractors, claiming damages for negligence, it was established that the accident was caused by the insufficiency of the staging, but the judge held that the contractors were not liable in negligence, as their duty to the welder, as an invitee, was only to protect him from an "unusual danger" and, as he was aware of the danger, it could not be an "unusual" one. On appeal :

HELD : an "unusual danger" was one which would not normally be expected, and a danger which was unusual did not become other than unusual merely because the person suing knew of it before his accident ; the



danger created by the insufficiency of the staging was an unusual one in that it was of a kind not usually encountered, and, as the contractors knew that the staging was to be used by the sub-contractors' workmen, of whom the welder was one, they were under a duty to him, even as they were to their own workmen, to provide proper plant and appliances and to make good any deficiencies, and they were relieved from responsibility by reason of the welder's knowledge of the danger only if they could prove contributory negligence or establish a plea of *volenti non fit injuria* (*Letang v. Ottawa Electric Ry. Co.* ([1926] A.C. 725), *applied*); on the facts, however, there was no contributory negligence and, as the welder, although not one of the contractors' own servants, was a servant of the sub-contractors and was working alongside the contractors' servants, and had, moreover, complained of the danger, the defence of *volenti non fit injuria* could not apply (*Bowater v. Rowley Regis Corpn.* ([1944] 1 All E.R. 465), *applied*), and, therefore, the contractors were liable to the welder for their negligence.

*Dictum* of WILLES, J., in *Indermaur v. Dames* (1866) (L.R. 1 C.P. 288), *explained*.

*Per* SINGLETON, L.J. The defence of *volenti non fit injuria* ought not to prevail against a workman who has complained, but who thinks it right to get on with his work as best he can and as carefully as he can, especially if there be a promise on behalf of the occupiers of the premises on which he is injured to put the matter right or to do "the best I can."

*Decision* of LYNSEY, J. ([1949] 2 All E.R. 169), *reversed*.

[AS TO DUTY TO INVITEES, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 41, 42, Nos. 247-258, and pp. 44, 45, Nos. 272-281.]

Cases referred to :

- (1) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; *affmd.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (2) *Norman v. Great Western Ry. Co.*, [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; 38 Digest 352, 580.
- (3) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.
- (4) *Letang v. Ottawa Electric Ry. Co.*, [1926] A.C. 725; 95 L.J.P.C. 153; 135 L.T. 421; Digest Supp.
- (5) *Bowater v. Rowley Regis Corpn.*, [1944] 1 All E.R. 465; [1944] K.B. 476; 113 L.J.K.B. 427; 170 L.T. 314; 108 J.P. 163; 2nd Digest Supp.
- (6) *Heaven v. Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest 8, 9.
- (7) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (8) *Le Lievre v. Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 36 Digest 10, 26.
- (9) *Addie, R. & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (10) *Hillen v. I.C.I. (Alkali), Ltd.*, [1934] 1 K.B. 455; 103 L.J.K.B. 163; 150 L.T. 147; *affd.*, on other grounds, *sub nom.*, *Hillen & Pettigrew v. I.C.I. (Alkali), Ltd.*, [1936] A.C. 65; 104 L.J.K.B. 473; 153 L.T. 403; Digest Supp.
- (11) *Cavalier v. Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 12 Digest 49, 273.
- (12) *Brackley v. Midland Ry. Co.*, (1916), 85 L.J.K.B. 1596; 114 L.T. 1150; 80 J.P. 369; 36 Digest 41, 254.

- (13) *Weigall v. Westminster Hospital*, [1936] 1 All E.R. 232 ; 2nd Digest Supp.
- (14) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156 ; [1941] 2 K.B. 343 ; 111 L.J.K.B. 45 ; 165 L.T. 185 ; 2nd Digest Supp.
- (15) *Harrison v. National Coal Board*, [1950] 1 All E.R. 171.
- (16) *Oliver v. Saddler & Co.*, [1929] A.C. 584 ; 98 L.J.P.C. 87 ; 141 L.T. 305 ; Digest Supp.

APPEAL by the plaintiff from a judgment of LYNSEY, J., dated June 2, 1949, and reported [1949] 2 All E.R. 169, in an action claiming damages for personal injuries arising out of the negligence of the defendants. A

The plaintiff, a welder employed by sub-contractors, was injured while working on a staging erected by the defendants, the head contractors, in the hold of a vessel which the defendants were re-converting into a fishing trawler. The accident was due to the fact that the staging was defective in that it was insufficient. The plaintiff and his fellow workmen had complained of the insufficiency to the defendants' charge-hand, but nothing had been done to remedy it. LYNSEY, J., held that the defendants' duty to the plaintiff, as an invitee, was to prevent damage from an unusual danger, and, as the danger was known to the plaintiff, there was no unusual danger, and, therefore, the defendants were not liable in negligence. From this decision the plaintiff now appealed and the Court of Appeal allowed his appeal. The facts appear in the judgment of SINGLETON, L.J. B

*Edgedale, K.C.*, and *C. J. A. Doughty* for the plaintiff.  
*Marven Everett* for the defendants. C

*Cur. adv. vult.* D

Dec. 21. The following judgments were read.

**SINGLETON, L.J. :** The trawler *Velmont* had been used as a naval vessel. In the latter part of 1946 she was being re-converted into a fishing trawler. The defendants were the main contractors for that work and they are to be regarded as the occupiers of the trawler. Thames Welding Co., Ltd., had a sub-contract with the defendants in respect of certain welding work which had to be done on the trawler. The plaintiff was an electric welder employed by Thames Welding Co., Ltd. In December, 1946, work was being done in the fish house, part of the hold of the trawler. A staging was necessary for work above a certain level and there were two thwart ship iron beams on angle-irons, and four boards or deals were placed on these fore and aft, two on the starboard side and two on the port side. Each of the deals was about twenty feet long, eleven inches wide and three inches deep. There was a space of about eighteen inches between each of the outermost deals and the skin of the trawler and a space of about five feet between each of the deals. There were no cross boards. The results of this was that, if one of the welders had to go from one of the boards to another, it had to be done by his using one of the angle-irons, and the same kind of thing had to be done if one wished to pass a tool-box to another, or if one working on the staging wished to leave it and to go up or down by the one ladder which was available. In the condition in which it was, the staging was defective, in that it was insufficient. There is no doubt as to that. It could have been made satisfactory by the use of more deals, *e.g.*, by the use of a couple of cross boards. As it was, it constituted a danger which led to an accident to the plaintiff. E

The staging was erected by the defendants, and the sub-contractors' men had no right to interfere with it. The welders worked in pairs, one relieving the other from time to time so as to avoid undue strain on the eyes. The plaintiff worked with a man named Fletcher. They had worked in the fish house for some time before it became necessary for them to use the staging. It is clear that before the date of the accident, Dec. 16, 1946, complaints as to the insufficiency of the staging were made by the plaintiff and by other welders to F

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the defendants' charge-hand. One of the witnesses (Death) said that he had complained to his employers' foreman as well as to the defendants' charge-hand. The plaintiff's evidence on this part of the case appears from the following question and answers :

"Q—Had you ever spoken to anybody about the absence of planks across the intervening gap ? A—About the gap ?

A Q—Yes, about the absence of planks across it ? A—Yes. The shipwright occasionally used to come to attend to the job. We spoke about there being insufficient boards there, but he said : ' We have not got this, that and the other ', or ' I will do the best I can and I will look round and have a look,' but that was the last we heard of it.

B Q—They promised to do something, but never did ? A—No, sir, that's it."

He added that Hewitt, the foreman of his employers, Thames Welding Co., Ltd., did not come to the trawler, and that appears to be confirmed by the evidence of Hewitt himself. The evidence of Fletcher, which was taken before an examiner, contains this passage :

C "Q—Had you yourself complained to anybody about the distance between the planks ? A—We only asked the shipwrights.

Q—What did you say to them ? A—We asked them if they could give us some more staging.

D Q—What would have been a safe distance to have those planks from one another ? A—A safe distance ? Safeness would be an extra two deals coming from one to the other. That would be the safe distance so that you could walk from one to the other. But there were none.

Q—How far were you working from the ship's bottom ? A—I should say about eight feet."

In fact, a cement lining had been put into the bottom of the ship and the angle irons were five feet five inches above that.

E On Dec. 16, 1946, the plaintiff had been working on the starboard side on one of the middle deals. That deal was five feet away from the deal which was nearest to the skin of the trawler on the starboard side. He had been welding an iron under the deck and had been using the tool-box, which contained hammer, chisels and welding rods and which weighed in all about fourteen pounds. He finished his work for the time being and his fellow welder, Fletcher, F climbed up on to the deal nearest to the starboard side, using the strips already welded as a ladder to reach the staging. When Fletcher reached the staging, the plaintiff picked up the tool-box in order to hand it to Fletcher. As there was a space of about five feet between the board on which the plaintiff was and the board on which Fletcher was standing, the plaintiff, having one foot on the starboard middle deal, placed his other foot on to the angle-iron and G handed the tool-box to Fletcher, who received it while he had one foot on his deal and the other foot on the angle-iron. Fletcher turned round to put the tool-box on the deal on which he was standing. The plaintiff tried to get both feet on to the middle starboard deal when his foot slipped and he fell astride the angle-iron. He was bruised about the pubic bone and he sustained a rupture.

H The plaintiff brought this action against the defendants, alleging that they were negligent in that they were under a duty to supply and erect a staging which was safe to persons using it and/or to provide safe means of access and/or a safe working platform to persons repairing and reconditioning the ship, and in breach of that duty and/or negligently they supplied a staging which was unsafe and/or did not provide a safe means of access and/or a safe working platform. Among the particulars they included an allegation that the defendants ignored complaints by those working on the staging that it was dangerous and inadequate. The defendants denied the plaintiff's allegations and pleaded that



such injuries as the plaintiff sustained were occasioned by, or, alternatively, were contributed to by, negligence on the part of the plaintiff. There was no plea of *volenti non fit injuria*. LYNSEY, J., gave judgment for the defendants. He was of opinion that there was no unusual danger in so far as the plaintiff was concerned and that there was no breach of duty on the part of the defendants. He added that, if it had been necessary, he would have held that the plaintiff, freely and voluntarily, impliedly agreed to accept the risk of working on the staging with full knowledge of the nature and extent of the risk he ran. Before the learned trial judge, the plaintiff's case was put on the footing of the duty owed by an invitor to an invitee. On the hearing of the appeal counsel for the plaintiff was inclined to put the case on a somewhat wider basis, though his main argument was directed towards showing that LYNSEY, J., was wrong in his statement of the position on the assumption that the defendants were to be regarded as invitores and the plaintiff as an invitee.

I propose to deal first with the arguments based on "invitor" and "invitee." (The judge said that it was clear that the defendants owed to the plaintiff the duties which an invitor owes to an invitee.) This involves a close examination of the nature of the duty as laid down by WILLES, J. (L.R. 1 C.P. 285, 287 and 288) in *Indermaur v. Dames* (1). WILLES, J., used these words (*ibid.*, 288):

"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

The rule there stated ends with the words "knows or ought to know." The words which follow are an indication of some of the ways in which a defendant may escape liability, *e.g.*, by giving notice of the danger, or by lighting, guarding or otherwise, and, of course, contributory negligence was a complete answer at that time. In such circumstances it is a question of fact whether reasonable care has been taken, and notice is an element which has to be taken into consideration.

The first difficulty arises from the words "unusual danger." The submission of counsel for the defendants was that "unusual" in this category means "unexpected by the plaintiff" and that, if the danger was known to him, it could not be an unusual danger, from which it would follow that there was no liability on the defendants. This submission met with the approval of LYNSEY, J., who, citing the judgment of PHILLIMORE, L.J. ([1915] 1 K.B. 596) in *Norman v. Great Western Ry. Co.* (2), said ([1949] 2 All E.R. 170):

"In my view 'unusual danger' means a danger unusual from the point of view of the particular invitee . . . It must be, from his point of view, unexpected in the particular circumstances in which he is availing himself of the invitation."

With respect, I do not regard this as the test in every case. "Unusual" may be defined as: "Not usual: uncommon: exceptional." It indicates the kind of thing which would not normally be expected. The danger created by the staging was through its being insufficient, and the danger was an unusual one in that it was of a kind not usually encountered. The plaintiff was an experienced welder, sixty-seven years of age, and he and others complained of the insufficiency of the staging. A danger which is unusual does not become other than unusual merely because the person suing knew of it before his accident. If it were otherwise, notice of an unusual danger might of itself render the rule in *Indermaur v. Dames* (1) wholly inapplicable, whereas notice is only

an element to be considered. In the case of an invitee it is not necessary to show a concealed or a hidden danger, as it is in the case of a licensee. In this respect I think that the reference by VISCOUNT MAUGHAM ([1941] 1 All E.R. 74) to "a hidden danger" in *Griffiths v. Smith* (3), was a slip, and, in any event, the duty towards an invitee was not being considered in that case.

A The next question is whether the plaintiff's knowledge of the danger prevents him from recovering damages. WINFIELD ON THE LAW OF TORT, 4th ed., p. 562, refers to the two different interpretations which have been put on the rule in *Indermaur v. Dames* (1), as a result of "an ambiguity in its terms."

"(i) The occupier must take reasonable care to make the structure safe.

(ii) The occupier need only ascertain the existence of dangers and either remove them or give adequate warning of their existence . . ."

B The submission on behalf of the defendants was that, as the plaintiff knew of the danger, there was no need for them to give him any notice, and he could not recover, for he was in the same position as one to whom notice had been given. I am not sure that there is any ambiguity in the rule as stated by WILLES, J., if, as I think, the rule itself ends with the words "knows or ought to know," and the words which follow are regarded as indicating possible defences. Once  
C there is evidence of neglect—and I think it is clear that there was, on the judge's finding as to the staging—it is a question of fact whether the notice given is sufficient to absolve the occupier from liability. I agree that one who has knowledge of the danger may well be treated as though he had been given notice of it. Whether the notice (or knowledge) is sufficient to absolve the occupier must depend on a variety of circumstances, including the nature of the risk and the position  
D of the injured party. If a veterinary surgeon is called to a farm at night time to attend to a sick animal and the farmer tells him: "Be careful how you go down the yard or you may fall into a tank," and, in spite of every care, the veterinary surgeon meets with an accident through an unusual danger, though of the kind envisaged, he may be entitled to recover, notwithstanding the warning or notice. On the other hand, if a shopkeeper says to a customer:  
E "Do not go to the far side of the shop. There is a hole there and it is dangerous," and the customer disregards the warning and thereby meets with an accident, it is unlikely that he could recover.

The plaintiff was employed to work on this staging. He had pointed out that it was insufficiently constructed. No doubt, he hoped that he would be able to carry on safely and, perhaps, he thought that the defendants would put the staging into a better condition. It was his duty to get on with the work. He was entitled to rely on the promise of the defendants' charge-hand that something would be done. There is no finding of contributory negligence against the plaintiff and it must be taken that at the time of his accident he was taking every care of himself and that the accident took place because of the insufficiency of the staging. Can it be said that reasonable care was taken "by notice . . . or  
G otherwise," so that the defendants are relieved from responsibility? In fact, they did nothing. I do not regard knowledge on the part of the plaintiff as an answer to the claim, unless it can be shown, not only that he realised the extent of the risk, but also that he freely and voluntarily undertook it—in other words, that the defence of *volenti non fit injuria* applies: see *Letang v. Ottawa Electric Ry. Co.* (4). I do not know how far *volenti* as a defence was considered in the  
H court of first instance. It was argued on the appeal, and I had not then noticed that it was not raised by the defence as pleaded.

We were referred to *Bowater v. Rowley Regis Corpn.* (5), in which it was said that the defence of *volenti* could seldom apply when the plaintiff was a servant of the defendants. It is difficult to see any real difference in principle between that case and this, for, though here the plaintiff was not a servant of the defendants, he was a servant of sub-contractors and was working alongside the defendants' employees. He had complained to the defendants' charge-hand,

who had promised to do the best he could, but who, in fact, did nothing. The defence of *volenti* ought not to prevail against a workman who has complained, but who thinks it right to get on with his work as best he can and as carefully as he can, especially if there be a promise on behalf of the occupiers to put the matter right or to do "the best I can."

It remains for me to deal with the other ground on which the plaintiff's claim is put. It was said that, as the defendants knew that the staging was to be used by the sub-contractors' men, of whom the plaintiff was one, they were under a duty to him to exercise reasonable care in regard to it. It seems to me that this is a much better way of putting the position than to regard it as merely the case of an invitor and an invitee. There has been much criticism of the words of SIR WILLIAM BRETT, M.R., in *Heaven v. Pender* (6), where he said (11 Q.B.D. 509):

"The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

In *Donoghue v. Stevenson* (7), LORD ATKIN, referring to this passage in the judgment of BRETT, M.R., said ([1932] A.C. 580):

"As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide . . . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender* (6), as laid down by LORD ESHER (then BRETT, M.R.) when it is limited by the notion of proximity introduced by LORD ESHER himself and A. L. SMITH, L.J., in *Le Lievre v. Gould* (8)."

After citing extracts from those judgments LORD ATKIN continued (*ibid.*, 581):

"I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

The defendants in the case now before us were the main contractors and they were fully aware of the purposes for which they erected the staging, and, in particular, that it was to be used by sub-contractors' workmen. Applying the words of SIR WILLIAM BRETT, M.R., in *Heaven v. Pender* (6), as explained and modified by him in *Le Lievre v. Gould* (8) and by LORD ATKIN in *Donoghue v. Stevenson* (7), I consider that the defendants were under a duty towards the plaintiff to use ordinary care and skill in the erection of the staging, and they failed in the performance of that duty. The defendants owed to their own workmen a duty to use due care and skill to provide proper plant and appliances. If an accident had occurred to one of their own men through this defective staging, it seems to me that, apart from questions such as contributory negligence, the defendants would have been responsible in damages, and I fail to see why the position should be different in the case of sub-contractors' men, for whose use also the staging was erected by the defendants.

In truth, there would not appear to be a great deal of difference between this aspect of the case and that of invitor and invitee if the view which I have



expressed of the rule in *Indermaur v. Dames* (1) is correct. In *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (9), LORD HAILSHAM, L.C., said of invitees ([1929] A.C. 365) :

“Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.”

A That was a shorter way of expressing the law and it omitted that part of the words of WILLES, J., which indicates what may provide a defence when there is evidence of neglect on the part of the occupier. LYNSEY, J., found that the staging was as described by the plaintiff and his witnesses. The defendants' charge-hand shipwright (Wright) admitted that the staging would be dangerous if it was as they had described it. Another of the defendants' witnesses (Atkinson) agreed that the staging was quite unsafe for welders, and he said that there were complaints every day about the staging. Clearly there was evidence of neglect on the part of the defendants, and I do not see anything in the evidence which can excuse them from liability, unless it can be said that the plaintiff freely and voluntarily undertook the risk. For the reasons I have given, I do not think that that avails the defendants in the circumstances of this case. I would allow the appeal and order that judgment be entered for the plaintiff with damages to be assessed.

C TUCKER, L.J. : This case appears to me to require us to decide a matter which has been much debated by the writers of text books, namely, as to the alleged ambiguity of the rule in *Indermaur v. Dames* (1). Does that rule require the occupier to take reasonable care to make the premises or structure reasonably safe for the purposes for which the invitee is invited thereto, or is the occupier's duty confined to taking reasonable care to prevent accidents arising from unusual dangers of which he is or ought to be aware, so that, if the danger is known to the injured person as a result of notice or otherwise, he is precluded from recovering ? It does not appear that in the long history of cases concerning inviters and invitees it has ever been necessary to the actual decision to answer this question. There have been numerous *dicta* either way. In *Hillen v. I.C.I. (Alkali), Ltd.* (10), SCRUTTON, L.J., referred to the conflict of opinion on the point in these words ([1934] 1 K.B. 465) :

E “It is unnecessary in this case to discuss whether that obligation is to use reasonable care to see that the premises are reasonably safe, as was held by the Court of Appeal in *Norman v. Great Western Ry. Co.* (2), or merely to give warning of a trap, the generally accepted view of WILLES, J.'s judgment in *Indermaur v. Dames* (1), as stated by LORD ATKINSON in *Cavalier v. Pope* (11), and held by the Court of Appeal in *Brackley v. Midland Ry. Co.* (12). On this point see SALMOND ON TORTS (7th ed.), pp. 462-464, and POLLOCK ON TORTS (13th ed.), p. 533, note (f).”

F He evidently regarded it as open to this court to adopt either view and nothing has occurred subsequently to alter the position.

G In 1929 LORD HAILSHAM, L.C., in *Addie (Robert) & Sons (Collieries), Ltd. v. Dumbreck* (9), had said ([1929] A.C. 364) :

H “The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.”

“The first category,” as he had previously indicated, consisted of people who went by invitation, express or implied, of the occupier. Since that date and since the observations of SCRUTTON, L.J., in *Hillen's* case (10), SLESSER, L.J., in *Weigall v. Westminster Hospital* (13) cited ([1936] 1 All E.R. 234) the passage

from LORD HAILSHAM's speech which I have just read, and SCOTT and GODDARD, L.JJ., in *Haseldine v. Daw* (14) have stated the duty as follows : SCOTT, L.J., said ([1941] 3 All E.R. 166) :

"On the scope of the occupier's duty to an invitee at common law, there is to-day general agreement, except on one aspect, and, if the plaintiff was an invitee, as I think that he was, the liability of the landlord in the present case to the plaintiff as his invitee turns on that very point. Is it his duty to provide 'reasonably safe premises,' or only to 'take reasonable care' to ensure that his premises shall be safe? The former standard is higher than the latter, 'a limited duty of insurance, as one may call it,' as was said in POLLOCK ON TORTS, 14th ed., p. 406, and, it has been suggested, may involve responsibility for the act of an independent contractor : see WINFIELD ON TORTS, p. 581, note (d). There are some judicial expressions to the former effect, but I do not know of any case where the point has been the *ratio decidendi*. In *Indermaur v. Dames* (1), WILLES, J., expressed it as a duty of care only, and I cannot see how, on principle, it can be put any higher."

GODDARD, L.J., used these words (*ibid.*, 181) :

"However, even assuming that the plaintiff is to be regarded as an invitee, I think that his claim... must fail. Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe."

IN HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 23, p. 604, para. 853, where all the authorities are referred to, the law is summarised as follows :

"The duty of the occupier of premises on which the invitee comes, is to take reasonable care that the premises are safe, and to prevent injury to the invitee from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or, in other words, to have his premises reasonably safe for the use that is to be made of them."

As this way of stating the duty appears to me to be apt to cover all the infinite variations of facts and circumstances which may exist in these cases and to meet the plain requirements of justice, I would be disposed to adopt it as a correct and comprehensive statement of the duty, unless I am compelled by authority to reject it. The only reason to the contrary of which I am aware is that the precise language of WILLES, J., in *Indermaur v. Dames* (1) has so often been quoted as correctly stating the whole duty that is owed by the invitor in such cases that it may be said to have become part of our law. I venture to think, however, that, as in every other case, the precise language used must be considered in relation to the particular facts which required decision. In that case there was a hole in the floor of the premises [which were used as a sugar-refinery], not due to any defect, but necessary to the operations being carried on on the premises. Before going there, the plaintiff had been cautioned in these terms :

"Now, mind, Indermaur, sugar-houses are very peculiar places : they neither allow candles nor lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man ; and you keep close to me."

The existence of the hole was well known to the regular employees on the premises, but it was unknown to the plaintiff, who was working for a contractor. To him it was an unusual danger ; to the regular employees it was a familiar feature of the premises. In directing the jury ERLE, C.J., used this language (L.R. 1 C.P. 277) :

"The plaintiff has to establish that there was negligence on the part of the defendant ; that the premises of the defendant, to which he was sent in the

A course of his business as a gas-fitter, were in a dangerous state ; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business."

B It was in this connection that WILLES, J., laid down what he stated was at least the duty owed by the inviters. I do not read it as purporting to be a comprehensive statement covering all cases, and I regard it as a good example of the application of the duty to take reasonable care to make the premises reasonably safe, expressed in terms appropriate to the facts of the case.

C It would, I think, be strange and unfortunate if our law allowed an occupier, who has supplied gear or equipment for immediate use by those whom he has invited to his premises without having taken reasonable care to see that such gear or equipment is reasonably safe, to escape liability in whole or in part unless he proves contributory negligence or establishes a plea of *volenti non fit injuria*. In the present case contributory negligence has not been found and on the facts proved was clearly not established. *Volenti non fit injuria* was not pleaded, and, although it depends in every case on questions of fact, I am clearly of opinion that the facts proved in the present case went no further than to establish *scienter*, there being no material distinction between this case and that of master and servant. For these reasons I agree that the appeal succeeds. The observations that I made in *Harrison v. National Coal Board* (15), with regard to the desirability of the assessment of damages in these cases by the trial judge applies equally in the present case.

E JENKINS, L.J. : I agree with the conclusion at which my Lords have arrived. The degree of care owed by the defendants as inviters to the plaintiff as invitee must obviously be assessed with reference to the circumstances of the particular case. The relevant circumstances, as I understand them, were these. The plaintiff's employers, Thames Welding Co., had contracted with the defendants to do certain welding work on the ship, which the defendants were F re-conditioning as head contractors. The relevant part of this work involved the use of staging, and the contract was entered into on the customary basis that the defendants would provide the requisite staging, and that Thames Welding Co. or its employees would not interfere with the staging so provided, but would report any deficiencies to the defendants' shipwrights for attention. The position, therefore, as regards the welding work in the hold, in the course G of which the plaintiff was injured, was that the staging from which Thames Welding Co.'s employees had to work was provided by the defendants and was under their exclusive control as regards any additions or alterations required to make it adequate for the purpose. I think it follows that, in inviting Thames Welding Co.'s employees (including the plaintiff) into the hold for the purpose of doing the work contracted for from the staging so provided and controlled H by the defendants, the latter assumed a duty towards the former to ensure that the staging was reasonably safe for the purpose for which it was to be used. If one of the planks had been rotten and had broken under the plaintiff, or if the staging had been insecurely supported and had collapsed under him, the plaintiff would clearly have been entitled to recover, both on the narrowest construction of the definition of the duty of inviters to invitees, as stated in *Indermaur v. Dames* (1) and applied in so many subsequent cases to an almost infinite variety of facts, and also on the principle that a person who provides



defective gear for a given purpose is liable to the person for whose use it is provided if the latter sustains injury through the defect, even though the person supplying the gear is not the employer of or otherwise contractually related to the person injured : see *Heaven v. Pender* (6) (as explained in *Donoghue v. Stevenson* (7)) and *Oliver v. Saddler and Co.* (16).

Does it make any difference that the defect actually in question lay, not in any unsoundness or insecurity in the members or construction of the staging, but in its inadequacy in the respects that the four planks provided and the transverse irons on which they rested were so narrow, and the planks were placed so far apart, that anyone attempting to cross, or to pass tools, from one plank to the next was likely sooner or later to slip and fall ? The defendants claim that this does make all the difference. The staging, they say in effect, was plain to see for what it was, and no more and no less dangerous than it actually appeared to be. The danger was obvious, and, if the plaintiff chose to use the staging, he did so at his own risk. I think that this argument involves an undue restriction on the duty owed by the defendants to the plaintiff in the circumstances of the case. It was their business to provide the staging, and, in using it as provided for the purposes of the work contracted for, the plaintiff was doing the very thing they invited him to do. It was also their business (and this I regard as a decisive element in the case) to make good any deficiencies in the staging, which the plaintiff was not entitled to supplement or re-arrange in any way. The staging, to be reasonably safe for the purpose in hand, had to be safe, not merely for a person using reasonable care to walk across or stand on, but for a person using reasonable care to work from and move about on, with his tools and so forth, in the course of welding operations of the kind contracted for. The degree of risk which the use of the staging as provided would be likely to involve in the various situations liable to arise in the course of the work would not be easy to assess in advance. It would, no doubt, have been theoretically possible for the plaintiff to refuse to work from the staging until it had been improved to his satisfaction, but the mere fact that he did not so refuse clearly did not suffice to bring him within the principle of *volenti non fit injuria* : see *Letang v. Ottawa Electric Ry. Co.* (4). The defendants must obviously be regarded as having known of the inadequacy of the staging as erected by their own employees, but, quite apart from this, the evidence shows that the plaintiff and his workmates complained to the defendants' employees of its inadequacy and that these complaints were ignored.

The defendants' position, therefore, comes to this. It was their business to provide staging for Thames Welding Co.'s employees to work from. They provided inadequate staging. It was also the defendants' business to make good any deficiencies in the staging. Complaints of the inadequacy of the staging were made to their employees and ignored. The plaintiff, using, in accordance with the defendants' invitation, the only staging which they thought fit to provide, slipped and was injured, without any negligence on his part, owing to the inadequacy of the staging provided. The plaintiff claiming damages, the defendants say in effect : " We are not liable. The accident was your own fault. It is true that the staging we provided and invited you to use was inadequate and that our employees did nothing when complaints about it were made, but, after all, you could have refused to use the staging and stopped work until we provided something better." This position seems to me to be wholly untenable. For these reasons, I agree that the appeal should be allowed.

*Appeal allowed with costs. Judgment of the court below set aside and judgment entered for the plaintiff for £275 and costs.*

Solicitors : *Shaen, Roscoe & Co.* (for the plaintiff) ; *Carpenters* (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

## Re EARL FITZWILLIAM'S AGREEMENT.

[CHANCERY DIVISION (Danckwerts, J.), December 13, 14, 15, 21, 1949.]

*Death Duty—Estate duty—Property deemed to pass—Annuity purchased from trustees of son's marriage settlement—Liability on annuitant's death—Finance Act, 1894 (c. 30), s. 2 (1) (c), s. 3 (1)—Finance Act, 1940 (c. 29), s. 44 (1).*

A The Finance Act, 1894, s. 2, provides : “ (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say : . . . (c) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words ‘ voluntary ’ and ‘ voluntarily ’ and a reference to a ‘ volunteer ’ were omitted therefrom.”

B The Customs and Inland Revenue Act, 1881, s. 38, provides : “ (2) The personal or movable property to be included in an account shall be property of the following descriptions, viz. : (a) Any property taken as a *donatio mortis causa* made by any person dying on or after June 1, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made three months before the death of the deceased.” The Customs and Inland Revenue Act, 1889, s. 11, provides : “ (1) . . . The description of the property marked (a) shall be read as if the word ‘ twelve ’ were substituted for the words ‘ three ’ therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise . . . ”

E By a settlement dated Apr. 19, 1933, made on the occasion of M.'s marriage, certain property was settled on discretionary and other trusts under which the whole income could be accumulated for twenty-one years (if M. or his father, F., should so long live) for the ultimate benefit of a class of beneficiaries consisting of the persons, other than F. but including M., capable of succeeding to the property subject to a re-settlement of the same date. On Jan. 30, 1934, the trustees of the settlement made a formal offer to sell to F. an annuity of £50,000 a year for his life for £375,000, which price was to be satisfied by the transfer to the trustees of certain shares in and debentures of limited companies at par value and eleven policies of assurance on F.'s life. The amount of the purchase price, seven and a half years' purchase, was that recommended as appropriate by two actuaries. F. accepted this offer, and on Feb. 14, 1934, the transfer of shares, debentures and policies was effected. It was not suggested that the transaction was other than a *bona fide* sale for full value in money or money's worth. The trustees paid the annuity to F. up to the date of his death, and also paid the premiums on the policies of assurance. On Feb. 15, 1943, F. died and estate duty was claimed under the Finance Act, 1894, s. 2 (1) (c), in respect of the property transferred to the trustees on the ground that the Finance Act, 1940, s. 44 (1) (which deals with the purchase of annuities from relatives) prevented the transaction from being treated as a sale within s. 3 (1) of the Act of 1894. The taxpayers argued that s. 2 (1) (c) was inapplicable and that s. 3 (1) and s. 44 (1) were, therefore, not material.

H HELD : the exclusion of the words “ voluntary,” “ voluntarily ” and “ volunteer ” from s. 38 of the Act of 1881 and s. 11 of the Act of 1889 by s. 2 (1) (c) of the Act of 1894 might have had the effect of causing

dispositions made in consideration of marriage to fall within the charging provisions (until such transactions were removed from taxation by the Finance (1909-10) Act, 1910, s. 59 (2)). but it did not charge to duty property which was the subject of a transaction for full value in money or money's worth such as that between F. and the trustees, and, therefore, s. 2 (1) (c) was inapplicable.

*Dicta of PALLES, C.B., in A.-G. v. Smyth* ([1905] 2 I.R. 553), criticised.  
*A.-G. v. Clarkson* ([1900] 1 Q.B. 156), distinguished.

A

[AS TO PROPERTY DEEMED TO PASS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 234, 237-241, paras. 224, 227-230 ; and FOR CASES, see DIGEST, Vol. 21, pp. 8, 10-14, Nos. 28, 43-67.]

Cases referred to :

B

(1) *A.-G. v. Johnson*, [1903] 1 K.B. 617 ; 72 L.J.K.B. 323 ; 88 L.T. 445 ; 67 J.P. 113 ; 21 Digest 12, 55.

(2) *A.-G. v. Holden*, [1903] 1 K.B. 832 ; 72 L.J.K.B. 420 ; 88 L.T. 729 ; 67 J.P. 135 ; 21 Digest 11, 48.

(3) *A.-G. v. Smyth*, [1905] 2 I.R. 553 ; 21 Digest 10, h.

(4) *H.M. Advocate v. Heywood-Lonsdale's Trustees*, (1906). 43 Sc. L.R. 529 ; 21 Digest 10, k.

C

(5) *A.-G. for Ontario v. Perry*, [1934] A.C. 477 ; 153 L.J.P.C. 145 ; 151 L.T. 405 ; Digest Supp.

(6) *A.-G. v. Worrall*, [1895] 1 Q.B. 99 ; 64 L.J.Q.B. 141 ; 71 L.T. 807 ; 59 J.P. 467 ; 21 Digest 12, 54.

(7) *Ormond Investment Co. v. Betts*, [1928] A.C. 143 ; 97 L.J.K.B. 342 ; 138 L.T. 600 ; 13 Tax Cas. 400 ; Digest Supp.

D

(8) *A.-G. v. Clarkson*, [1900] 1 Q.B. 156 ; 69 L.J.Q.B. 81 ; 81 L.T. 617 ; 21 Digest 45, 288.

(9) *A.-G. v. Fairley*, [1897] 1 Q.B. 698 ; 66 L.J.Q.B. 454 ; 76 L.T. 526 ; 21 Digest 45, 287.

(10) *Canadian Eagle Oil Co., Ltd. v. R.*, [1945] 2 All E.R. 499 ; [1946] A.C. 119 ; 114 L.J.K.B. 451 ; 173 L.T. 234 ; 27 Tax Cas. 206 ; 2nd Digest Supp.

E

(11) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 1 K.B. 64 ; 90 L.J.K.B. 113 ; *aff'd.*, [1921] 2 K.B. 403 ; 90 L.J.K.B. 461 ; 125 L.T. 108 ; 12 Tax Cas. 358 ; Digest Supp.

ADJOURNED SUMMONS to determine whether on the death on Feb. 15, 1943, of the seventh Earl Fitzwilliam estate duty became leviable under the Finance Act, 1894, s. 2 (1) (c), incorporating the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), in respect of funds which at the date of his death constituted or represented debentures of and shares in companies and policies of assurance which the seventh earl had in 1934 transferred to the plaintiffs (the trustees of his son's, Lord Milton's, marriage settlement) in consideration of the payment by them to him during his life of an annuity of £50,000. DANCKWERTS, J., held that estate duty was not so leviable. The facts appear in the judgment.

F

G

*Upjohn, K.C.*, and *N. C. Armitage* for the plaintiffs, the trustees of Lord Milton's marriage settlement.

*The Solicitor-General (Sir Frank Soskice, K.C.)* and *J. H. Stamp* for the Crown.

H

*Cur. adv. vult.*

Dec. 21. DANCKWERTS, J., read the following judgment. This is an originating summons taken out for the determination of the validity of a claim by the Inland Revenue Commissioners for estate duty on the occasion of the death of the seventh Earl Fitzwilliam on Feb. 15, 1943, in respect of funds apparently now of the value of over £548,000. The duty is claimed to be leviable



by virtue of the Finance Act, 1894, s. 2 (1) (c), and the transaction which is claimed to have given rise to the claim arose in the following manner.

- In 1933, Earl Fitzwilliam, who was then about sixty-two years of age, wished to supplement his income by the purchase of an annuity, and it was suggested that he might purchase from the trustees of a settlement, dated Apr. 19, 1933, made on the occasion of the marriage of his son, Lord Milton, and known as “the special settlement”, an annuity of £50,000 a year for the sum of £375,000, that is to say, seven and a half years’ purchase, which was the rate recommended as being appropriate by two actuaries. The seventh earl had no beneficial interest under the special settlement, which settled certain capital monies and investments on discretionary and other trusts, under which the whole income could be accumulated for twenty-one years (if the seventh earl or Lord Milton should so long live) for the ultimate benefit of a class of beneficiaries consisting of the persons, other than the seventh earl, capable of succeeding to the property subject to a re-settlement of the Fitzwilliam estate of the same date, Apr. 19, 1933. The seventh earl’s son, Lord Milton, was, of course, within this class of beneficiaries. In pursuance of this suggestion, on Jan. 30, 1934, the trustees of the special settlement made a formal offer to sell to Earl Fitzwilliam an annuity of £50,000 a year for his life for the sum of £375,000, which was to be satisfied by the transfer to the trustees of the following property to which Earl Fitzwilliam was absolutely entitled: £121,534 four per cent. debentures of Earl Fitzwilliam’s collieries company, £88,998 six per cent. preference shares of £1 each in the same company, £61,418 five per cent. preference shares of £1 each in Earl Fitzwilliam’s Wentworth Estates Co., and eleven policies of assurance on the seventh earl’s life which were valued by an actuary at the sum of £103,050. The debentures and shares were to be taken at par value. This offer was accepted by the seventh earl, and the debentures, shares and policies were duly transferred to the trustees, as they acknowledged in writing on Feb. 14, 1934. It is not suggested that this transaction was other than a *bona fide* sale for full value in money or money’s worth. The trustees duly paid the annuity to the seventh earl down to the date of his death. The trustees also paid the premiums on the policies transferred to them after the date of such transfer down to the date of Earl Fitzwilliam’s death or the maturity of the policies as the case might be. Moneys received on policies that had matured and from a sale of some of the debentures transferred to the trustees were represented at the date of the earl’s death by advances to the eighth earl on mortgage amounting to a total of £86,534.
- On the death of Earl Fitzwilliam on Feb. 15, 1943, estate duty was claimed in respect of the moneys and investments then representing the property which had been transferred to the trustees by the seventh earl in 1934. As I have said, the transaction was a sale for full value, and, having regard to the Finance Act, 1894, s. 3, duty would not have been claimed but for the provisions of the Finance Act, 1940, s. 44, which is in the following terms:
- “(1) Where a person dying after the commencement of this Act has made a disposition of property in favour of a relative of his, the creation or disposition in favour of the deceased of an annuity or other interest limited to cease on the death of the deceased or of any other person shall not be treated for the purposes of s. 3, or of s. 7 (1) of the Finance Act, 1894, as consideration for the disposition made by the deceased.”
- The disposition in the present case was, of course, in favour of the trustees of the special settlement, but, as Lord Milton was one of the beneficiaries under the settlement, it is admitted that in substance it was a disposition in favour of a relative of the seventh earl. It is, however, contended that the transaction did not fall within the provisions of the Finance Act, 1894, s. 2 (1) (c), and that neither s. 3 of that Act, nor s. 44 of the Act of 1940 are material.
- The Finance Act, 1894, substantially inaugurated a new scheme of taxation on death, but this Act incorporated certain provisions relating to the former

account duty, and it is with these provisions (as altered by the Act of 1894) that this case is concerned. The Finance Act, 1894, s. 2, provides :

" (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say :... (c) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom . . . "

It is necessary, therefore, to turn to the Customs and Inland Revenue Act, 1881, s. 38, which, after providing for a stamp duty to be charged and paid on accounts therein mentioned, provides :

" (2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz. :—(a) Any property taken as a *donatio mortis causa* made by any person dying on or after June 1, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made three months before the death of the deceased. (b) Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person. (c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

The period of three months mentioned in para. (a) has, of course, been extended successively to twelve months, three years, and (since Earl Fitzwilliam's death) to five years, but these periods are not material for the purposes of the present case. I have read the whole of sub-s. (2) because arguments were founded on the various provisions contained in it.

That section was amended by the Customs and Inland Revenue Act, 1889, s. 11, which (so far as directly material) is in the following terms :

" . . . The description of property marked (a) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise . . . "

It is by reason of this provision, as re-enacted in the Finance Act, 1894, s. 2, that duty is claimed in the present case. The word "voluntarily" or "voluntary" does not appear in the provision, but the words "gift" and "donee" and "donor" appear in it, and as originally enacted there seems to be no reason to attribute to this statutory provision any intention to include transactions for value. But the contention of the Inland Revenue Commissioners is that by reason of the removal of the words "voluntary" "voluntarily" and "volunteer" by the Finance Act, 1894, s. 2 (1) (c), from the former provisions of the Customs and Inland Revenue Acts, 1881 and 1889, transactions for value, even though sales for full monetary consideration, are now included in those

provisions, as re-enacted by the Finance Act, 1894. If it was the intention of the legislature to make such a striking change as to include sales for full monetary value in the former provisions relating to gifts, it certainly seems that an odd method of carrying out such a change was adopted. So long as the provisions were dealing with gifts and purely voluntary transactions, the words "gift," "donor" and "donee" were the natural words to use and were entirely logical.

- A It seems to me that it would have been perfectly simple (if it were desired to include sales) to have substituted the word "assurance" for "gift" and "grantor" and "grantee" or "transferor" and "transferee" for the words "donor" and "donee." It is contended, however, on behalf of the commissioners, that such changes were unnecessary, because the words "gift" and "donor" and "donee" are words of more than one meaning and often
- B have reference simply to transfers, and I was referred to SHEPPARD'S TOUCHSTONE, 8th edn., vol. 1, p. 227. It is said that the materiality of the words "purporting to operate as an immediate gift *inter vivos*" in the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), is simply to show that the reference is to a transaction operating at once, and it is urged that this meaning must be the correct one as otherwise transactions which pretended to be something
- C other than a gift would not be caught by what is the evident intention of the section.

The case has been very fully and carefully argued, and I am very much indebted to counsel for their research and assistance. There does not appear to be any decided case directly holding that a sale for full value in money is within the provisions in question, but I was referred to a number of cases which were said

- D to have a bearing on the point and to a number of other provisions in the statutes relating to estate duty which were alleged to assist me in arriving at the true interpretation of these particular statutory provisions. In *A.-G. v. Johnson* (1) the deceased had paid a sum of £500 to a charity in lieu of a legacy on terms that the charity should pay to him £25 a year for life and to his wife £25 a year for her life after his death. It was held by the Court of Appeal that estate duty
- E was payable on the whole sum of £500 although the commercial value of the annuity of £25 was £210. It is plain that the transaction was treated not as a sale at all but as in substance a gift. For this reason the Court of Appeal rejected the contention that £210 should be deducted from the value of the property as a partial consideration for the transaction. As VAUGHAN WILLIAMS, L.J., said ([1903] 1 K.B. 625): . . . "it was intended not to be a matter of pure business
- F but one of bounty." In *A.-G. v. Holden* (2), the respective fathers of the bride and bridegroom agreed to make settlements on their children on the occasion of those persons' marriage, and the sums so provided were held to be subject to estate duty. This was quite clearly a contract by the two fathers to make gifts, and gifts were, therefore, involved. I have no difficulty in seeing that when the word "voluntary" was removed from the statutory provisions these gifts
- G were clearly within their ambit.

The next case is *A.-G. v. Smyth* (3), in the King's Bench Division of Ireland, before PALLES, C.B., JOHNSON and JOBSON, JJ. It is technically not binding on me, but I should naturally attribute the greatest importance to a decision of that court on a point which I have to consider and decide, particularly having regard to the great reputation of PALLES, C.B., who delivered the reasoned

H judgment in that case. I think it is on this case that the commissioners principally rely. The question for determination, as stated by PALLES, C.B., was whether estate duty was payable on the death of a settlor on property included in an ante-nuptial settlement by him within twelve months before his death, on the marriage of his son, which settlement did not reserve to him an estate for life or for any period determinable by reference to his death, but for which there was no consideration in money or money's worth. The court held that estate duty was payable. PALLES, C.B., delivered a judgment in which he discussed the



effect of the changes made by the Finance Act, 1894, at some length and supplied a number of the arguments which were used on behalf of the commissioners in the present case. The decision, of course, only deals directly with a case where a settlement is effected in consideration of marriage and has no direct bearing on a sale for full monetary consideration, but a wider field was covered by PALLES, C.B., in his judgment. With all due respect to the learned Chief Baron, the reasons which he gives for rejecting the arguments of the defendants as to the effect of the removal of the word "voluntary" do not seem to me convincing. A  
It may well be that the result which he reached on the facts of the case was perfectly correct, but, if the word "gift" in the re-enacted provision be still regarded as something different from "sale," it does not follow that after the exclusion of the word "voluntary" the provision has the same meaning as before the Act of 1894 so that the change is nugatory. B  
It seems to me that the effect of the change might be to bring in dispositions made in consideration of marriage (as in *A.-G. v. Holden* (2)) until such dispositions were removed from taxation under the Finance Act, 1894, s. 2 (1) (c), by the Finance (1909-1910) Act, 1910, s. 59 (2), which section, in fact, refers to "gifts" which are made in consideration of marriage or are proved to be part of the normal expenditure of the deceased. C  
Secondly, it seems to me that the argument that regard must be had to the history of the statutory provisions may well operate in exactly the opposite way from that suggested by PALLES, C.B. If the history of the statutes shows that the word "gift" had a clear and sensible meaning in the statute as originally passed, why should one assume that a violent change has been caused to that word by the omission of the word "voluntary" alone? D  
It also seems to me that there is no real basis for the subtle and scientific analysis on which PALLES, C.B., bases much of his explanation of the provisions in question. These provisions seem to me to have no more scientific basis than a desire to prevent evasion by a tax-payer of the duties which would otherwise be leviable on property devolving on his death by means of a few obvious devices. And, lastly, the theory propounded by PALLES, C.B., seems to me to be at variance with the view of the English Court of Appeal in *A.-G. v. Johnson* (1). E

However, the judgment of PALLES, C.B., has received approval, and, indeed, praise, from LORD DUNEDIN in *H.M. Advocate v. Heywood-Lonsdale's Trustees* (4). It seems to me, however, that this approval may have been somewhat uncritical as the court had, without assistance from *A.-G. v. Smyth* (3), already reached the conclusion that the judgment of the lord ordinary should be affirmed. This was another case of a transaction which was not in any sense a commercial transaction for monetary value, but a transaction operating under a marriage contract, to which it seems obvious different considerations would apply. F  
Finally, it is said that *A.-G. v. Smyth* (3) received the approval of the Privy Council in a judgment delivered by LORD BLANESBURGH in *A.-G. for Ontario v. Perry* (5). In this case it was, in fact, held by the Privy Council that the reasoning of *A.-G. v. Smyth* (3) did not apply to the statute of Ontario which was in question. This result must in itself diminish the force of the approval. Furthermore, the approval given by LORD BLANESBURGH to the judgment of PALLES, C.B. (though described by him as "the leading authority on the subject") must have been of a limited character as LORD BLANESBURGH thought that a contract by a husband to settle property on his wife in consideration of her marriage to him was not within the terms of the Finance Act, 1894, s. 2 (1) (c). G  
LORD BLANESBURGH's view is, it seems to me, more clearly indicated by the following passage ([1934] A.C. 486) : H

"Their Lordships cannot leave the consideration of the Finance Acts without referring to a series of decisions under what may be regarded as the third limb of [s. 38 (2) (a)] of the Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889. A reference to that limb of the subsection *supra*, shows that the gift therein being dealt with need not be pre-

ceded by a 'disposition,' but that the words following seem to contemplate that there may be within their meaning a gift, although accompanied by some benefit to the donor by contract. On that part of the section it has been held that a gift does not cease to be a gift although there is some consideration for it received by the donor: a gift, it has been said, may be something which is not 'a pure and simple gift.' *A.-G. v. Worral* (6) and *A.-G. v. Johnson* (1) may be cited as typical; and see *A.-G. v. Holden* (2)."

- A In referring to s. 38 (2) (a) in the above quotation I have corrected the mistaken reference to s. 38 (1) (9). LORD BLANESBURGH's language is quite inconsistent with the proposition that the word "gift" is to be treated as equivalent to "assurance" or "transfer" so as to include transactions for full monetary consideration.
- B I now turn to the consideration of certain statutory provisions which, it was argued, show that sales for full monetary consideration must be within the terms of the Finance Act, 1894, s. 2 (1) (c). Section 3 of the same Act, which exempts from duty transactions "for full consideration in money or money's worth" (and which was amended by the Finance Act, 1940, s. 44), is the first of these, and was relied on by PALLES, C.B., it seems, to support his theory of the purposes of the Act. It seems to me, however, that s. 3 could have been intended, and on its face clearly was intended, to meet other cases than those that might fall within s. 2 (1) (c). It is to be observed, moreover, that the words of the section are that estate duty shall not be payable in respect of property passing on the death of the deceased "by reason only of a *bona fide* purchase." The reason advanced on behalf of the commissioners for the insertion of these words did not seem to me to be clear. It is evident that the words must contemplate some additional factor, and the section cannot apply unless the case would otherwise be within the charging provisions of the Act. It was contended on behalf of the commissioners that, if the provisions of an earlier statute are doubtful, that is to say, the provisions are "fairly and equally open to diverse meanings," it is permissible to look at a later statute in order to ascertain the meaning of the earlier statute, and especially so if the later statute declares the meaning of the earlier. As authority for this proposition I was referred to *Ormond Investment Co. v. Betts* (7) ([1928] A.C. 154-156 and 164-166). It was argued that certain statutory provisions subsequent to the Finance Act, 1894, and in one instance subsequent to the date of the seventh Earl Fitzwilliam's death, indicate that the Finance Act, 1894, s. 2 (1) (c), must have the meaning attributed to it by the commissioners, that is to say, that transactions for full monetary consideration are subject to estate duty. These statutory provisions are the Finance Act, 1940, s. 44 (to which reference has already been made), the Finance Act, 1939, s. 31 (1), and the Finance Act, 1944, s. 38. Of course, none of these sections deals expressly with the interpretation of the Finance Act, 1894, s. 2 (1) (c), or the Customs and Inland Revenue Acts, 1881 and 1889, but it is argued that the inevitable deduction from their provisions is that the earlier provisions include sales for full value. Such a deduction does not seem to me to be by any means inevitable, and the sections appear to be equally capable of reference to other matters.
- G

- H Furthermore, it is said (and I think that this is really a development of the same point) that where the provisions of an earlier statute have been interpreted by the courts and then that interpretation has been incorporated in a later statute, it is no longer open to argument that the true interpretation of the earlier Act is otherwise. The authority for this proposition is *A.-G. v. Clarkson* (8). This dealt with a situation which was caused by the decision in *A.-G. v. Fairley* (9), in which it was held that estate duty was payable on property contingently settled, though the contingency might not in fact arise. As this was thought to be unfair, it was provided by the Finance Act, 1898, s. 14, that, if it was shown that the contingency had not arisen and could never arise, the duty which had

been levied should be repaid. Then, in *A.-G. v. Clarkson* (8) a similar question to that decided in *A.-G. v. Fairley* (9) arose, and though the court felt doubt as to the true construction of the earlier statutory provision, the construction adopted in *A.-G. v. Fairley* (9) was followed in view of the statutory recognition given by the Finance Act, 1898, s. 14. This rule is referred to in *Ormond Investment Co. v. Betts* (7) ([1928] A.C. 155). It is to be observed that this rule was applied when the legislature was indisputably referring to the construction put on the earlier statutory provision and precisely providing for the situation which had thus arisen. In the present case the contention appears to be that the sections of the later Acts to which I have referred must be taken to have adopted, not merely the decision of the Irish King's Bench Division in *A.-G. v. Smyth* (3), but also the reasoning of PALLES, C.B., in his long judgment in that case. It seems to me that it is quite impossible to make any such deduction from the complicated and, in some respects, obscure sections in question. A

Stress was laid on the wide ambit of the Finance Act, 1894, which sought to bring into the area of taxation on death all property, real and personal, wherever situate, so that property must be said to be subject to duty unless an exemption can be found in the Act. That may be true in respect of property passing within the meaning of the Finance Act, 1894, s. 1. It cannot be true in regard to s. 2 of the Act. By the latter section a number of cases are brought artificially within the ambit of the Act so that property is deemed to pass. For the purposes of cases falling or claimed to fall within s. 2, therefore, it seems to me that a charge for duty must not be assumed *prima facie* to exist, but must be found to be created by the terms of the Act. Finally, it must not be forgotten that the provisions I have to construe are contained in a taxing statute. The rules to be applied to such a statute are well known, but it is worth while to refer to the statement by VISCOUNT SIMON, L.C. ([1945] 2 All E.R. 506) in *Canadian Eagle Oil Co. v. R.* (10) where he said : B

"The late ROWLATT, J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, said in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (11) ([1921] 1 K.B. 71): 'In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' C

In the present case the one thing which is clear is that the statutory provisions which are said to impose liability are obscure. I am asked to give a construction to these provisions which is beyond anything decided by any of the courts that have had to deal with the provisions in question, by reason of judicial statements which were purely *obiter* and were in no way, as it seems to me, necessary to the decisions in question. The application of these statements in the manner now contended for would carry the burden of taxation imposed in 1894 far beyond the subject-matter of the cases in which they occur. After all, the Finance Act, 1894, was an Act inaugurating a new scheme of taxation, and the complications of the sections added from time to time to deal with methods of evasion of duty which were discovered as the burden of death duties was made heavier were probably never anticipated at the date when that Act was passed. I do not think it would be right for me to attribute to the draftsman of the Finance Act, 1894, an intention to impose on the Customs and Inland Revenue Acts, 1881 and 1889, the far-reaching change for which the commissioners now contend, and I certainly cannot find in those statutory provisions words clearly imposing tax in the circumstances of the present case. D

*Order accordingly. Inland Revenue Commissioners to pay the plaintiff's costs.* E

Solicitors : Warren, Murton & Co., agents for Newman & Bond, Barnsley (for the plaintiffs) ; Solicitor of Inland Revenue. F

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.] G

H



*Re* WALLACH (deceased). WEINSCHENK *v.* TREASURY  
SOLICITOR (WALLACH intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), December 1, 2, 5, 6, 7, 8, 9, 1949.]

*Domicil—Widow—Retention of domicil of husband.*

A In 1906 the intestate, a woman, married E.W. whose domicil of origin was German. In 1943 E.W. died in England where he had been living since 1939. Five days after her husband's death the intestate died. On the trial of an issue to determine the domicil of the deceased, the learned judge found as a fact that E.W. had acquired a domicil of choice in England.

B HELD : a widow retains her late husband's last domicil until she changes it, and, therefore, the intestate's domicil was English.

[AS TO THE DOMICIL OF A MARRIED WOMAN, see HALSBURY, Hailsham Edn., Vol. 6, pp. 209, 210, para. 255 ; and FOR CASES, see DIGEST, Vol. 11, pp. 332-334, Nos. 211-228.]

C AS TO INTESTATE SUCCESSION, see HALSBURY, Hailsham Edn., Vol. 6, pp. 245, 246, para. 299 ; and FOR CASES, see DIGEST, Vol. 11, pp. 367-369, Nos. 468-491.]

Cases referred to :

- (1) *Gout v. Zimmermann*, (1847), 5 Notes of Cases, 440 ; 9 L.T.O.S. 412 ; 11 Digest 332, 212.
- (2) *In the Goods of Raffeneil*, (1863), 3 Sw. & Tr. 49 ; 1 New Rep. 569 ; 32 L.J.P.M. & A. 203 ; 8 L.T. 211 ; 11 Digest 331, 192.
- (3) *Udny v. Udny*, (1869), L.R. 1 Sc. & Div. 441 ; 11 Digest 309, 19.

ACTION to determine domicil.

E The plaintiff claimed as the lawful second cousin of the deceased, Mrs. Lucie Wallach, who died intestate in England on July 21, 1943, to be entitled to share in the estate of the deceased in accordance with the law of France or, alternatively, Germany. In 1906 the deceased, who was born in France, married Eugene Wallach whose domicil of origin was German and at the time of the marriage was carrying on business in France. In 1939 the husband came to England where he lived with the deceased until his death in 1943, shortly before that of his wife. For the Treasury it was claimed that the deceased on marriage F acquired the domicil of her husband which she retained after his death until she changed it. HODSON, J., upheld this contention, found that the husband had acquired a domicil in England, and that the Treasury Solicitor was the only person entitled to succeed to the estate of the deceased.

Raeburn, K.C., and ~~Graveson~~<sup>t</sup> for the plaintiff.

G Geoffrey Cross, K.C., and J. Stirling for the Treasury Solicitor.  
Pennycuik, K.C., and Michael Browne for the intervener.

H HODSON, J. : In this action, which concerns the estate of Mrs. Lucie Wallach, who died on July 21, 1943, the plaintiff claims to be the lawful second cousin of the deceased, who died domiciled in France or, alternatively, Germany, and, as such, to be one of the persons entitled in accordance with the law of France or Germany to share in her estate. The plaintiff denies that the Treasury Solicitor, the defendant, has an interest in the estate. The Treasury Solicitor, by his defence, denies the allegations as to domicil and the interest of the plaintiff and alleges that the deceased died intestate and domiciled in England, without leaving anyone entitled, by virtue of the Administration of Estates Act, 1925, s. 46 (1), to share in her estate, so that the Treasury Solicitor is the only person entitled to succeed to it. On these pleadings an issue was directed to be tried as to the domicil of the deceased.

The deceased, having been a married woman until five days before her death and being then a widow, according to the accepted principles of English law retains her late husband's domicile until she changes it: see *DICEY'S CONFLICT OF LAWS*, 6th ed., p. 111, which contains the following rule :

"A widow retains her late husband's last domicile until she changes it."

Counsel for the plaintiff, who has argued that this rule is wrong, referred me to a case in the Prerogative Court of Canterbury, *Gout v. Zimmermann* (1), the head-note to which reads (5 Notes of Cases 440) :

"A testatrix, born at Smyrna, of Dutch or Russian parents there residing, under the protection of the Dutch consulate at Smyrna, married to a British subject, and, after his death, continuing to reside during the remainder of her life in the Levant, makes a will, disposing of property in England, in the English form : *Held*, that her British domicile acquired by marriage had not been changed, nor had her domicile of birth reverted, and the protest to the jurisdiction of the court overruled."

The proposition advanced by counsel is that the domicile which a woman acquires by marrying a man is a sort of mantle which she wears during her coverture and during her coverture only, and that when she becomes a widow she reverts automatically to her domicile of origin. That proposition was not advanced in *Gout v. Zimmermann* (1) or in another case to which I was referred, namely, *In the Goods of Raffanel* (2), where it was assumed that the rule which I have mentioned applied without any argument to the contrary being put forward. The proposition that the domicile which a married woman takes from her husband can be dropped in that way is based by counsel for the plaintiff on the use of the word "dependent," which is used in this connection, because her domicile is said to be dependent on that of her husband, and counsel argues that when a woman's husband dies there is no reason why she should not shed her domicile with her coverture and no binding authority that she does not do so.

Counsel for the Treasury Solicitor, on the other hand, pointed out that the proposition has been universally accepted as one of the principles of English law for a long time and it would lead to manifest inconvenience if the contrary were to be established as the law because this form of dependent domicile applies equally to infants. Counsel instanced a case of *commorientes* where, for example, a woman, although, apparently, dying at the same moment as her older husband, is deemed by the Law of Property Act, 1925, s. 184, to have survived him. She, having had no opportunity of changing her domicile after his death, would be deemed, if the proposition of counsel for the plaintiff were correct, to revert automatically to her domicile of origin which might entail a most troublesome enquiry.

The speeches delivered in the House of Lords in *Udny v. Udny* (3) all point against the validity of the proposition of counsel for the plaintiff—in particular, that of LORD WESTBURY where he used this language (L.R. Sc. & Div. 457) :

"Other domicils, including domicile by operation of law, as on marriage, are domicils of choice."

He, therefore, included the domicile which counsel for the plaintiff prefers to call a dependent domicile under the heading of domicile of choice and that seems to me to be the appropriate heading under which to put it because when a woman marries a man she exercises a choice in the marriage and takes the consequence of that choice which in law involves the acquisition of his domicile. There is no reason why, if it is a domicile of choice, it should be lost in a way different from that in which any other domicile of choice can be lost, namely, by abandonment.

Having arrived at this conclusion, I need not consider in detail the question of the domicile of origin of Mrs. Lucie Wallach herself. The

domicil I have to consider is the domicil of Mr. Eugene Wallach, her husband, to whom she was married in 1906 in Frankfurt, Germany. His domicil of origin was German, he having been born in 1874 in Kassel. [His LORDSHIP reviewed the evidence and concluded :]—I find that he acquired a domicil of choice in this country which existed at the time of his death. The issue, therefore, falls to be determined in favour of the Treasury Solicitor as to the English domicil and it is unnecessary to make any further finding.

Solicitors : *Alexander Rubens & Co.* (for the plaintiff) ; *Treasury Solicitor* (for the Treasury) ; *Norden & Co.* (for the intervener).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

## G. W. GRACE AND CO., LTD. v. GENERAL STEAM NAVIGATION CO., LTD.

[KING'S BENCH DIVISION (Devlin, J.), December 12, 13, 14, 15, 21, 1949.]

*Shipping—Charterparty—"Good and safe port"—Ship damaged by ice—Extraordinary risk—Liability of charterers.*

On Jan. 10, 1947, the *Sussex Oak*, being then in the Thames under time charter in the Baltimore form, was ordered by the charterers to load a cargo of flour for Hamburg. On the voyage to Hamburg, she sustained damage by ice in the River Elbe. The charterparty provided by cl. 2 that the vessel was "to be employed . . . between good and safe ports," and by cl. 15 that the vessel was not to be ordered to any ice-bound place or where there was a risk that ordinarily the vessel would not be able, on account of ice, to reach the place or to get out. The arbitrator found that Hamburg was not a good and safe port for the *Sussex Oak* at any time between Jan. 5 and mid-March and that, owing to the exceptionally severe weather, there was an extraordinary risk in a voyage to the port, and he made an award against the charterers. There was no finding that when the *Sussex Oak* was in the Elbe the ice dangers were considered likely to be more than temporary.

HELD : (i) on the facts found by the arbitrator, Hamburg was a port which the *Sussex Oak* could not safely reach, the voyage to Hamburg was not one which an ordinarily prudent and skilful master could find a way of making in safety, and there had, therefore, been a breach of cl. 2.

*Palace Shipping Co., Ltd. v. Gans S.S. Line* ([1916] 1 K.B. 138), *applied*.

(ii) the application of the general words of cl. 2 was not affected by the specific words of cl. 15, the only object of which was to make special and detailed provision for matters which the parties thought were of special importance.

(iii) Hamburg having been found to have been in fact unsafe, it was irrelevant that at the time well-informed men might erroneously have pronounced it to be safe, because the shipowners' right to damages depended on a wrong done and an injury actually sustained and not on an estimate whether a wrong was likely to be done or an injury likely to be sustained.

(iv) it having been conceded that the charterparty, on its true construction or by implication, forbade the giving by the charterers of orders outside their powers, the order to sail to an unsafe port was a breach of the charterparty, and, as the master had acted in the ordinary course of things and not blameworthily, there was nothing to break the chain of causation between the order given by the charterers and the damage, and the charterers were, therefore, liable.



*Dictum of BRANSON, J., in West (Samuel), Ltd. v. Wright's (Colchester), Ltd., (1935), (40 Com. Cas. 192), criticised.*

*Lensen Steamship Co. v. Anglo-Soviet Steamship Co. (1935) (52 Ll.L. Rep. 141), followed.*

[AS TO WHAT IS A SAFE PORT, see HALSBURY, Hailsham Edn., Vol. 30, pp. 516-519, paras. 669, 670 ; and FOR CASES, see DIGEST, Vol. 41, pp. 521-523, Nos. 3497-3517.]

Cases referred to :

- (1) *Palace Shipping Co., Ltd. v. Gans S.S. Line*, [1916] 1 K.B. 138 ; 85 L.J.K.B. 415 ; 115 L.T. 414 ; 41 Digest 522, 3503.
- (2) *Johnston Brothers v. Saxon Queen S.S. Co.*, (1913), 108 L.T. 564 ; 41 Digest 523, 3516.
- (3) *Royal Greek Government v. Minister of Transport* (unreported).
- (4) *S.S. Knutsford, Ltd. v. Tillmans & Co.*, [1908] A.C. 406 ; 77 L.J.K.B. 977 ; 99 L.T. 399 ; 41 Digest 522, 3504.
- (5) *Embiricos v. Reid (Sydney) & Co.*, [1914] 3 K.B. 45 ; 83 L.J.K.B. 1348 ; 111 L.T. 291 ; 41 Digest 409, 2548.
- (6) *Limerick S.S. Co. v. Stott*, [1921] 2 K.B. 613 ; 90 L.J.K.B. 865 ; 125 L.T. 516 ; *affmg.* [1921] 1 K.B. 568 ; 41 Digest 521, 3496.
- (7) *West (Samuel), Ltd. v. Wright's (Colchester), Ltd.*, (1935), 40 Com. Cas. 186 ; Digest Supp.
- (8) *The Pass of Leny*, (1936), 155 L.T. 421 ; Digest Supp.
- (9) *Hall Brothers S.S. Co., Ltd. v. Paul (R. & W.), Ltd.*, (1914), 111 L.T. 811 ; 41 Digest 523, 3515.
- (10) *Axel Brostrom & Son v. Louis Dreyfus & Co.*, (1932), 38 Com. Cas. 79 ; Digest Supp.
- (11) *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.*, (1934), 50 Ll.L. Rep. 62 ; *affmd.* (1935) 52 Ll.L. Rep. 141 ; 40 Com. Cas. 320 ; Digest Supp.
- (12) *Vsesojuznoje Objedihenii Sovfracht v. Temple S.S. Co., Ltd.*, (1945), 173 L.T. 373 ; 79 Ll.L. Rep. 1 ; 2nd Digest Supp.
- (13) *Portsmouth Steamship Co. v. Liverpool Salvage Co.*, (1929), 34 Ll.L. Rep. 459.
- (14) *Summers v. Salford Corpn.*, [1943] 1 All E.R. 68 ; [1943] A.C. 283 ; 112 L.J.K.B. 65 ; 168 L.T. 97 ; 107 J.P. 35 ; 2nd Digest Supp.

SPECIAL CASE stated by an arbitrator.

In January, 1947, the claimants were the owners of a vessel which suffered damage from ice in the River Elbe while on a voyage to Hamburg, and they claimed damages from the charterers on the ground that the charterers, in breach of cl. 2 of the charterparty, had ordered the vessel to make the voyage at a time when Hamburg was an unsafe port. The arbitrator found that at the time Hamburg was an unsafe port by reason of ice and that the charterers were liable for the damage sustained by the vessel, subject to the decision of the court on the Special Case. The charterers contended that a port was not unsafe by reason only of the fact that ice dangers were encountered on the way to it ; that the sole remedy for dangers from ice lay in cl. 15, which provided that the vessel was not to be ordered to an ice-bound place or one which ordinarily might not be reached on account of ice ; that the absence of safety was temporary only ; that there was no evidence to support the finding that the port was unsafe ; that the only result which could flow from an order to sail to an unsafe port was that the master was at liberty to refuse to go ; and that the damage was caused solely by the master's voluntary act in taking the navigational decision to proceed up river. DEVLIN, J., found for the shipowners on all points. The facts appear in the judgment.

*Roskill, K.C.*, and *B. S. Eckersley* for the claimants.

*R. M. Wilson* for the charterers.

Dec. 21. **DEVLIN, J.**, read the following judgment. The facts stated in this Special Case show that the *Sussex Oak*, being then in the Thames and under time charter in the Baltimore form, was, on Jan. 10, 1947, ordered by the charterers to load a cargo of flour for Hamburg. After her arrival there, she was ordered by the charterers to load a cargo of timber for London. On the voyage to and from Hamburg, she sustained damage by ice in the River Elbe. The charterparty

**A** contained the usual provision in cl. 2 that the vessel was "to be employed . . . between good and safe ports." The arbitrator has found that Hamburg was not a good and safe port for the *Sussex Oak* to reach or leave at any time during her service under the charterparty after Jan. 5 or at any time before the middle of March and that its approaches were not good and safe places during that time. Subject to the decision of the court, he has awarded that the charterers are

**B** liable to pay for the damage sustained by the vessel, and he has left to the court the question whether, on the facts found by him and the true construction of the charterparty, the charterers are so liable. Slightly different considerations apply to the two voyages, and I take the voyage up to Hamburg first. Counsel for the charterers has formulated six points of law for determination by the court and I shall take them in the order in which they were advanced.

**C** Counsel submits, first, that a port is not unsafe because ice dangers are encountered on the way to it. In my judgment, there is a breach of cl. 2 if the vessel is employed on a voyage to a port which she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that

**D** the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety. In the present case the only route to Hamburg was by the Elbe, and the arbitrator has found that this approach was unsafe by reason of ice. The view of the law which I have expressed is supported by the authority of *Palace Shipping Co., Ltd. v. Gans S.S. Line* (1), and, so far as it

**E** rests on that authority, is not challenged by the charterers, but it is contended that the principle, which **SANKEY, J.**, there applied to military or naval dangers likely to be encountered on the voyage, does not apply to marine dangers, for these the master is appointed to deal with. I cannot see any distinction in principle here. The reasoning, if it is sound, should apply with equal force to marine dangers within the area of a port, but dangers from wind and weather

**F** can make a port unsafe: see *Johnston Brothers v. Saxon Queen S.S. Co.* (2). It is true that a master is better equipped than a landsman to deal with marine perils, and, doubtless, better equipped to deal with marine perils than with naval perils. That is a consideration which is relevant as a matter of fact when the degree of danger is being determined. Likewise, the ordinary sea perils, such as heavy weather or storm, will not usually last long enough to make the

**G** port or the route to it more than temporarily unsafe. That gives rise to another point which I consider later, but I see no reason why dangers which can be classified as marine—and I suppose that that includes ice—should be disregarded altogether in determining the safety of a port or voyage.

Next, it is contended that cl. 2 does not apply at all, because its general provisions are, in relation to ice dangers, ousted by the specific provisions of cl. 15, which gives an exclusive remedy for such dangers. Clause 15 provides that the vessel is not to be ordered to any ice-bound place or where there is a risk that ordinarily the vessel will not be able, on account of ice, to reach the place or to get out. On this clause the arbitrator has found in the charterers' favour. The wide provisions of cl. 2, it is argued, must not be extended to prohibit what is impliedly permitted (since it is not expressly prohibited) by the specific provisions of cl. 15. In a very recent case, *Royal Greek Government v. Minister of Transport* (3), I pointed out what seemed to me to be some of the general objections to this

type of argument in relation to charterparties, and I shall not repeat them here. In this particular case the argument can, I think, be sufficiently tested by considering what, if it is sound, is impliedly permitted by cl. 15. In the finding of the arbitrator that there was no risk that ordinarily the vessel would not be able, on account of ice, to reach Hamburg, the significant word is "ordinarily." The case as a whole makes it abundantly clear that in January, 1947, there was such a risk, and it is also clear, I think, from what he says in the Case about the exceptional severity of the period, that the arbitrator regarded the risk as extraordinary. The alleged implication would, therefore, result in the charterers having the right to insist that the ship should go to a port which *ex hypothesi* was unsafe because the danger that made it unsafe was extraordinary instead of ordinary. I cannot think that such a result was intended. Commercial men like to make special and detailed provision for matters they think of special importance. That, in my judgment, is all that cl. 15 is doing.

Thirdly, it is contended that the condition of unsafety was temporary only. It is the law that the danger must be operative for a period which, having regard to the nature of the adventure and of the contract, would involve inordinate delay : see, in particular, *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (4). This raises primarily a question of fact. The arbitrator notes in the Case the charterers' contention that the obstacle was temporary only and must be taken by his finding to have decided it against them. The period of the ice danger compared with the duration of the charterparty and the shortness of the voyage to Hamburg clearly justifies this conclusion. Indeed, it is not, I think, directly challenged, but it is said that the arbitrator acted on a wrong basis. The question of safety it is argued, must be determined at the time when the master has to make his decision to proceed. It must, therefore, be determined on the estimate of the position which would be reached at that time by a well-informed and experienced master, and a decision based on such an estimate will not be affected by the fact that, in the light of after-events, it is proved to be erroneous. There is in the Special Case no finding that, on Jan. 14, when the Sussex Oak was in the Elbe, the ice dangers were then considered likely to be more than temporary. Indeed, there is no finding that at that point of time the port or its approaches were then considered to be unsafe. The only evidence that there is points, it is said, the other way, for it consists of the views of the river pilots who thought it safe to proceed.

This leads to the fourth contention of the charterers, that there was no evidence to support the finding that the port was unsafe, and I can conveniently consider these two contentions together. The argument is, I think, mistaken. I am not here dealing with the decision of the master not to proceed. I am dealing with the fact that the master, whether advisedly or not, did proceed, and thereby the ship was damaged. If I was dealing with a decision and its validity, it might well be that the test propounded is the right one. *Johnston Brothers v. Saxon Queen S.S. Co.* (2), on which counsel for the charterers relied for this purpose, suggests that view. This is an illustration of a principle of wide application in commercial affairs, best expounded in the well-known passage from the judgment of SCRUTTON, J., in *Embiricos v. Reid (Sydney) & Co.* (5) ([1914] 3 K.B. 54) :

"Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not ; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds."

That principle is at least as old as the conception of constructive total loss, but it is a principle to be applied with discrimination. It involves the court in proceeding on an erroneous estimate of the facts and probabilities, for, if the estimate is not erroneous, no point arises. That course can be taken only when it serves the important commercial purpose indicated by SCRUTTON, J. When a claim for damages is being considered, the event has happened and need no



longer be forecast. The right to damages depends on a wrong done and an injury actually sustained, not on someone's estimate of whether a wrong is likely to be done or an injury likely to be sustained. A master is not to be deprived of his remedy because, in ignorance of the danger, he entered a port which well-informed men might erroneously have pronounced to be safe, nor is he to be given damages if he sustains injury in conditions which fall short of the danger-point merely because well-informed men might have erroneously pronounced his entry into the port to be foolhardy. In my judgment, the arbitrator, being concerned only with a claim for damages for injury to the ship, rightly proceeded on the view he formed of the true facts.

The fifth and sixth contentions of the charterers may be taken together. The fifth contention is that the only result which can flow from an order to sail to an unsafe port is that the master is at liberty to refuse to go. The order being one which the master is not bound to obey, there can be no remedy for him in damages if he chooses to obey it. The sixth contention is that the damage was caused solely by the voluntary act of the master in taking the navigational decision to proceed up river. The first of these points gives rise to a little difficulty, for the position, on the authorities, is not entirely clear. In *Limerick S.S. Co. v. Stott* (6), SCRUTTON, L.J., ([1921] 2 K.B. 621) reserved his opinion on the point. In *West, Ltd. v. Wright's, Ltd.* (7), the ship alleged that she had sustained damage at an unsafe berth to which she had been ordered by the consignees of the bill of lading (incorporating the terms of a voyage charterparty). BRANSON, J., dismissed the claim, saying (40 Com. Cas. 192) :

"It seems to me that the true position is that the charterparty gives the consignee a right to order the vessel alongside any particular wharf, but if the vessel does not know what it is going to find there it can make inquiry, and if it finds that it cannot safely deliver by going there, then it is excused from obeying that order ; that is all, in my view, that is intended by those words of the charterparty."

In *The Pass of Leny* (8), a similar claim under a voyage charterparty, but based on breach of warranty, was dismissed by BUCKNILL, J., on the ground that the charterer did not expressly or impliedly warrant that the berth was safe. There have been cases in which the ship has been given, by way of damages, the expenses of lightering or of tug assistance in order to enter a port otherwise unsafe : see *Hall Brothers S.S. Co., Ltd. v. Paul (R. & W.), Ltd.* (9) and *Axel Brostrom & Son v. Louis Dreyfus & Co.* (10). Counsel for the charterers seeks to distinguish these on the ground that in them the master was avoiding the risk instead of incurring it. In the former case I note that it was unsuccessfully argued that the master, by accepting the order, was estopped from alleging that the port was unsafe. In *Limerick Steamship Co., Ltd. v. Stott* (6) on a point which did not reach the Court of Appeal, BAILHACHE, J. ([1921] 1 K.B. 575), awarded as damages the expenses of cutting the masts in order that the vessel might safely leave Manchester. Counsel has distinguished this on the ground that when it comes to leaving the port, as distinct from proceeding to it, the master has no choice.

While the main strength of counsel for the charterers lies in the *dictum* of BRANSON, J., his main difficulty is created by *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (11). In that case, the ship, which was under time charter, was ordered to a berth which, although neither party knew it, was in fact unsafe, and she thereby sustained damage and had to be repaired. The charterers appear to have deducted hire during the period of repair, and the owners claimed the balance of hire, or, alternatively, damages, and a declaration that the charterers were liable to pay the cost of the repairs. The arbitrator awarded in their favour. MACKINNON, J., upheld the award, holding (50 Ll.L. Rep. 66) that "it was a breach of the charterparty to send her to that berth." Clause 1 of the charterparty was, so far as material, in the same terms as cl. 2 of the charterparty

which I am considering. The Court of Appeal also, by a majority, MAUGHAM, L.J., dissenting, upheld the award. GREER, L.J., held that, although cl. 1 referred to ports and not expressly to berths, it extended, on its proper construction, or, alternatively, by implication, to berths within the port. He, therefore, held (52 Ll.L. Rep. 148) :

“ that the ship was employed at a loading berth which was outside the limits in which the owners agreed that she should be employed . . . ”

SLESSER, L.J., disagreed with the construction, but accepted the implication. The court does not appear to have dealt with the claim for damages as such. GREER, L.J., held that the breach of cl. 1 disentitled the charterers from relying on the off-hire clause. He also relied on cl. 8 (the indemnity clause) and cl. 12, which made the charterers responsible for loss or damage caused to steamer by goods being loaded contrary to the terms of the charterparty. The effect of the case was, therefore, that the owners recovered for damage to the ship.

*West, Ltd. v. Wright's, Ltd.* (7) was decided between the hearing before. MACKINNON, J., and the hearing before the Court of Appeal. It was cited in the Court of Appeal and distinguished by GREER, L.J. (*ibid.*), on the ground that it did not relate to a time charter, nor did the contract contain a term that the master should obey the orders of the charterers as to the employment of the ship. With the greatest deference, I find this distinction difficult to follow. It implies that whereas under a voyage charterparty the master is not bound to obey the order of the charterer to go to a port or berth outside the contractual limits, under a time charterparty he is. I cannot think that the clause in the time charterparty which puts the master under the orders of the charterer as regards employment is to be construed as compelling him to obey orders which the charterer has no power to give. It is, perhaps, sufficient for my determination of the present case that it concerns a time charterparty and is, therefore, governed by *Lensen Shipping Co. v. Anglo-Soviet Shipping Co.* (11) and not by *West, Ltd. v. Wright's, Ltd.* (7). Counsel for the owners, while not able to offer any explanation of GREER, L.J.'s *dictum* which satisfied him, contended that I am bound by it. If I am, I, of course, accept it, but, even if I am not, I should reach the same conclusion, for I should respectfully disagree (for reasons which I shall give later) with the *dictum* of BRANSON, J.

Before I leave the authorities, I may refer to *Vsesojuznoje Objedihenii Sovfracht v. Temple S.S. Co., Ltd.* (12). Under the curious form of charter which was considered by the House of Lords in that case the charterer ordered the vessel to Garston, to which he had no power to order her, and she went to Garston where she was requisitioned. The House treated the order as a breach of the charterparty and upheld an award of damages based on the difference between a free and a requisitioned ship.

As the authorities are not clear and conclusive on the point I have to determine, I shall state my own view of it. I think that it is necessary, first, to determine whether the giving of the order constitutes a breach of contract. *Ex hypothesi*, the order has no contractual force, and is, therefore, of no greater validity than an order given to the ship by a stranger. The charterers in this case do not expressly warrant that their orders will be within their powers, and it might be argued that it is for the recipient to determine for himself whether they are binding on him or not. In some types of contract, that may be so, but in this case counsel for the charterers concedes that the charterparty, either on its true construction or by implication, forbids the giving by the charterers of orders outside their powers, and, accordingly, that the giving of an order to sail to an unsafe port is a breach of the charterparty. If this concession had not been made, counsel would plainly have found it difficult to explain *Hall Bros. S.S. Co., Ltd. v. Paul (R. & W.), Ltd.* (9), *Axel Brostrom & Son v. Louis Dreyfus & Co.* (10) and the judgments of BAILHACHE, J., in *Limerick S.S. Co. v. Stott* (6) and of MACKINNON, J., in *Lensen Shipping Co. v. Anglo Soviet Shipping Co.* (11),

which all proceeded on the basis that the order to go to an unsafe port or berth was a breach of the charterparty. The same result might be reached, irrespective of the giving of any order, by construing cl. 2 as a warranty that the ship would not be employed otherwise than between good and safe ports, but, in view of the charterers' concession, I need not consider this.

A Once the breach of contract is established, it seems to me to follow that, subject to the ordinary rule of remoteness, damages must result. There may be cases in which the charterer is innocent of any intention to break the contract and where the master deliberately decides to enter a port which he knows to be unsafe. ROCHE, J., on a rather similar point in *Portsmouth Steamship Co. v. Liverpool Salvage Co.* (13), indicated that the master should not follow the instructions of the charterer if they lead to obvious danger, but these factors go to the question of causation only. The giving of an order does not necessarily cause the damage that flows from an act done in pursuance of it. Put more specifically, the decision of the master to obey the order may in certain circumstances amount to a *novus actus interveniens*, but, in the circumstances of this case, the arbitrator clearly regarded the acts of the master as done in the ordinary course of things and not blameworthy. He was doing what any intelligent observer, knowing exactly how he was circumstanced, would have expected him to do. I take these phrases from the speech of LORD WRIGHT in *Summers v. Salford Corpn.* (14) ([1943] 1 All E.R. 74). The facts set out in the Special Case fully justify this conclusion.

B This disposes of the damage done to the ship on her way to Hamburg. The damage done to the ship on her way down the Elbe was, on the arbitrator's view as a matter of causation, the result of her leaving an unsafe port. A safe port means "a port to which a ship can safely get and from which she can safely return" : per BAILHACHE, J., in *Limerick S.S. Co. v. Stott* (6) ([1921] 1 K.B. 575). The point that the master might have avoided the damage by using an icebreaker is, in my view, concluded against the charterers on the facts found : see para. 10. Since, after consideration, I have reached a clear conclusion about the breach of C cl. 2 and its consequences, I need not further consider two other grounds on which it was sought to sustain the award and which were based on the indemnity clause (cl. 9) and the re-delivery clause (cl. 7). I answer in the affirmative the first part of the first question stated in para. 21 of the Case, and that answer is sufficient to uphold the award made in para. 18.

E *Judgment for the claimants (upholding the award) with costs of setting down and F hearing.*

Solicitors : *Sinclair, Roche & Temperley* (for the claimants) ; *Keene, Marsland & Co.* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]



# SIR LINDSAY PARKINSON & CO., LTD. v. COMMISSIONERS OF WORKS AND PUBLIC BUILDINGS.

[COURT OF APPEAL (Cohen, Asquith and Singleton, L.JJ.), May 11, 12, 13, 16, 17, June 22, 1949.]

*Building Contract—Liability to pay for alterations and additions—Contract amended by deed of variation—Payment to contractor limited—Subsequent large increase in works—Right of contractor to payment for additional work.* A

On Jan. 6, 1937, a building contractor contracted with the Commissioners of Works to erect an ordnance factory, at a cost of £3,505,834, by Jan. 30, 1939, subject in specified circumstances to extensions of time, time being of the essence of the contract. Under the contract the commissioners were empowered "at their absolute discretion to modify the extent, character, sections, quantities or dimensions of the work shown or described in the contract or the levels or positions of any of the works . . . or to order additional works . . . without vitiating or in any way making void the contract," and the contractor was required to "perform such extra and additional works in the same manner as nearly as the circumstances will admit as if the same had originally formed part of the works." A note to the bills of quantities (found to import, not a contractual obligation, but a representation as to the scope of the contract) stated that: "It is probable that further work to the value of approximately £500,000 will be ordered on a measured basis under the terms of the contract." The value of alterations and additions to the work ascertained in accordance with specified rules was to be added to or deducted from the contract sum. Owing to delay in receipt of information from the commissioners, the contractor became entitled to extensions of time, but by a deed of variation, dated Aug. 18, 1937, it was provided that the work should be completed by the date originally fixed by employing exceptional and uneconomic methods of carrying it out, at an estimated additional cost of £1,000,000, which, with the value of the further work estimated at £500,000, would increase the contract price to £5,000,000. The deed also provided that the sum to be paid to the contractor under the contract should be calculated in accordance with the terms of the contract, but should be not less than the cost of the works, ascertained in accordance with prescribed rules, plus a net profit remuneration of £150,000, and not more than such cost of works plus £300,000, *viz.*, three per cent. and six per cent. of £5,000,000 respectively. As a result of variations made by the commissioners, the works executed were greatly in excess of the quantity and value provided for in the varied contract, the actual cost being £6,683,056. B C D E F

HELD: on the true construction of the deed of variation it was not within the contemplation of the parties at the time of the execution of the deed that there would be such large increases in the amount of work to be executed; at that time both parties contemplated work which, with the introduction of exceptional methods, would cost approximately £5,000,000 and it was on that basis that the maximum profit was agreed at the figure of £300,000; and, the additional work having been performed by the contractor at the request of the commissioners, he was entitled to be paid a reasonable profit or remuneration in respect of it. G H

*Jackson v. Union Marine Insurance Co., Ltd.* (1874). (L.R. 10 C.P. 125), and *Bush v. Whitehaven Port and Town Trustees* (1888). (2 Hudson's B.C. 4th ed., 122, C.A., 130), *applied*.

[AS TO LIABILITY TO PAY FOR ALTERATIONS AND ADDITIONS ON A BUILDING CONTRACT, see HALSBURY, Hailsham Edn., Vol. 3, pp. 266-269, para. 478-485; and FOR CASES, see DIGEST, Vol. 7, pp. 378-381, Nos. 181-198.]

(Cases referred to :

(1) *Bush v. Whitehaven Port and Town Trustees*, (1888), 52 J.P. 392 ; 2 Hudson's B.C., 4th ed., 122 ; *affmd.*, 2 Hudson's B.C., 4th ed., 130 ; 7 Digest 392, 232.

(2) *Jackson v. Union Marine Insurance Co., Ltd.*, (1874), L.R. 10 C.P. 125 ; 44 L.J.C.P. 27 ; 31 L.T. 789 ; *affg.*, (1873), L.R. 8 C.P. 572 ; 42 L.J.C.P. 284 ; 12 Digest 386, 3175.

(3) *Inland Revenue Comrs. v. Raphael, Inland Revenue Comrs. v. Ezra*, [1935] A.C. 96 ; *sub nom., Re Sassoon*, 104 L.J.Ch. 24 ; 152 L.T. 217 ; Digest Supp.

(4) *Shirlaw v. Southern Foundries, (1926), Ltd.*, [1939] 2 All E.R. 113 ; [1939] 2 K.B. 206 ; 108 L.J.K.B. 747 ; 160 L.T. 353 ; *affmd.*, [1940] 2 All E.R. 445 ; [1940] A.C. 701 ; 109 L.J.K.B. 461 ; 164 L.T. 251 ; 2nd Digest Supp.

(5) *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft & Co.*, [1918] 2 K.B. 486 ; 87 L.J.K.B. 1066 ; 118 L.T. 783 ; *affg.*, [1918] 1 K.B. 331 ; 118 L.T. 442 ; 12 Digest 395, 3212.

(6) *Pepper v. Burland*, (1791), Peake, 139 ; 7 Digest 371, 155.

(7) *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119 ; 87 L.J.K.B. 370 ; 117 L.T. 766 ; 82 J.P. 61 ; 12 Digest 399, 3233.

(8) *Distington Hematite Iron Co., Ltd. v. Possehl & Co.*, [1916] 1 K.B. 811, 85 L.J.K.B. 919 ; 115 L.T. 412 ; 2 Digest 175, 403.

APPEAL by the Commissioners of Works from a judgment of LEWIS, J., dated Oct. 29, 1948.

By a contract dated Jan. 6, 1937, the plaintiffs, who were building contractors, contracted with the commissioners to construct an ordnance factory. Under the original contract they were to be paid for the value of variations and additions to the works ascertained in accordance with prescribed rules, but a deed of variation subsequently entered into by the parties owing to delay in the works provided for completion within the time originally specified by using exceptional and uneconomical methods and fixed the minimum and maximum net profits to be paid to the plaintiffs on the work done at £150,000 and £300,000 respectively. Owing to the fact that large additions to the work were required by the commissioners under the terms of the contract, the work could not be completed within the time prescribed, and the payment based on cost plus profit under the deed of variation was much less than would have been due under a valuation of the additions in accordance with the terms of the original contract. The plaintiffs contended that the upper and lower limits of profit were based on an estimated cost of the works made at the time of the execution of the deed, and that, since that estimate had been greatly exceeded, he was entitled to be paid a reasonable remuneration in respect of the excess work, or, alternatively, a *quantum meruit* for that work as not coming within the scope of the contract. LEWIS, J., upheld this contention. The Court of Appeal now dismissed the appeal. The facts appear in the judgments of COHEN and ASQUITH, L.JJ.

*Rewcastle, K.C.*, and *Dingle Foot* for the commissioners.

*Sir Valentine Holmes, K.C.*, *E. J. Rimmer* and *Stewart-Brown* for the plaintiffs.

*Cur. adv. vult.*

June 22. The following judgments were read.

COHEN, L.J. : This dispute arises out of a contract between Sir Lindsay Parkinson and Co., Ltd. ("the contractor") and the Commissioners of Works and Public Buildings. In 1936 the contractor was invited to tender for the erection of an ordnance factory at Chorley in Lancashire. On Jan. 6, 1937, the tender was accepted. The original contract, which was reduced into writing, bears the same date, but it was not, in fact, signed until Apr. 1, 1937, on which date a letter was also signed modifying the conditions of the contract in certain

particulars. The contract recited the acceptance of a tender whereby the contractor undertook to erect the ordnance factory according to the general conditions of the contract, specifications and bills of quantities and drawings annexed to the contract. By cl. 1 the contractor covenanted to execute the works set out in the annexed documents in a thoroughly sound and workmanlike manner in accordance in every respect with the requirements, stipulations and conditions of the said annexed documents. Clause 2 reads as follows :

" In consideration of the covenant for the payment by the commissioners hereinafter contained the contractor hereby covenants with the commissioners that the contractor will execute and complete in a thoroughly sound and workmanlike manner all the works set out in the said specifications bills of quantities and drawings in accordance in every respect with the requirements stipulations and conditions of the said general conditions of contract specifications bills of quantities and drawings."

Clause 3 declared that the provisions of the general conditions of the contract, specifications and bills of quantities should be as binding on the contractor and on the commissioners as if the same had been repeated in the contract and should be read as part of the contract. Condition 1 of the general conditions contains the following definition of " works " :

" ' The works ' shall mean the works indicated on the drawings and/or described in the specifications and/or bills of quantities including all modified extra or additional works and all obligations to be performed under the contract."

By condition 2 the contractor was bound to carry out the work in accordance with the directions of the commissioners' architect, who was authorised to give directions *inter alia* as to variations or modifications of the design, quality or quantity of the works, or the addition to or omission or substitution of any work pursuant to condition 33 (1)—" any other matter not in condition 2 particularly described." Condition 2 ended as follows :

" The contractor shall from time to time forthwith comply with all the architect's instructions and duly execute any work comprised therein. The contractor shall not be entitled to any compensation additional allowance rate or payment or extension of time for completion by reason of his compliance with the architect's instructions, except in those cases where specific provision to that effect is contained in these conditions."

By condition 3 it was provided that the contractor should have no claim for additional payment by reason of certain specific matters and that he should not be relieved from any risks or obligations imposed on or undertaken by him under the contract on any of the grounds therein specified or on the grounds—and some reliance was placed on these words—that he could not or did not foresee any matter which might, in fact, affect or have affected the execution of the work. Condition 5 provided for day and night work in certain conditions. Condition 27 gave the commissioners power to suspend or determine the contract at their discretion, but gave the contractor a right to reasonable and just compensation if the suspension or determination should not have been occasioned by the failure of the contractor to observe the provisions of the contract or should not have been ordered under condition 26 which dealt with suspension for frost, etc. Condition 27 fixed the date for completion as Jan. 30, 1939, but subject to an extension of time in a number of events, including *inter alia* if the contractor should be required to execute any modified or additional work. Condition 29 provided for the payment of liquidated damages by the contractor if the works should not be completed and the site cleared on or before the date for completion. Condition 33, which deals with alterations, additions or omissions, is in the following terms :



"The commissioners shall have power from time to time by written instructions to the contractor from the architect at their absolute discretion to modify the extent, character, sections, quantities or dimensions of the work shown or described in the contract or the levels or positions of any of the works or to order any portion or portions of the works to be omitted with or without substitution of any other works in lieu thereof or to order any work or any portion of any work executed or partially executed, to be removed, changed or altered, or to order additional works, or to change the nature of the materials with which the works are intended to be constructed, without vitiating or in any way making void the contract and the contractor shall on the receipt of written instructions before mentioned make such alterations and changes or as the case may be perform such extra and additional works in the same manner as nearly as the circumstances will admit as if the same had originally formed part of the works. The value of all alterations, omissions or abandonments ordered as aforesaid shall be ascertained in accordance with condition 35 hereof and shall be added to or deducted from the contract sum as the case may be."

I pause here to observe that, although the contractor fixed a price and date for completion, both price and date were plainly elastic having regard to the very wide scope of condition 33 and to the provisions for varying the price and date of completion if the commissioners should exercise their right under condition 33. Condition 35 dealt with the valuation of alterations, additions and omissions and provided that, unless previously or otherwise agreed, the valuation should be made in accordance with the provisions therein set forth which, so far as material, were as follows :

"(a) The net rates or prices in the bills of quantities shall determine the valuation of work of similar character executed under similar conditions as work priced therein. Where the net rates or prices do not apply, but where there shall have been no change in the conditions of execution of the work, the value shall be based upon prices deduced therefrom so far as it is practicable to do so ; (b) If it is not practicable, or (by reason of a change in the conditions of execution of the work) not reasonable, either to apply the net rates or prices in the bills of quantities or to deduce net rates or prices therefrom the said value shall be ascertained on the basis of such net rates or prices as shall be agreed on between the architect and the contractor, or failing agreement, fixed by arbitration under condition 58 hereof; . . . (e) In the case of alterations additions or omissions which are valued otherwise than as daywork there shall be added to the contract sum any increased cost in respect of preliminaries (other than water or insurance) mentioned or referred to in bill No. 1 of the bills of quantities actually incurred by the contractor by reason of any such alterations or additions and there shall be deducted from such sum any saving or decrease in cost in respect of such preliminaries (other than as aforesaid) effected by the contractor by reason of or resulting from any such alterations or omissions."

Condition 37 provided that the description and quantity of the work covered by the contract sum should be deemed to be that which was set out in the bills of quantities and that any error therein or omission therefrom should not vitiate the contract nor release the contractor from his obligations, but should be rectified or treated as an alteration, addition, or omission as the case might be under condition 35. Condition 41 provided for advance payments to the contractor during the progress of the work of ninety per cent. of the value of the work from time to time certified by the architect, the balance of ten per cent. being retained by the commissioners until the retention moneys should be £100,000. The only other condition to which I need refer is condition 58, the arbitration

clause, under which the dispute now before us was afterwards referred to arbitration.

I turn now to the bills of quantities. The only one to which our attention was called is bill No. 1. Item 1 therein describes what is called the scope of the contract. Item 33 states that the next thirty-four items are extracts from the general conditions, and among these 34 items is the following :

“ 57. Alterations additions or omissions. The prices in these bills of quantities shall not in any way be affected by any alterations additions or omissions being made to the works. (Condition 33) Note :—It is probable that further work to the value of approximately £500,000 will be ordered on a measured basis under the terms of the contract.”

At this point I must observe that the arbitrator found, and the learned judge agreed, that this note to item 57 had no contractual effect. The arbitrator had said :

“ Whilst this note is not contractual in the sense of obliging the commissioners to order such further work or giving rise to a claim by the contractor if such further work is not ordered it constitutes a representation as to the scope of the contract having regard to condition 33 of the conditions of contract (which is in wide terms) and in item 57 in the bills of quantities is a direct reference to condition 33 of the conditions of contract. The object of such a note is to place the contractor in a position to gauge the probable ambit of the contract and to price the bills of quantities accordingly having particular regard to the time required for completion and the probability of the work being executed in the time stipulated in the invitation to tender.”

The letter of Apr. 1, 1937, which formed part of the contract, provided for adjustment of the contract price in the event of a change in (a) the price of structural steel or (b) the wages of workmen pursuant to a national agreement and made certain other modifications to which I need not refer.

I turn now to the history of the contract, taking the facts from the arbitrator's award and from his findings of additional facts pursuant to a direction of the learned judge in the court below. The works proceeded, but, owing to the contractor not receiving information in time, he became entitled to an extension of time for the completion of the works. As, however, the commissioners still desired the works to be completed not later than Jan. 30, 1939, negotiations took place between the parties, as the result of which a deed of variation was drawn up and was executed on Aug. 18, 1937. That deed, after reciting (i) the original contract to carry out the work for a sum of £3,505,834 7s. 7d., adjusted as might be necessary in accordance with the provisions of the general conditions of contract, (ii) the letter of Apr. 1, 1937, amending the said original contract and (iii), a deed of assignment by which the rights of the original contractors were assigned and vested in the contractor with the consent of the commissioners, contained the following further recitals :

“ And whereas the date stipulated to the general conditions for the completion of the works is Jan. 30, 1939, or in the case of any extensions of time as provided for by the general conditions then the date of expiry of such extensions And whereas the contractor has entered on the execution of the works and the same have been in part completed and the contractor has become entitled under the general conditions to extensions of time for completion of the remainder of the works but the commissioners are desirous that the works shall nevertheless be completed not later than the said Jan. 30, 1939 And whereas the contractor has satisfied the commissioners that so far as concerns the part of the works already completed as aforesaid the contract has proved profitable to the contractor and that the contract if normally completed in its entirety under and with any extensions of time properly allowable by the existing terms and conditions thereof And

whereas the parties are agreed that completion by Jan. 30, 1939 cannot be effected unless exceptional methods are used including where practicable and desirable the employment of machinery where in ordinary circumstances it would not be economical so to do, by increase of employment of labour day and night, by the purchase of materials in advance of definite requirements and by disregarding, where necessary to achieve the object the economic sequence of the work. And whereas the commissioners recognise that if such exceptional methods are used prices for future work will *prima facie* but not necessarily come to be valued under cl. 35 (b) of the conditions of contract."

I think something has been missed out between the words "contract" and "if normally completed" and the following words should appear "may be expected to prove profitable throughout to the contractor." The words "*prima facie* but not necessarily" in the last recital are at first sight a little difficult to understand, but counsel for the contractor suggested, I think rightly, that the reason for the words was that the price of materials, for example, the price of a brick, would not be affected by the adoption of the exceptional methods referred to in the previous recital and would, therefore, not come to be valued under condition 35 (b). The operative part of the deed is as follows :

"Clause 1. The contractor will use his utmost endeavours to complete the works by or before Jan. 30, 1939, and will for that purpose use exceptional methods as aforesaid and generally will take and prosecute all steps and measures reasonably practicable for the purpose of completing the works by or before the said date or as soon thereafter as practicable."

Clauses 2 and 3 contain corresponding obligations on the commissioners to do certain things in order to facilitate the completion of the work by the contractor before Jan. 30, 1939. Clause 4 is in the following terms :

"The sum to be paid to the contractor is to be calculated in accordance with the provisions of the contract and in particular the value of the works is to be ascertained *prima facie* but not necessarily in accordance with condition 35 (b) of the general conditions of contract Provided always that the sum eventually to be paid to the contractor shall be not less than the actual cost as hereinafter defined plus a net profit remuneration of £150,000 and shall not be greater than the said actual cost plus a net profit remuneration of £300,000."

It is this clause which has given rise to the dispute between the parties. For the ultimate cost of the work far exceeded the figure specified in cl. 1 of the original contract plus the sum of £500,000 stated in the note to item 57 in the bills of quantities as being the probable amount of the extras to be ordered under condition 33 of the general conditions, and the contractor contends that the profit limit of £300,000 cannot have been intended to apply to so large an increased cost. Clause 5 provides for the calculation of the annual cost and it is common ground that this clause covered every conceivable item of cost. Clause 8 was strongly relied on by counsel for the contractor and is in the following terms :

"Without prejudice to the right of the contractor to show that advances due under condition 41 of the general conditions of contract are in excess of the amounts paid from time to time the commissioners shall pay on monthly account to the contractor during the currency of the works such sum as shall bring the amount paid to the contractor in respect of the work to the actual cost incurred by him plus such proportion of £150,000 as shall represent the proportion of the amount of work executed to the whole of the work Provided always that at the option of the commissioners they may keep in reserve a sum not exceeding £100,000 and interest on such sum at



four per centum per annum shall be deemed to be part of the actual cost under cl. 5."

Clause 9 provides for the adjustment of the amount payable by way of advances to the contractors so as to ensure that the contractor did not receive more than £300,000 payment on account of profits. Clause 10, on which the commissioners rely, is in the following terms :

" This deed shall be complementary to the contract and the contract and all the terms provisions and conditions thereof shall be read and construed subject to the provisions of this deed but subject as thereby varied shall be and continue of full force and effect."

This clause they say preserved the rights to which they claim to be entitled under the original contract to order extras to an unlimited amount provided the extras ordered were within the scope of the project and were not of such a quantity as to render the contract fantastic or absurd.

The contract having been thus varied, the work proceeded. In about September, 1938, when the payments to the contractor amounted to approximately £4,500,000, including payments in respect of the expeditious and uneconomical working, the contractor, at the request of the commissioners, supplied further information to assist the commissioners in making a further indent on the Treasury. It is suggested that this application for information was necessary because the commissioners had originally estimated the work at an amount which was nearing exhaustion. On Nov. 5, 1938, the contractor wrote to Sir James West, the chief architect of the commissioners, claiming that he was being called on to execute more work than was contemplated by the varied contract and that he was entitled to extra remuneration for work in excess of the contemplated work. In the same letter he pointed out that he thought his cost of finishing the work (without remuneration) would be not less than £6,000,000 on the basis that no further work would be ordered before completion. Some discussions took place, but on July 12, 1939, one Goodale, on behalf of the commissioners, refused to recommend any increased payments, alleging that when the deed of variation was entered into the full character and extent of the work involved could be, and was, no doubt, clearly appreciated by the contractor. The contractor then proposed to suspend all work unless he was paid additional remuneration, but continued with the work on the understanding that his claim for additional remuneration would be referred to arbitration. The job was completed early in 1940 at a cost far in excess of the original estimate, the actual cost being £6,683,056 to which the commissioners added the maximum profit of £300,000 allowed under cl. 4 of the deed of variation. The contractor refused to accept this sum as being a final settlement of his claim under the varied contract, contending (a) that the minimum and maximum profit had been fixed on the basis of a sum of approximately £5,000,000 made up of the following elements :—£3,500,000, the original cost price ; £500,000, the approximate limit indicated in the note to item 57 in the first bills of quantities ; and £1,000,000, being the estimated amount of additional expenditure arising from the adoption of exceptional methods ; (b) that this calculation was in the contemplation of both parties, and that, accordingly, they were entitled to additional profit in respect of work done at a cost in excess of this sum of approximately £5,000,000. It is to be observed that having regard to the correspondence to which I have already referred this claim was not an after-thought by the contractor. I should add that certain subsidiary contracts were entered into in respect of which the contractor was paid additional remuneration. The arbitrator has found that there were minimum and maximum profits fixed in the subsidiary contracts and that they were based on three per cent. and six per cent. respectively of the cost or estimated cost of the work involved. The contractor suggests that the minimum and maximum profits fixed in cl. 4 of

the deed of variation were based on similar percentages of the £5,000,000, which, he says, was the agreed estimated cost of the work contemplated when the deed of variation was executed. This, however, is disputed by the commissioners.

The commissioners persisted in their rejection of the demand of the contractor for remuneration in excess of the maximum of £300,000 fixed by cl. 4 of the deed of variation and the dispute was referred to the arbitration of a distinguished architect, Mr. Woodward, under cl. 58 of the original contract. Pleadings were directed and the contentions of the contractor are set out in paras. 8-11 of the points of claim. Paragraph 8 contains the contentions as to the contemplated work and the method of ascertaining the minimum and maximum fixed by cl. 4 of the deed of variation. In the paragraph the work represented by the original sum of £3,506,584 plus the allowance of £500,000 for extras made in item 57 of bill No. 1 is referred to as "the stipulated work." Paragraphs 9, 10 and 11 are as follows :

" 9. In the circumstances aforesaid and from the custom of the industry to relate profit remuneration to the cost or estimated cost of the work to be done it was to be implied as a term of the varied contract that should the work carried out by the claimants [contractor] substantially exceed in quantity and value the stipulated work the claimants [contractor] should be paid a proportionate or alternatively a reasonable profit remuneration on the cost of such excess work. 10. Alternatively on the true construction of the varied contract the proviso to cl. 4 of the supplementary contract applied only to the stipulated work, and the claimants [contractor] were [was] entitled to be paid for work in excess of the stipulated work a sum calculated in accordance with the provisions of the contract and *prima facie* but not necessarily in accordance with condition 35 (b) of the general conditions of contract. 11. In the further alternative on the true construction of the varied contract the respondents [commissioners] were not entitled to require the claimants [contractor] to execute thereunder work in excess of the stipulated work."

Paragraphs 12 and 13 contain figures which are now agreed as representing the cost of the work on various bases. From this it appears that, measured and valued at the prices in the said bills of quantities, the cost was £6,263,296, while, measured and valued in accordance with condition 35 (b) pursuant to cl. 4 of the deed of variation, the cost was not less than £7,471,238. There were attached to the pleadings schedules A and B. Schedule A showed that, taking measurements and not values, the amount of the work on a number of items such as excavation, planking, strutting, etc., were very largely increased, the amount for excavation, for instance, being more than doubled. Schedule B contains similar particulars as regards values. The commissioners contended that the contractor's claim had no foundation in law, and, in particular, they said that the note to item 57 in bill of quantities No. 1 had no contractual or other effect on the legal relations between the parties and that the true position was as set out in paras. 8 and 12 of their answer. Paragraph 8, so far as material, was in the following terms :

" The respondents [commissioners] deny that the varied contract referred to in the points of claim is to be construed as containing any such implied term as is alleged in para. 9 of the points of claim. In point of fact, as both parties fully understood when the contract was negotiated and made between them, the respondents [commissioners] had not at that time decided what work would eventually be required to be carried out at the factory in question and the contract was accordingly drawn up in such terms as would, by the operation of the provision as to omissions variations and additions, enable the respondents [commissioners] when they eventually decided what their requirements were, to order what they

wanted to be done without there being any question of any such work being outside the contract. Neither expressly nor by implication did the parties at any time agree on any maximum limit regarding the amount or value of the work to be covered by the contract, and to imply any such limitation, were it possible to do so, would be to contradict the express terms of the said contract."

Paragraph 12 concludes as follows :

" All the work in respect of which the claimants [contractor] here claim[s] was either work expressly provided for by the varied contract or work executed as the result of instructions given to them under the provisions of the varied contract which empowered the respondents [commissioners] to vary and add to the contract work and, having accepted and acted on such instructions, it is not open to the claimants [contractor] to allege that such work or any part of it was either work not contemplated by the varied contract, or work in respect of which they are entitled to be paid any sum in addition to that expressly provided by the varied contract to be paid."

The arbitrator made his award in the form of a Special Case. I have already referred to most of his findings, but I think I should read paras. 2, 3 and 4 of his award. They are in the following terms :

" 2. That the quantity and value of work executed, though not different in character from that covered by the varied contract, was largely in excess of the quantity and value of work the subject of the varied contract. The contract time of two years for completion was not sufficient in which to execute the excess quantity of work in addition to the quantity of work in the varied contract. 3. That it is a well recognised usage in the building industry to relate profit remuneration to the actual or estimated costs of the work and to the time required to execute the work. 4. That the quantity of work and the time required to execute such work was so varied and extended that, if the respondents' [commissioners'] contentions are upheld, the aforesaid trade usage would in this case be rendered of no effect."

Counsel for the contractor did not contend that there was any trade custom to be incorporated into the contract. He relied on findings 3 and 4 to support his contention that the £5,000,000 was in the contemplation of both parties since the commissioners were familiar with building contracts of this kind and must be taken to know that without some such agreed basis the contractor could not calculate the prices at which he would tender. The arbitrator was in considerable difficulty in dealing with the question of what was in the contemplation of the parties, as Col. Parkinson, who had negotiated the matter on behalf of the contractor, was dead and the commissioners did not call Sir James West who had dealt with the matter on their behalf. On the documents and facts the arbitrator stated the questions for the opinion of the court as follows :

" (i) Whether on the true construction of the varied contract the [contractor is] entitled to be paid a proportionate or reasonable profit or remuneration in respect of the 'excess work' ? (ii) Whether, in the alternative, the [contractor is] in law entitled to be paid for the excess work on the basis of a *quantum meruit* as work not coming within the scope of the contract ? (iii) Whether in the further alternative the [contractor is] in law entitled to be paid for the whole of the work executed by [him] on the basis of a *quantum meruit* ?"

When the matter first came before LEWIS, J., he decided that more information was required to enable him to reach a conclusion and he remitted the matter to the arbitrator to answer a series of fifteen questions. The arbitrator answered these questions on Mar. 16, 1948. The answers, like the award, are set out



in full in the judgment of LEWIS, J. It is sufficient for my purpose to refer to the following findings :

“(i) That on or before Aug. 18, 1937, there was not any information available to the [contractor] and no instructions had been given to [him] indicating that [he] would be called on to execute work which would exceed the ‘stipulated work’ as defined in para. 8 of the points of claim either in quantity or when measured and valued on a comparable basis. That on July 5, 1937, Sir James West on behalf of the [commissioners] called on the [contractor] to supply a complete time and progress schedule of the work to be carried out, and early in August, 1937 the [contractor] informed Sir James West that it would be possible to complete the work by the original contract date (Jan. 30, 1939) if abnormal methods were used. (ii) (a). That when the [contractor] entered into the varied contract and agreed to take a minimum and maximum profit he did not know and had no reason to believe that the ultimate quantity of work would or might be greater than work valued at £4,000,000 or thereabouts at bills of quantities prices. (iii) That on Aug. 18, 1937 the extent of the work which the [contractor] was ultimately called on to execute was not and could not have been appreciated by [him]. (iv) That the [contractor], on the information available to [him] in August, 1937, estimated that the cost of the work which [he] would be called on to execute would be in the neighbourhood of £4,005,834 plus £1,000,000 as mentioned in para. 1 (k) of my award of Aug. 22, 1947. There was no evidence enabling me to answer the question as to whether or not the [commissioners] had in mind any different estimate at that time. (v) That by Aug. 12, 1937 the [contractor] had only executed work to the value of £459,910, and this shewed a profit of sixteen per cent. (vi) That, as stated in para. 1 hereof on July 5, 1937, Sir James West on behalf of the [commissioners] called on the [contractor] to supply a complete time and progress schedule of the works to be carried out, and the [contractor] early in August, 1937, informed Sir James West that it would be possible to complete the work by the original contract date (Jan. 30, 1939) if abnormal methods were used . . . (xii) That the increases in the minimum and maximum profits provided for in the subsidiary contracts were based on three per cent. and six per cent. respectively of the cost or estimated cost of the work involved.”

It is further stated in the answer to question 14 that the contractor erected 667 buildings instead of the 468 described in the original specifications and bills of quantities, but that there was no evidence on which to base any comparison between the type of the 468 buildings and the 667 buildings.

Before LEWIS, J., as before us, the principal authority on which counsel for the contractor relied was *Bush v. Whitehaven Port and Town Trustees* (1). LEWIS, J., carefully considered that case and also several cases laying down principles to be applied in considering whether a term which is not expressed can properly be implied in a contract. After referring to the judgments of this court in *Bush's* case (1) LEWIS, J., said :

“LORD ESHER, M.R., held to be right the principle laid down in *Jackson v. Union Marine Insurance Co., Ltd.* (2), namely, that you are to look and see what were the circumstances under which the contract was made in construing the contract, and you have to see whether what has happened was an event which was in the contemplation of the parties when they made it and, if it was not, you are entitled to construe that particular clause of the contract (having looked at the whole of the contract also, of course) to see whether or not it can clearly be said that the interpretation put on it by one side is an interpretation which could be the right interpretation, bearing in mind what was in the mind of the parties when they entered into the contract.”

LEWIS, J., having stated this principle, continued :

" I do not propose to read the whole of those extremely useful judgments in that very well known case, but, in my view, they laid down the principle which I have endeavoured to enunciate, and on the facts of this case I am satisfied that it was never contemplated, when the deed of variation was entered into, that the limit of profit clause was to be applied to the variations (which amounted, as I have said, to something like £2,000,000) and that the contractor was not to be paid on some other basis and he had not got to look only to his maximum profit for remuneration for the additional work which was imposed on him after that varied agreement was entered into. I am quite satisfied that that was never in the contemplation of the parties."

LEWIS, J., then gives his reasons for thinking that this large increase in the amount of work was no more in the contemplation of the commissioners than it was in the contemplation of the contractor saying:

" The arbitrator has found that it was never in the contemplation of the contractors and this is his finding, which I hope I am paraphrasing correctly : they could not know, and they had no idea and no reason to believe that there would be these large increases. About the commissioners he says : ' I cannot tell you what they thought because I have no evidence before me of that and after all the test is : What did the parties contemplate ? ' I cannot believe that if those who negotiated this deed of variation had in mind that they were dealing on the basis of putting in that clause on the basis that they were contemplating a very great increase in the amount of work which the contractor is going to be asked to do they would not have said so—but they did not. Please do not let it be thought that I am suggesting anything like bad faith on behalf of the contractor—of course I am not—but I should have thought that the commissioners, when dealing with a thing, if they had that in their minds, would have gone out of their way to make it quite clear to Messrs. Lindsay Parkinson and said : ' True we have put £500,000 in the original contract as the probable amount of additional work that we shall want, but do not let us have any misunderstanding about that ; we are entering into this varied contract now and we know we may want something like £2,000,000.' I cannot believe that, if they had contemplated that, they would not have made it perfectly clear to Messrs. Lindsay Parkinson. The arbitrator found that Messrs. Lindsay Parkinson did not contemplate it and had no reason to contemplate it, and I think the proper inference to draw from that is that just as Messrs. Lindsay Parkinson had no reason to contemplate it so also had the commissioners no reason to contemplate it."

He concludes by answering the first two questions in favour of the contractor, leaving the third question unanswered. I confess I feel some difficulty in following how these two alternative questions can both be answered in the affirmative, but it may be that the learned judge did so because the arbitrator had said that on either basis the amount of his award would be the sum of £90,298.

Counsel for the commissioners attacked this judgment on two grounds. First he said that it was inherent in the learned judge's decision that he was importing into the varied contract a term that the limitation on profit thereby imposed was not to apply if the extras ordered brought the total valuation of the contract work beyond the sum of approximately £5 million. He relied on the observations of LORD WRIGHT in *Inland Revenue Comrs. v. Raphael* (3), where the learned Lord said ([1935] A.C. 142) :

" I must however deal shortly with the authorities which have been so strenuously urged on behalf of the appellants as leading to the contrary conclusion. It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that

intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word 'intention' in cases of this character. The word is constantly used as meaning motive, purpose, desire, as a state of mind, and not as meaning intention as expressed. The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them : such facts may be proved by extrinsic evidence or appear in recitals : again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonise as far as possible all the parts : particular words may appear to have been used in a special sense, which may be a technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention : these matters may be established, as they generally are, by extrinsic evidence. The court will thus re-form or re-write the clauses in order to give effect to the real intention. But that is not construction, but rectification."

Applying that statement of the law to the present case, counsel said that the varied contract was plain and unambiguous ; condition 33 of the original contract gave the commissioners an unlimited power of ordering extras, even to the extent of altering the character of the work ; and there was no hardship in such a provision, as, if extras were ordered, the contractor would get additional payment under condition 33 and an extension of time for completing the works under condition 28. Condition 33, he said, was preserved unaltered by the deed of variation (see cl. 10 thereof) and he met the argument that a provision for unlimited modification which might be reasonable when there was a provision for increased remuneration became unreasonable when a maximum profit was fixed by pointing out that under the revised contract the contractor got the benefit of a guaranteed minimum profit. The contractor, he said, was seeking to get rectification under the guise of reconstruction. He further argued that it would have been perfectly easy to cover expressly the event which the contractor was now seeking to cover by the implied term if the parties had intended any such term, and that it was obvious to anyone who read condition 33 of the original contract that the event might arise. Finally, on this part of the case, counsel cited the passage about the "officious bystander" from the judgment of MACKINNON, L.J., in *Shirlaw v. Southern Foundries (1926), Ltd.* (4) ([1939] 2 All E.R. 124), which had been cited by LEWIS, J. In the present case, said counsel, it would be quite impossible to imagine the parties saying "of course" if the officious bystander had suggested the insertion of implied limit in the application of the maximum fixed by cl. 4 of the deed of variation which the contractor now sought to introduce, for the commissioners had rejected it when the contractor first raised the point in 1938, and the very nature of the work—the construction of an ordnance factory in time of emergency—made it unlikely that the commissioners would ever have accepted it.

But, said counsel, it was suggested that the learned judge was relying, not on an implied term, but on a principle supposed to be derived from *Bush v. Whitehaven Port and Town Trustees* (1). If so, he misapplied that case. To



appreciate this point it is important to see exactly what *Bush's* case (1) decides. In that case the plaintiff had entered into a contract with the defendants to construct a fifteen inch water main from Ennerdale Water towards Whitehaven for £1,335. The contract allowed for extras, the defendants were to give the plaintiff the use of so much of the site as might from time to time, in the opinion of their engineer, be required to enable them to commence and continue the work, but the contract contained this provision :

"But the non-delivery in the manner aforesaid of the use of such site, or any part thereof, shall not vitiate or affect the contract, nor any provision therein or in this specification contained, nor entitle the contractor to any increased allowance in respect of money, time, or otherwise unless the engineer may grant him any extension of time, and then only to that extent under the provisions for that purpose hereinafter contained."

A time was fixed for completion, but the engineer had power to extend it. Time was made of the essence of the contract and penalties for delay were imposed. The plaintiff's tender was sent in on June 12, 1886, and he was given to understand that he was to begin at once and to have four months in which to finish the work, and his calculations were based on that footing, as the cost of doing the work in the winter months would be at least fifty per cent. higher than the tender. The contract was accepted on June 23 and the plaintiff was then told that arrangements for immediate possession had been made with five out of eight owners and five out of ten occupiers of the land necessary for the works. The plaintiff began work on July 12 before the corporation had sealed the contract, but the land was not all available until Oct. 6. In consequence of this delay, the work was thrown into the winter months, and the contractor was put to heavy extra expense for which he sued the defendants. The action was tried before CAVE, J., with a jury, and a number of questions were left to the jury. Questions 1, 2, 5 and 8 and the answers thereto are as follows :

"(1) Was it the duty of the defendants under the contract to be in a position at the commencement of and at all times during the contract to give the contractor the use of so much of the site of the works as might, in the opinion of the engineer, be required to enable the contractor to commence and continue the execution of the works in accordance with the contract ? A.—Yes. (2) Was the contract made on the basis that the defendants would be in a position to act as aforesaid ? A.—Yes. (5) Were the conditions of the contract so completely changed, in consequence of the defendants' inability to hand over the sites of the work as required, as to make the special provisions of the contract inapplicable ? A.—Yes. (8) What damages had the plaintiff suffered by reason of the inability of the defendants to hand over the sites required for the purpose of this work ? A.—£600 over and above the contract price."

It appears that on these findings the judge found himself unable to reach a conclusion. The defendants, therefore, moved before a Divisional Court that judgment should be entered for them with costs. The Divisional Court, however, directed judgment to be entered for the plaintiff for £600. LORD COLERIDGE, C.J., states the question before the court as follows (Hudson's B.C., 4th ed., 124) :

"It is an action brought by a contractor who has signed a contract, and who has undertaken to be bound by the terms of that contract, to recover not only the contract price, but to recover a sum of money either by way of *quantum meruit* or by way of damages against the defendants—it does not very much matter which view is taken—to recover a considerable sum of money beyond the contract price, on the ground that the circumstances under which he completed the contract were wholly different from those

under which he entered into it, and that therefore he is set free from the terms of it and has a right to recover this sum of money.”

He first of all deals with the question whether a term could be implied for breach of which the plaintiff could recover damages and was inclined to answer it in the affirmative, but goes on to say that, even if he was wrong on that point, there was another principle on which he thought the plaintiff was entitled to recover. He states that principle in these terms (*ibid.*, 127) :

“ Now, what is that principle ? I find it stated in very clear terms in the judgment of the majority of the court in *Jackson v. Unicorn Marine Insurance Co., Ltd.* (2), and after going through a variety of authorities, with which I need not now trouble myself, the result is stated in this way (L.R. 8 C.P. 581) : ‘ These authorities seem to support the proposition, which appears on principle to be very reasonable, that where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to, or impossible of application to any such circumstances, it ceases to have any application ; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made.’ ”

He then proceeds to examine the facts of the case before him in the light of that principle. He points out that what was to have been a summer contract had been turned into a winter contract, saying :

“ It was turned into a winter contract—into a contract when wages were different, probably, or may have been ; when days were short, instead of long ; when weather was bad, instead of good ; when rivers which had to be dealt with, and had to be crossed by the pipes, were full not empty ; and when, in fact, I will not say every circumstance, but a great many most important circumstances under which the contract was to be executed, had wholly changed from those which, it is reasonable to suppose, were in the contemplation of both the parties when the contract was entered into. The contract, nevertheless, was carried on, and was completed. It was carried on and was completed, of course, with the knowledge of the contractor, and equally, of course, with the knowledge of the defendants. The defendants knew as well as the contractor that the work was being carried on under totally different circumstances to those contemplated in the contract. They knew that perfectly well, and although the plaintiff possibly or probably might at the expiration of the four months have thrown up the contract and refused to proceed, he had also a perfect right, if he had thought fit, with the knowledge and assent of the defendants, which in this case is to be presumed, and, indeed, was proved, to go on with the contract and to complete it under the altered conditions, or I will not say to complete the contract, but to complete the work under the totally altered conditions that had arisen.”

He then relies on finding 5 of the jury’s finding to show that there was such a change of circumstances as to make applicable the principle he had stated. MATHEW, J., agreed with this conclusion, saying (*ibid.*, 130) :

“ It appears to me there was abundant evidence to justify the conclusion of the jury that the plaintiff and the defendants permitted the works to go on on the understanding that those works were being done, not under the original contract, but under a contract with altered conditions.”

This decision was affirmed by this court on the second ground stated by LORD COLERIDGE, the ground with which MATHEW, J., concurred. LORD ESHER, M.R., said (*ibid.*, 131) :

“ Now, the answer to the fifth question (if you take it to be a binding finding of the jury), in my opinion, comes to this, that the condition of things

had so been altered after the making of the original contract (they had been so greatly altered) that it was not reasonable, or right, or fair, or just to hold that the original contract was made with regard to those circumstances. In other words you may put it thus, that the condition of things was so altered that if they had been supposed to be the things with regard to which the first contract was made, neither party acting as (I must use my favourite phrase) reasonable men of business could have made the original contract in the terms in which it was with regard to that state of circumstances. The result of that, if it is true, is this, that the original contract is made with regard to a different subject-matter from the subject-matter which was dealt with by the parties . . . The one party goes on to deal with the new state of circumstances and does work with regard to those. The other party knows that that party is dealing with that new state of circumstances and allows him to do so. Therefore, the one does work which he intends to be for the other. The other person allows him to do that work, knowing that it is intended to be done for him. It is work which he knows that the one party is doing on the terms of being paid for it somehow, and he allows him to go on, with an understanding that he is to be paid for it somehow. What does that give rise to ? It gives rise to a claim for a fair remuneration for that work done. That fair remuneration is called in legal language a payment according to a *quantum meruit*. If the first contract was gone, if the state of circumstances with regard to which it was made were really no longer in existence as between the parties, if the one did work for the other on the new state of circumstances which the other accepted, knowing that it was being done on the terms of being paid for, that gives rise to a *quantum meruit*."

To complete my citation, let me take a short passage from the judgment of LINDLEY, L.J., where he says (*ibid.*, 133) :

" . . . a state of things was assumed by both parties which was never realised, and . . . the contract was based on the supposition that the state of things assumed would exist."

Now it is said that the *ratio decidendi* of this case does not involve any implied term. I doubt whether that is correct. It seems to me at least to involve the implication of a term that the contractor shall not be bound to complete the work if the assumed state of affairs did not exist and it certainly involves the implication outside the contract of a fresh contract to pay a *quantum meruit* for the work done by the contractor and accepted by the owner. Both LORD ESHER, M.R., and LORD COLERIDGE, C.J., based their conclusion on the decision in *Jackson v. Union Marine Insurance Co.* (2). It will be convenient, therefore, to refer to that case before reverting to the argument of counsel for the commissioners. The actual question in that case was whether the insurance company were liable on an insurance of chartered freight, the charterers having thrown up the charter because the ship went aground on its way to the port of loading and was much damaged and was still under repair at the date of trial. The court held the charterers were absolved from loading the vessel, and, therefore, the defendants were liable to the shipowner. The *ratio decidendi* is conveniently stated in a short passage in the judgment of BRAMWELL, B., in the Exchequer Chamber, where he says (L.R. 10 C.P. 141) :

" In considering this question, the finding of the jury that 'the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers,' is all important. I do not think the question could have been left in better terms ; but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties contemplated had become impossible ; that



a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not, indeed, different as to the ports of loading and discharge, but different as a different adventure,—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo ; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage.”

Applying the principle of those decisions to the case before us, counsel for the commissioners says that they show that the character of the adventure must be changed before a party can claim to be discharged from his obligation. He relies on the finding of the arbitrator that the quantity and value of the work executed was not different in character from that covered by the varied contract and says that the fact that it was largely in excess of the quantity and value of work the subject of the varied contract is not sufficient to make the principle of the cases cited applicable. Counsel for the contractor, on the other hand, says that the principle established by these cases is that, if the circumstances in which a contract is carried out differ so completely from the circumstances which were in the contemplation of the parties when the contract was made that the parties cannot be taken to have intended to apply the provisions of the contract, or some of them, to the work as actually done, the provisions in question will not apply, and if such work has been done by one party at the request of the other party for which no remuneration is provided under the contract as thus amended, the party doing such extra work will be entitled to payment therefor on a *quantum meruit* basis. He argued that the principle would have been applicable to the original contract. He relied on the observations of McCARDIE, J., in *Naylor, Benson & Co., Ltd. v. Krainische Industrie Gesellschaft & Co.* (5) where the learned judge said ([1918] 1 K.B. 335):

“ It is essential to remember, however, that words, even though general, must be limited to circumstances within the contemplation of the parties.”

He referred to various provisions in the contract document, and, in particular, to the note to item 57 in the first bill of quantities which, though not contractual in character, was, he said, an indication that the parties contemplated work of the value of approximately £4 million, namely, £3½ million mentioned in para. 1 of the original contract and half a million mentioned in the note to item 57. He said that an increase in the amount of work ordered might be so great as plainly to amount to a complete change of the circumstances contemplated by the parties and thus bring the principle in *Bush's* case (1) into operation. The question, he said, when that point was reached must really be a question of fact, and para. 2 of the arbitrator's award really amounted to a finding in his favour on this point. But, said counsel, whatever be the position on the original contract, the varied contract made it plain that the parties were proceeding on the basis of work represented by the original contract price of approximately £3½ million and the allowance of approximately half a million for extras. His argument continued on the following lines : (i) On any other basis completion of the contract by Jan. 30, 1939, would be impossible. Not only did the recitals in the deed of variation show that this was the object of the parties, but the contractor had been called on for a time and progress report, and had informed the commissioners early in August, 1937, that completion by Jan. 30, 1939, would be possible if the abnormal methods were adopted. (ii) It is inconceivable that the contractor would have agreed to a limit of profit of £300,000 if the commissioners were to have the right to tie up his men and equipment for an indefinite period by calling for extras to an unlimited amount under condition 33. (iii) The upper and lower limits of profit must have been calculated on some basis. This basis was three per cent. and six per cent. on an estimated cost of £5 million made up as to £3½ million of the original cost price of the work, as to

half a million of the original estimate of extras, and as to £1 million of the estimated cost of adopting the exceptional methods referred to in the penultimate recital to the deed of variation. The arbitrator had found that the maxima and minima in the subsidiary contracts were based on three per cent. and six per cent. of the cost or estimated cost of the work involved in those contracts and it was a reasonable inference that the maximum and minimum in the deed of variation were fixed on the same basis. (iv) Clause 8 of the contract would be unworkable unless "the whole of the work" was an ascertained sum.

Counsel for the commissioners said that this argument was based on a misconception of cl. 8 and on a number of assumptions unsupported by findings of the learned arbitrator. In particular, he stressed the fact that the learned arbitrator had stated that there was no evidence enabling him to find what was the state of the mind of the commissioners at the date of the deed of variation. As regards cl. 8 he said that, if counsel for the contractor was right, all that the draftsman of the clause need have done would have been to provide that each payment should be of an amount equal to three per cent. of the cost of the work comprised in the relevant architect's certificate and that the clause is quite workable if "the whole of the work" is read as meaning the whole of the work ordered at the date of the certificate. There is some force in this criticism, but cl. 8 is not essential to the argument of counsel for the contractor on the varied contract. As regards the criticism that the arbitrator had found himself unable to make a finding as to the state of mind of the commissioners, I think the arbitrator was merely saying that, as the commissioners had chosen to call no evidence, he had no direct evidence as to their state of mind. I think he failed to appreciate that it was open to him to draw inferences from the facts deposed to before him and the documents in the case. As he failed to do so, it was, I think, within the province of the learned judge and is within our province to draw such inferences as are justified by the arbitrator's findings and the documents.

Looking at the matter as a whole, I have come to the conclusion that, whatever might have been the position had the contract not been varied, the argument of counsel for the contractor that both parties entered into the varied contract on the basis that the work to be comprised therein would be the work covered by the original estimate of £3½ million and half a million is well founded. How could the parties have arrived at the conclusion that the work could be done by Jan. 30, 1939, by the use of the exceptional methods if they had not in their minds an estimate of the work to be done? Knowing that this had originally been estimated at approximately £4 million and knowing that this was the basis on which the contractor was proceeding, is it not a reasonable inference that the commissioners were contracting on the same terms? Counsel for the commissioners said there was no evidence that the commissioners had estimated or accepted the contractor's estimate of £1 million as the cost of the exceptional methods. As no evidence was adduced to suggest that any part of the excess cost of the work ultimately executed was attributable to the exceptional methods, I do not think it is of vital importance to determine whether or not the commissioners agreed the figure of £1 million, but I think the proper inference is that they did. I agree with the argument of counsel for the contractor based on the minimum and maximum amounts fixed by cl. 4 of the deed of variation that these must have been calculated on a figure of £5 million which included, therefore, an estimate of £1 million for the cost of the exceptional methods.

In the result, I am of opinion that LEWIS, J., was right in his conclusion that the principle of *Bush v. Whitehaven Port and Town Trustees* (1) is applicable to this case. The work executed so far exceeded the stipulated work, that is to say, the work comprised in the original estimate of £4 million that it seems to me, to use the language of counsel for the commissioners, fantastic and absurd

to suppose that such a large increase as, in fact, occurred was within the contemplation of the parties when the deed of variation was executed. We are, I think, amply justified (a) in reaching the conclusion that the basis of the varied contract was that the *quantum* of work which the commissioners were entitled to require was work measured approximately by the said sum of £5 million, and (b) in implying a term that the commissioners should not be entitled under the contract to require work materially in excess of that sum. It follows that, such excess work having been done by the contractor at the request of the commissioners, the commissioners are liable to pay the contractor reasonable remuneration therefor. I was at one time inclined to think that the result of the application of *Bush's* case (1) should have been to answer the arbitrator's first two questions in the negative and the third question in the affirmative, thus making the *quantum meruit* basis applicable throughout, but counsel for the contractor referred us to the decision in *Pepper v. Burland* (6) which supports an award of the contract price for the work within the contract and a *quantum meruit* for the excess. In the result, I am of opinion that the appeal fails and should be dismissed with costs.

ASQUITH, L.J. : I agree. The question in this appeal is whether the original contract between the parties, as varied by the deed of Aug. 18, 1937, is to be read as producing this extraordinary result, namely, first, that in no circumstances may the contractor's remuneration exceed £300,000, but, secondly, that nevertheless, after he has earned that profit, the commissioners are entitled to require him to perform further additions and variations till the end of time without paying him an extra penny in respect of them. For brevity, I will call such variations and additions "extras."

I propose to consider, in its bearing on this problem, first, the construction of the original contract, and, secondly, the effect of the superimposition on it of the deed of August, 1937. Under general condition 33 of the original contract, read literally, the commissioners were entitled to require the contractor to carry out "extras" without limit of *quantum* or time. They could require him to erect a series of buildings on the site, pull them down, and put them up again, with or without alterations, as often, and for as long, as they chose. When the original contract alone was concerned, this was not such an unreasonable stipulation as on its face it appears, since two factors would in practice militate against the abuse by the commissioners of their strict legal rights. First, under that contract they would have to pay for all extras under either sub-cl. (a) or sub-cl. (b) of condition 35, and, secondly, pay for them out of public funds. The contractor might feel some legitimate confidence that, whatever their strict rights, the commissioners would not in practice choose, or, perhaps, in a democratic country be allowed, to waste the taxpayers' money wantonly. A further consideration suggests some doubt whether such a course of conduct would even be within their strict legal rights. There is a note to item 57 of the first bill of quantities which reads as follows : "It is probable that further work to the value of approximately £500,000 will be ordered on a measured basis under the terms of the contract." So far as the original contract is concerned, it is not suggested that this note was *per se* a term of that contract in the strict sense that the commissioners were undertaking to order not less or not more than about £500,000 by value of "extras." The very words "it is probable" rule out any such construction, for they necessarily imply that, in less probable events, the commissioners may order less (or more) than this *quantum* of extras, a possibility which would not exist if they were not entitled to do so. It was, however, suggested that the presence of this note is indirectly relevant as supporting an implied limitation of the literal scope of condition 33, a limitation to extras on some such scale as £500,000, and at all events precludes so literal a reading of condition 33 as would entitle the commissioners to require extras to be carried out to the tune of, say, £100,000,000, or, indeed, £2,000,000.



It is not necessary to decide this point. If it were, I should for myself feel serious doubt whether any such limitation could validly be implied. When, however, the original contract is read subject to the overriding effect (where the two are inconsistent) of the deed of August, 1937, the case for reading condition 33 as subject to an implied restriction on its literal tenor is much stronger. Two new considerations here intervene, the first derived from the terms of the deed itself and the second derived from the circumstances which surrounded and led up to its execution.

To deal with these in turn, first, if the original contract plus the deed are read without any implied limitation on their literal meaning, the result, as indicated above, is that after £300,000 profit has been earned by the contractor, he can be compelled to labour like the Danaids without reward or limit, on any further "extras" which the commissioners may elect to exact from him, "till the last syllable of recorded time." The restraining practical factor that such "extras" will have to be paid for, and paid for out of the taxpayers' funds, no longer operates, because of the proviso to cl. 4 of the deed imposing a maximum profit. Only the most compelling language would induce a court to construe the combined instruments as placing one party so completely at the mercy of the other. Where the language of the contract is capable of a literal and wide, but also of a less literal and a more restricted, meaning, all relevant surrounding circumstances can be taken into account in deciding whether the literal or a more limited meaning should be ascribed to it. What, if any, then, were, in the present case, the relevant surrounding circumstances at the time when the varying deed was executed? They include the following: (a) Owing to the default of the commissioners, the contractor had by August, 1937, become entitled to an extension of time beyond Jan. 30, 1939, the date fixed for the completion of the work by the original contract. The commissioners were most anxious that he should not enforce his right to any extension. (b) Early in August the contractor informed them that it would be possible to complete by the original date if certain time-saving, but uneconomic, methods were adopted. The main object of the varying deed was to commit the contractor to their adoption. In passing, it is to be noted that (subject to their adoption) the contractor felt he could give an assurance that he would complete by a specific date. It is hard to see how he could give such an assurance unless he at least contemplated a more or less fixed *quantum* of work, ascertained at the time when the assurance was given. He certainly could not give it if he contemplated a *quantum* indefinitely expansible at the option of the other contracting party. (c) The *quantum* of work originally contemplated as that which the contractor could or was likely to be called on to perform was (i) work valued at bills of quantities prices at £3½ million, plus (ii) extra work which was thought likely to work out, at the same prices, at roughly half a million pounds. The bills of quantities prices were to be adjustable if and so far as wages and the price of structural steel rose or fell, but this does not affect the *quantum* of the work. It merely affects its measure in money. (d) If the "uneconomic devices" were applied, this same *quantum* of work would cost an additional sum estimated by the contractor at £1,000,000. I will call this *quantum* by the name given to it in the points of claim, "the stipulated work." The money measure (if we adopt the contractor's estimate of the cost of the uneconomic devices) of "the stipulated work" was thus in August, 1937, almost exactly £5,000,000 if the uneconomic devices were adopted—almost exactly £4,000,000 if they were not. (e) When the deed came to be drawn, it provided for a "floor" and a "ceiling" to the contractor's profit. His guaranteed minimum profit was to be £150,000; his maximum £300,000. This first figure is precisely three per cent. on £5,000,000; the second precisely six per cent. (f) On Aug. 11 or 12, 1937, a few days before the deed was signed, Col. Parkinson had a conference with Sir James West, chief architect

to the commissioners, the result of which is confirmed in a letter of that date by the commissioners to the contractor, which letter names these two figures as minimum and maximum profit respectively. (g) The arbitrator says there was no evidence enabling him to determine what the commissioners, as opposed to the contractor, contemplated as to the *quantum* of work, if any, to be performed in excess of the stipulated work under the contract as varied—whether, for instance, the commissioners had in mind a fixed total of work measured within a narrow margin by the sum of £5,000,000 and whether they concurred in the contractor's estimate of £1,000,000 (one element in building up the £5,000,000) as the extra cost referable to the "uneconomic devices." By saying there was "no evidence," in my view, the arbitrator meant no more than that, Col. Parkinson at the time of the arbitration being dead and Sir James West not being called as a witness, he had no direct oral evidence showing what the commissioners contemplated under these heads immediately before the execution of the deed. It seems likely that the arbitrator, mistakenly, supposed he was disabled from drawing inferences of fact from the facts proved by the oral evidence. This court at least is under no such disability, and, in drawing such inferences, is not disturbing any finding by the arbitrator, but merely filling a blank which he could, and perhaps should, have filled. (h) I am much impressed by the argument of counsel for the contractor that when the figures of £150,000 and £300,000 emerged—first in the commissioners' letter of Aug. 12, 1937, and then in the deed itself—they were not, presumably, as he put it, "drawn from a hat." It seems overwhelmingly probable that they would be related to some basic figure as percentages. They happen to form precise percentages of £5,000,000, a figure which was clearly in the mind of the contractor as measuring the *quantum* of the work he had to carry out—the "stipulated work." (i) If so, it seems also overwhelmingly probable that in the interview or interviews leading up to the deed this £5,000,000 figure was communicated to and accepted by the commissioners as the basis of the minimum and maximum profit figures agreed on in the deed. The parties at these interviews must have discussed why the contractor should receive these sums and not some others, and their precise mathematical relationship to £5,000,000 cannot be a miraculous coincidence. I should draw the same inference from the terms of the deed itself, viewed in the light of the surrounding circumstances, even if the letter of Aug. 12 were entirely excluded from consideration. If so, the conclusion seems justified that the parties to the varying deed contracted on the basis of a maximum and minimum profit directly related and limited to a total *quantum* of work measured approximately by £5,000,000 and on the basis that the commissioners should not be entitled under the contract to require work materially in excess of this *quantum*. Hence no claim to exact an extra *quantum* of work measured by about £2,000,000 can be sustained under the contract and, such extra work having been in fact requested and performed, the contractor is entitled to claim in respect of it, not under the contract, but *dehors* the contract, for a reasonable remuneration.

Many authorities were cited to us on the construction of the contract as varied by the deed. The majority of these were decisions on "frustration." Frustration cases differ from the present case, in so far as in many of them a catastrophic event is involved. A catastrophic event, caused by the act of neither party, intervenes, destroying some basic, though tacit, assumption on which the parties have contracted, and with that assumption destroying the contract itself. In the present case there is no such external event, for the commissioners' act in demanding £2,000,000 worth of "extras" cannot be regarded in that light and is in any case the act of one of the parties. The ground common to this case and frustration cases—the area of overlap between them—is limited to this, that in many frustration cases a stipulation absolute, if literally construed, has been construed as subject to an implied restriction by reason of the circum-

stances surrounding the formation of the contract and contemplated by the parties at that time, and it is sought in the present case by the contractor to import a similar implied restriction. In a frustration case "X" may contract to sing in the Albert Hall on Tuesday, and the obligation, if read literally, is unconditional, yet the contract is construed as subject to an implied term that the Albert Hall shall not have been burnt to the ground on the previous Monday. The continued existence of the Albert Hall was a basic assumption, only not expressed in the contract because the parties thought (or would have thought if they had considered the point) that it was too obvious to need expressing. So, again, where an obligation is subject to a clause modifying its incidence in certain named events, such a clause may itself have to be construed against its literal tenor if the literal construction runs counter to some similar basic assumption. A contract often provides that in the event of "delay" through specified causes, the contract is not to be dissolved, but merely suspended, yet such a provision has been held not to apply where the delay was so phenomenal, so pre-emptive, as to fall outside what the parties could possibly have contemplated in the suspension clause—in other words, "delay," though literally describing what has occurred, has been read as limited to normal, moderate delay, and as not extending to an interruption so differing in degree and magnitude from anything which could have been contemplated as to differ from it in kind.

*Metropolitan Water Board v. Dick Kerr, Ltd.* (7) is a good illustration of this. Dick Kerr, Ltd., contracted in July, 1914, to build a reservoir for the water board within six years, with a proviso that if, by reason of any "difficulties, impediments, or obstructions whatsoever and howsoever occasioned, the contractors should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract," it should be lawful for the engineer to grant an extension—in other words, such a delay should neither dissolve the contract nor leave it unaffected, but should suspend its execution. In February, 1916, the Ministry of Munitions required the company to cease work on the contract, thereby making its further performance temporarily illegal. It was held that the provision for extending the time did not apply to the prohibition of the Ministry, but that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract broken off. Such a prohibition plainly fell literally within the designation "all difficulties, impediments, or obstructions whatsoever and howsoever occasioned." It was both a difficulty, an impediment and an obstruction, and it was occasioned. It was both a difficulty, an impediment and an obstruction, and it was occasioned somehow, yet it was held that the parties who framed that provision did not and could not have contemplated an interruption of so extreme a nature, and the provision was read as impliedly excluding it. (Compare also *Distington Hematite Iron Co., Ltd. v. Possehl & Co.* (8)). The famous case of *Jackson v. Union Marine Insurance Co., Ltd.* (2) illustrates the same process, namely, a restriction imposed on the literal scope of the language actually used by the parties, by implication from what they must have contemplated. In that case a ship was bound under a charterparty to sail in February for Newport "with all convenient speed . . . accidents of navigation excepted." She was stranded on her way to the loading port and was under repair until August—seven months in all. There had nevertheless been no breach of the charterparty by the owners, for the ship had proceeded "with all convenient speed" towards Newport and had only not arrived there because of an "accident of navigation." On a literal construction of the contract, it should still have been open to and obligatory on the owners to perform the chartered voyage in August, but it was held that the seven months' delay would have turned a spring voyage into an autumn voyage, that the parties had contemplated a spring voyage only—



this was the basic unexpressed assumption—and that the owners could not claim, nor could the charterers require them, to perform something wholly different in quality, namely, an autumn voyage. A sufficient delay may convert the stipulated adventure into something else, something unstipulated and *dehors* the contract.

I pass from *Jackson's* case (2) to *Bush v. Whitehaven Port and Town Trustees* (1) which is a convenient bridge between the frustration cases and the present one. In *Jackson's* case (2) as just indicated, an un contemplated turn of events altered the character of a voyage from that of a spring to an autumn voyage. In *Bush's* case (1) an un contemplated turn of events converted a summer building contract into a winter building contract. In each case a delay or interruption was fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply, although there was nothing in the express language of either contract to limit its operation in this way. Indeed, in *Bush's* case (1) the contract appeared, on a literal construction, to make express positive provision for the legal consequences of the very event which in fact changed the contract from a summer to a winter one. The event in question was the failure of the defendants to make available the whole of the site, on which the plaintiffs were to erect certain works, in time for the plaintiffs to erect those works during the summer months. The contract, by cl. 11 and 22, read literally, provided that the non-delivery of the site in time to enable the contractor to "commence and continue the works" should not vitiate the contract, nor entitle the contractor to anything except an extension of time (at the discretion of the engineer) which would enable him to avoid the penalties imposed by the penalties clause. It was held, however, that these clauses, though literally applicable, did not apply to a delay in providing the site so extreme as to throw the work from the summer into the winter months and so to revolutionise its character. The works were thrown into, and in fact carried out in, the winter, and the contractor succeeded in a claim to extra payment, based in the alternative on a *quantum meruit* or a breach of the contract. The basis on which he succeeded was that none of the work he did was done under the contract, and that he was entitled to payment of reasonable remuneration for the work he had actually done under conditions of greater expense. He had in fact been paid at contract rates and, credit being given for those payments, recovered £600 in excess.

In the case now under appeal, as in some of the cases just reviewed, the contractual documents contain terms capable literally of a very wide meaning. The varying deed speaks of the "works," and by its tenth paragraph saves so much of the original contract (including the general conditions) as is consistent with its own terms. No. 1 of the general conditions defines the work as "the work indicated on the drawings and/or described in the specifications and/or bills of quantities including all modified extra or additional works and all obligations performed under the contract." Condition 33, again read literally, gives the commissioners the right "at their absolute discretion" to "modify the extent, character, quantities or dimensions of the work shown or described in the contract" and generally to require the contractor to perform extra work without any express limit as to its *quantum* or even its character. Literally, therefore, the "work" in the contract as varied includes an unlimited quantity of "extras," but, for the reasons given above, I think the contract as varied should not be construed according to its literal tenor, having regard to the circumstances surrounding the execution in particular of the deed of August, 1937, and the implications, in the light of those circumstances, of the sums of £150,000 and £300,000 expressed in it. In the result, the *quantum* of work exigible, including extras, is measured by £5,000,000 roughly, the extras constituting about £500,000 worth, at bill of quantities prices, of this total. Some margin above this may be taken as contemplated and covered, but anything

resembling £2,000,000 worth of "extras" over and above this is, in my view, impliedly excluded from the contemplation of the parties and the scope of the contract. I, therefore, agree with the order proposed.

**SINGLETON, L.J.**, stated the facts and continued: If one had to consider this matter on the original contract alone, the contractor's difficulties would be almost insurmountable. The commissioners were entitled to call on him to carry out additional works or alterations, and payment for any such works would have been based on the prices in the bills of quantities, which included profit or remuneration for the contractor. The deed of variation introduced an entirely different method of payment. All cost incurred by the contractor had to be paid and a minimum profit was guaranteed and a maximum profit was stipulated. At the time this arrangement was made both parties had in mind work which could be completed by Jan. 30, 1939. I cannot think that the commissioners, or their advisers, thought that there would be any material alteration beyond the £500,000 mentioned in item 57 of the bill of quantities No. 1. If there had been any thought of material increase at that time, surely there would have been something said about it. As the arbitrator found, the object of such a note as that to item 57 is to place the contractor in a position to gauge the probable ambit of the contract and to price the bills of quantities accordingly, having particular regard to the time required for completion. A  
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I regard the time factor as of great importance. A "thrust" was being made to have the work completed (using exceptional methods) by Jan. 30, 1939. The additional work which was ordered subsequently, and which was executed, meant that the work could not be completed until early in the year 1940. In other words, the contractor was occupied a year longer on the work than was contemplated, and a year longer than he would have been but for the additional work ordered. The arbitrator finds that the contract time of two years for completion was not sufficient in which to execute the excess quantity of work in addition to the quantity of work in the varied contract. He further states that it is a well recognised usage in the building industry to relate profit remuneration to the actual or estimated cost of the work and to the time required to execute the work. Now, the commissioners must have been well aware of this usage, and both parties had in contemplation work which could be completed by Jan. 30, 1939. At the date of the deed of variation there had been nothing to indicate that the contractor would be called on to execute work which would exceed the stipulated work as defined in para. 8 of the points of claim. Indeed, he had been called on to supply a complete time and progress schedule of the work to be carried out, and early in August, 1937, he had informed Sir James West that it would be possible to complete the work by Jan. 30, 1939, if exceptional methods were used. The arbitrator finds expressly that when the contractor entered into the deed of variation and agreed to a maximum profit, he did not know, and had no reason to believe, that the ultimate quantity of work would or might be greater than the stipulated work, and, further, that the extent of the work which he was ultimately called on to execute was not, and could not have been, appreciated by him. In his further findings of fact (para. 4) the arbitrator concludes that the contractor, on the information available to him in August, 1937, estimated that the cost of the work would be £4 million plus £1 million estimated cost of the exceptional or abnormal methods of working to be adopted to secure completion by Jan. 30, 1939. He adds that there was no evidence enabling him to answer the question whether or not the commissioners had in mind any different estimate at the time. D  
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It is submitted by counsel for the commissioners that this defeats the claim of the contractor in that there is no finding by the arbitrator of a figure which was in the contemplation of both parties. It is, I think, unfortunate that no document in relation to the discussions of August, 1937, was disclosed by the commissioners. I find it difficult to imagine that there could be discussions as to

maximum or minimum profit amounting to £300,000 or £150,000, as the case might be, without a memorandum of some kind. No one was called on behalf of the commissioners. In the case of certain subsidiary contracts, the minimum and maximum profits were based on three per cent. and six per cent. respectively of the cost or estimated cost of the work involved. The case for the contractor was that the £150,000 and £300,000 figures were arrived at in the same way, namely, three per cent. and six per cent. on £5 million. I find it difficult to resist this conclusion. No one agrees in advance figures of profit of this nature without some basis on which to work. It would have been easy for someone to have been called on behalf of the commissioners if there was any doubt as to this. I was impressed, too, by the argument based on cl. 8 of the deed of variation, though it may be that the clause is open to more than one construction.

I find myself unable to agree with the submission of counsel for the commissioners that, under the contract as varied by the deed of variation, the contractor would have been bound to continue making alterations and additions, if ordered, for years and years, without any extra payment by way of profit. That would have led to manifest absurdity and injustice, as MATHEW, J., said in *Bush v. Whitehaven Port and Town Trustees* (1). There must be a limit. I think that LEWIS, J., drew the right inference, and that it was an inference which he was entitled to draw, namely, that at the date of the deed of variation both parties contemplated work which, with the introduction of exceptional methods, would cost approximately £5 million, and that it was on that basis that the maximum profit was agreed at the figure of £300,000. The additional work called for and executed later was something outside the contemplation of the parties in August, 1937. The contractor executed it at the request of the commissioners, and he was entitled to be paid a reasonable profit or remuneration in respect of it. I would dismiss the appeal of the commissioners.

*Appeal dismissed with costs.*

Solicitors : *J. H. Lambert & Co.* (for the contractor) ; *Treasury Solicitor* (for the commissioners).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

## F KAYSER v. LONDON PASSENGER TRANSPORT BOARD.

[KING'S BENCH DIVISION (Humphreys, J.), January 11, 12, 1950.]

*Street Traffic—Duty of driver—Right to proceed when satisfied that persons crossing are out of danger.*

Where the driver of a vehicle is satisfied that persons who are lawfully entitled to cross the road, whether they are on a pedestrian crossing or not, are out of any danger from him if he goes on in the normal course, he is entitled to do so, but only at such a pace as will enable him to stop almost immediately should the persons who are crossing do anything dangerous or negligent.

[FOR THE PEDESTRIAN CROSSING PLACES (TRAFFIC) REGULATIONS, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 350.]

Case referred to:

(1) *London Passenger Transport Board v. Upson*, [1949] 1 All E.R. 60 ; [1949] A.C. 155; [1949] L.J.R. 238.

**ACTION** for damages for personal injuries.

On May 17, 1946, the plaintiff, a girl aged fourteen (who sued through her mother), was knocked down and injured by a motor omnibus belonging to



the defendants, London Passenger Transport Board. It was contended on her behalf that the accident was due (a) to the negligence of the driver of the omnibus, and (b) to breaches of statutory duty on his part, in that (i) he had ignored the indication given by the traffic light signals, contrary to the Road Traffic Act, 1930, s. 49, and (ii) he had failed to comply with the provisions of the Pedestrian Crossing Places (Traffic) Regulations, 1941, regs. 3 and 5. The evidence established that there were no breaches of statutory duty on the part of the driver, as the traffic lights were in his favour and the plaintiff was not on the pedestrian crossing at the time when the accident occurred. HUMPHREYS, J., now held that there was no negligence on the part of the driver, and he gave judgment for the defendants. The facts appear in the judgment.

*Krikorian* for the plaintiff.

*Glyn-Jones, K.C.*, and *King Anningson* for the defendants.

HUMPHREYS, J.: The accident to the plaintiff happened on May 17, 1946, but the matter was held up until the House of Lords delivered their judgment in *London Passenger Transport Board v. Upson* (1), in which their Lordships had to consider the Pedestrian Crossing Places (Traffic) Regulations, 1941, reg. 3. I deprecate the view that, if the House of Lords is considering some question, the hearing of any case which relates to that matter should be delayed until the House of Lords have delivered their opinions. The House of Lords do not sit as a tribunal every day, having other duties to perform, and, in consequence, it is often a long time before they are able to announce their decision, with the result that it may be some years before the case which is held over comes on for hearing. It is very difficult to obtain accurate evidence of a momentary happening three or four years previously, as everyone has more or less forgotten what the facts were. In this case the plaintiff was, undoubtedly, knocked down by a motor omnibus belonging to the defendants, but the all-important facts, e.g., what people said at the time of the accident and what the plaintiff's position was when the police constable came up are unknown, because the police officer's notebook, in which all those facts were set out, has been destroyed. Apparently, the police have a rule that police notebooks are to be destroyed at the end of three years. That seems to me to be rather an unfortunate rule, particularly in a case where the police officer has already been subpoenaed to produce his notebook and give his evidence. Naturally, the police officer has forgotten all about the accident, and his notebook is not available.

The best evidence that I have had of the material facts of this case is the evidence of the driver of the omnibus, which was corroborated by other witnesses. His evidence is as follows. As he was going from Cricklewood to Edgware he stopped his omnibus at a compulsory stop at some distance from the pedestrian crossing near Stag Lane and Watling Avenue, both wide thoroughfares leading out of the main road. When the conductor rang the bell to tell him to start again, he did so. At that time there were two trolley buses in front of him, and, as the traffic lights turned green so that he was free to proceed on his way, he did so, following the two trolley buses. When he was about an omnibus length and a half from the lights that controlled the traffic on his side of the road, he saw three pedestrians (two girls and a man) hurrying across the road, holding hands and talking. They were walking, not straight across the road, but diagonally. As it was obvious to him that they would have crossed the road, which was a wide one, before he reached the place where they were crossing, he went on, but, as there was a temporary obstruction, i.e., an air-raid shelter of considerable length and height, which made it difficult for him to see who was on the crossing (even as there was an obstruction, i.e., a taxicab, in *London Passenger Transport Board v.*

Upson (1) ), he was going very slowly at the time—"cruising" in first gear, as he put it—so that he could put on his brakes and stop within a foot or two if necessary.

The driver said:

A "My eyes then turned to Stag Lane to see if there was any difficulty in Stag Lane. The next thing that I saw was, for some reason—I did not know at the time what it was—these three people scatter. As soon as they did that, I pulled on my brakes. I braked hard. The young man was pulling one of the girls. As my 'bus stopped, I realised that the third person, who disappeared from my view, was just under the 'bus. Fortunately, I stopped so quickly that I had not actually gone over her, but I actually touched her and, no doubt, knocked her down. She was not actually on the crossing. She was going diagonally. She probably had started on the crossing—that is very likely—but she had gone off the crossing and was moving towards . . . her left front. As she lay there, my off wheel had to be moved back about six inches from her. It was actually on her clothes. I should say that, as she lay, she was probably within twelve feet of the crossing and she was at that time quite close to the kerb, and so was I."

This evidence was confirmed by other witnesses, one of whom said that the plaintiff started to run back, probably as a result of seeing that there was something coming in the opposite direction, and, as she ran back, she really ran into the omnibus. She lay just off the crossing, and I do not think that it is material in this case to determine on which side of the crossing she was.

D [HIS LORDSHIP then dealt with the evidence of the plaintiff and continued:] According to the evidence on both sides, the accident happened because the plaintiff, having got half way across the road, suddenly altered her mind—it may have been for a good reason—and decided to run back. If it is the duty of a driver, when he is satisfied that people who are crossing the road are well out of any danger from him, to stop until they have touched the kerb on the other side, the traffic of London could not go on. The law must be, and I hold that it is, that, where a driver is satisfied that persons who are lawfully entitled to cross the road—whether they are on a pedestrian crossing or not—are well out of any danger from him if he goes on in the normal course, he is perfectly entitled to go on, but, of course, only at such a pace as will enable him to stop almost immediately in the unlikely happening of those persons doing something dangerous and negligent themselves. I am satisfied that the driver in this case was driving at such a pace, and the allegation that he was driving too fast is, I think, totally unsupported by any evidence. As the real explanation of the accident was that the plaintiff, having got half way across the road, made up her mind to run back, and, in running back, ran into the omnibus, which was on its proper side of the road, with the lights in its favour, and was going very slowly, there was no negligence on the part of the driver, and for that reason I give judgment for the defendants.

*Judgment for the defendants with costs.*

Solicitors: *Ernest Bevir & Son*, agents for *Hanchett Copley & Hails*, Edgware (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

## LINDLEY v GEORGE W. HORNER &amp; CO., LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.),  
January 12, 1950.]

*Food and Drugs—Proceedings against manufacturer—Nail found in sweet—Absence of negligence—Liability of manufacturer—Food and Drugs Act, 1938 (c. 56), s. 3 (1), s. 83 (3).*

The Food and Drugs Act, 1938, s. 83 (3), provides : " Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first-mentioned person could establish a defence under sub-s. (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person. In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first-mentioned person might have been charged."

A customer who had bought some sweets from a retailer discovered a nail in one of them. On an information under s. 83 (3) against the respondents as manufacturers of the sweets, charging them with an offence under s. 3 (1) of the Act in that there had been a sale to the customer of food which was not of the nature, substance, or quality of the article demanded, the magistrate found that the respondents had taken every reasonable precaution to prevent such an occurrence, and dismissed the information.

HELD : s. 3 (1) imposed an absolute duty on the respondents regardless of negligence and, therefore, they should have been convicted of the offence charged.

[FOR THE FOOD AND DRUGS ACT, 1938, s. 83 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 458.]

CASE STATED by Leeds stipendiary magistrate.

On July 19, 1949, at a court of summary jurisdiction sitting at Leeds, an information was preferred by the appellant, an officer of the Public Health Department of the city of Leeds, against the respondents, a firm of sweet manufacturers, charging them under s. 83 (3) of the Food and Drugs Act, 1938, with an offence under s. 3 (1) of that Act. On June 9, 1949, a customer bought from a retailer some sweets manufactured by the respondents in one of which was found a nail. It appearing to the local authority that an offence had been committed in respect of which proceedings might have been taken under the Act against the retailer in that the retailer had sold sweets which were not of the nature, substance, or quality of the article demanded by the customer contrary to s. 3 (1) of the Act, and being satisfied that the offence was due to an act or default of the respondents and that the retailer could establish a defence under s. 83 (1), took proceedings against the respondents. The magistrate was of the opinion that the nail had got into the sweet at some point during its manufacture by the respondents and that they had used every reasonable precaution to prevent any such occurrence, and he dismissed the information. The Divisional Court now allowed the appeal and remitted the case with a direction to convict.

Vernon Gattie for the appellant.

Fenwick, K.C., and Norman Harper for the respondents.

LORD GODDARD, C.J. : This is a Case stated by the learned stipendiary of the city of Leeds, before whom the respondents were charged with an offence against the Food and Drugs Act, 1938.



A woman bought some sweets at a shop and in one of the sweets she found a nail. She handed the sweet containing the nail to an inspector employed by the local authority, and the local authority, having ascertained that the shopkeeper had bought the sweets from the respondents, who were the manufacturers of the sweets, took "third party" proceedings under s. 83 (3) against the respondents, as being the persons whose act or default was responsible for the presence of the nail in the sweet, in contravention of s. 3 (1) of the Act of 1938.

A By s. 83 (1), if the local authority proceeds against the retailer, the retailer can give notice and bring the manufacturer before the court. The retailer can then show that he used all due diligence in carrying on his business with regard to the particular article, and that the extraneous matter which got into the goods was due to the act or default of the manufacturer. By s. 83 (3) it is provided that the local authority may, if they choose, "short-circuit" the matter by proceeding at once against the manufacturer.

B The learned stipendiary has found that all due diligence was used in the manufacture of these articles. That may be, but, nevertheless, a nail was found in the sweet, and that is extraneous matter. If the proceedings had been taken against the retailer, the retailer would have had no defence unless he could have brought himself within that given by s. 4 (4), which provides :

C "Where the food or drug in question contains some extraneous matter, that the presence of that matter was an unavoidable consequence of the process of collection or preparation."

D In my opinion, that sub-section does not cover this case. It cannot be said that the presence of a nail in the sweet was an unavoidable consequence of the process of collection or preparation. The manufacturer or his servant did not notice the nail. If it had been noticed, its presence could have been avoided and it could have been taken out. The Food and Drugs Act imposes absolute duties quite apart from *mens rea*. Section 83 (3) refers to the "act or default" of the manufacturer and not to a "negligent act or default." It provides that, if the contravention is due to the act or default of the manufacturer, he may be convicted of the offence with which the retailer might have been charged. He must answer for it, whether he has been negligent or not. The court below has confused matters of defence with matters which may be considered in mitigation of sentence. In my opinion, there is no defence here to the summons, although it may be that the magistrate, having heard all the evidence, will think there are matters which can go in mitigation. The case must be remitted to the magistrate with a direction that the offence was proved.

F LYNKEY, J. : I agree.

G SELLERS, J. : I agree.

*Appeal allowed with costs. Case remitted with direction to convict.*

Solicitors : Sharpe, Pritchard & Co., agents for O. A. Radley, Leeds (for the appellant); Hyde, Mahon & Pascall, agents for Wilkinson & Marshall, Newcastle-on-Tyne (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

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## CHAPELLE v. CHAPELLE.

[MANCHESTER MICHAELMAS ASSIZES (Willmer, J.), November 18, December 15, 1949.]

*Divorce—Jurisdiction—Marriage already declared void ab initio by decree of court in Malta in 1944—Legal effect of decree—Petitioner husband domiciled in Malta until 1945—Marriage in England in 1931—Wife domiciled in England until marriage—Domicil of wife after purported marriage—Wife's claim to Maltese domicil founded on marriage.*

The parties were married at a register office in England on Nov. 3, 1931. At that time the husband was domiciled in Malta, and until the marriage the wife had been domiciled in England. The wife had been previously married and had been divorced in 1928. Since then she had been resident in Malta, but the parties came to England to be married as re-marriage during the lifetime of the previous spouse of a person whose marriage had been dissolved by civil decree was deemed to be void under Maltese law. After the marriage the husband and wife returned to Malta where they cohabited until 1941. The wife then returned to England and remained there until the present time. In 1943 the husband instituted proceedings for nullity in the Civil Court in Malta, and, by a decree dated Aug. 7, 1944, the Maltese court pronounced the purported marriage to be void *ab initio* on the ground that it had not been celebrated in accordance with the canon law, and, therefore, could not be recognised in Maltese law. The husband, having acquired an English domicil since 1945, presented a petition for divorce in England, alleging desertion and adultery by the wife, and the preliminary question arose whether it was competent for the court to pronounce a decree of dissolution in respect of a marriage already annulled by decree of the court in Malta. It was contended (*inter alia*) by the wife that, as the marriage took place in England, her domicil must be determined by English law under which she acquired a Maltese domicil by the marriage, and, therefore, as both parties were domiciled in Malta at the time of the commencement of the Maltese proceedings, the principle in *Salvesen v. Austrian Property Administrator* ([1927] A.C. 641) applied, and the court was bound to hold that the decree of the court in Malta was binding and conclusive.

**HELD :** as the court in Malta had pronounced the marriage of 1931 to be void *ab initio*, the wife could not base her claim to be within the jurisdiction of that court on the ground that she had acquired a Maltese domicil through that marriage; the court in England would not accept as binding a decree of the court in Malta which, by its very terms, destroyed the ground on which the claim to exercise jurisdiction over the wife was based; and, therefore, as the wife had not established a common domicil with the husband in Malta, the principle in *Salvesen v. Austrian Property Administrator* (*supra*) could not be applied, and the court had jurisdiction to entertain the husband's petition.

*White (otherwise Bennett) v. White* ([1937] 1 All E.R. 708), applied.

[AS TO FOREIGN DECREES OF NULLITY OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 312-314, para. 365, and FOR CASES, see DIGEST, Vol. 11, p. 431, Nos. 944-946.]

Cases referred to :

- (1) *Salvesen (or von Lorang) v. Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; Digest Supp.
- (2) *De Massa (otherwise Horveno) v. De Massa*, [1939] 2 All E.R. 150, n.; Digest Supp.
- (3) *Galene v. Galene (otherwise Galice)*, [1939] 2 All E.R. 148; [1939] P. 237; 108 L.J.P. 82; Digest Supp.

- (4) *White (otherwise Bennett) v. White*, [1937] 1 All E.R. 708 ; [1937] P. 111 ; 106 L.J.P. 49 ; 156 L.T. 422 ; Digest Supp.
- (5) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56 ; [1948] P. 100 ; [1948] L.J.R. 1761 ; 2nd Digest Supp.
- (6) *Ogden v. Ogden*, [1908] P. 46 ; 77 L.J.P. 34 ; 97 L.T. 827 ; 11 Digest 334, 228.

**A** PRELIMINARY ISSUE on the application of the wife (the respondent) to determine whether the court had jurisdiction to pronounce a decree of dissolution in respect of a marriage already annulled by decree of His Majesty's Civil Court in Malta. The husband was of Maltese domicil until 1945, since when he had acquired an English domicil, and the wife's domicil before the marriage was English. The marriage took place at a register office in England in 1931 and the husband and wife resided together in Malta from 1931 to 1941, the wife then returning to England. In 1944 the husband obtained a decree of nullity in the Civil Court in Malta on the ground that the marriage, not having been celebrated in accordance with the canon law, could not be recognised in Maltese law and was absolutely void *ab initio*. After acquiring an English domicil, the husband presented a petition for divorce in England and an issue was directed to determine the legal effect of the decree of the court in Malta on the validity of the purported marriage. The wife contended that the court in Malta had jurisdiction to pronounce the decree as both parties were domiciled in Malta, and she based her claim to Maltese domicil on (*inter alia*) her marriage to a husband domiciled in Malta. The issue was argued before WILLMER, J., at Liverpool Assizes on Nov. 18, 1949, and judgment was given at Manchester Assizes on Dec. 15, 1949.

**D** WILLMER, J., now held that the wife could not base her claim to be within the jurisdiction of the court in Malta on the fact that she had acquired a Maltese domicil by the marriage because that marriage had been declared by that court to be void *ab initio*, and he gave judgment for the husband on the preliminary issue. The facts appear in the judgment.

**E** *J. G. Burrell* for the wife.  
*Baucher* for the husband.

*Cur. adv. vult.*

Dec. 15. WILLMER, J., read the following judgment. The material facts in this case are as follows. The petitioner and the respondent (to whom I will refer hereafter as "the husband" and "the wife" respectively) went through a ceremony of marriage on Nov. 3, 1931, at the register office in Lincoln. At that time the husband, who professed the Roman Catholic faith, was domiciled in Malta, and he continued to be so domiciled until about the end of 1945, since when he has acquired an English domicil. The wife, who was a Protestant, was the divorced wife of one Bennet, from whom she was divorced in 1928. Until that time she had an English domicil, and, although it is alleged that during the next three years she was resident in Malta, it is not suggested that prior to the marriage ceremony in 1931 she acquired a Maltese domicil. No civil decree of divorce is recognised by the law of Malta, and, if a person whose marriage has been dissolved by civil decree purports to re-marry during the lifetime of the previous spouse, such re-marriage is deemed to be void in Maltese law. For this reason the parties, though both resident in Malta during 1931, proceeded to England for the express purpose of being married in this country. Thereafter they returned to Malta, and cohabited in Malta as man and wife until 1941. The wife gave birth to two children, both of whom were born on Nov. 13, 1933. Early in 1941 the husband, who was then serving in His Majesty's Forces, was posted to India, and did not return to Malta until 1943. In the meantime the wife left Malta in October, 1941, and returned to England. Since then she has been resident in England, and there has been no further cohabitation between the parties. The husband, by his petition, alleges that the wife deserted him in October, 1941, and further alleges that since that date she has committed



adultery with a named co-respondent, and on these grounds he prays for a dissolution of the marriage. In June, 1943, the husband instituted proceedings for nullity in His Majesty's Civil Court in Malta. The wife was not herself present at the hearing, but her legal representatives were heard in opposition to the husband's claim. By a decree dated Aug. 7, 1944, the court in Malta pronounced the purported marriage between the parties to have been null and void. The ground of the decision was that Maltese law—the law of the husband's domicile—did not recognise as valid any form of marriage celebration which did not comply with the requirements of the canon law. It was held, therefore, that the purported marriage in this case, not having been celebrated in accordance with the canon law, was defective in form and, consequently, could not be recognised as valid in Maltese law. It is important to observe that the court in Malta treated the marriage, not as voidable, but as one that was absolutely void *ab initio*. The wife did not appeal from the decree of the court in Malta, and on being served with the petition in the present case immediately raised the question whether it is competent for this court to pronounce a decree of dissolution in respect of a marriage already annulled by decree of the competent court in Malta. In these circumstances and to avoid the possibility of unnecessary costs being incurred in determining the merits of the husband's petition, an issue was directed to determine the legal effect of the decree of His Majesty's Civil Court in Malta on the validity and subsistence of the purported marriage. The matter was argued before me at Liverpool Assizes on Nov. 18, 1949, when it was contended on behalf of the wife that the decree of the court in Malta should be held to be binding, in which event there could be no subsisting marriage capable of dissolution by decree of this court. On behalf of the husband doubt was expressed as to the legal effect in this country of the decree of nullity obtained in Malta. I was given to understand that the husband's main concern was merely to obtain a definitive ruling from this court so as to safeguard his position if only to the extent of protecting him from a possible charge of bigamy in the event of his being minded to contract a fresh marriage. The questions raised were of some difficulty and novelty, and, having regard to this fact, as well as to the great importance of the matter from the point of view of the parties. I thought it right to take time to consider my judgment.

The argument on behalf of the wife was based on the proposition stated in DICEY'S CONFLICT OF LAWS, 6th ed., p. 381, r. 73 (1), which is in the following terms :

“ The courts of a foreign country have jurisdiction to pronounce a decree of nullity of marriage if . . . the parties were domiciled in such foreign country at the commencement of the proceedings for nullity.”

This rule is founded on the decision of the House of Lords in *Salvesen v. Austrian Property Administrator* (1), in which it was held that, where the parties are domiciled in a foreign country, a decree of nullity of marriage pronounced by a competent court of that country will, in the absence of fraud or collusion, be recognised as binding and conclusive by the courts of England and Scotland, unless it offends against British notions of substantial justice. I was referred to *De Massa v. De Massa* (2) and *Galene v. Galene* (3), in both of which this court accepted as conclusive and binding French decrees of nullity pronounced in respect of marriages celebrated in this country between parties both of whom were domiciled in France. It was contended that the present case was indistinguishable on the ground that the parties herein were both domiciled in Malta, and, consequently, the Civil Court in Malta was a court of competent jurisdiction to pronounce a decree of nullity. If I accept the premise, namely, that both parties in this case were domiciled in Malta at the time of the commencement of the Maltese proceedings, I have no doubt that the conclusion contended for by the wife would follow, and I should be bound on the authorities to hold that the decree of nullity pronounced by the court in Malta

is conclusive. There is no doubt that at the material time the husband was domiciled in Malta. The wife claims a Maltese domicile on two alternative grounds, (a) from the fact of her marriage to a husband domiciled in Malta, or, alternatively, (b) from the fact of her residence in Malta for some ten years following the celebration of the marriage with the intention of remaining there permanently. I will deal first with the former claim, which, to my mind, raises

A a difficult position of law.

The argument of the wife is that her domicile at the material time must be determined by English law. The marriage celebrated between the parties in 1931 was celebrated in England and complied with all the requirements of English law. It is, therefore, contended that by English law the wife acquired the domicile of her husband. On behalf of the husband, however, it is objected that, the court

B in Malta having pronounced the marriage void *ab initio*, the wife can no longer rely on the fact of her marriage as giving her a Maltese domicile—in other words, the court in Malta, by its own act in pronouncing the decree of nullity, cut away the very ground on which its jurisdiction over the wife was based. *Salvesen v. Austrian Property Administrator* (1) and the other cases to which I have referred were decided on the basis that the parties unquestionably shared a common

C domicile. In the present case, however, on the basis of the Maltese decree the wife did not acquire a common domicile with her husband from the mere fact of a marriage which, by the self-same decree, was held never to have been a valid marriage at all.

In *White v. White* (4), it was clearly recognised by BUCKNILL, J., that the principle of *Salvesen v. Austrian Property Administrator* (1) does not apply

D where there is no common domicile. On this point the decision in *White v. White* (4) was recently approved by the Court of Appeal in *De Reneville v. De Reneville* (5). Though the facts of the latter case bear little resemblance to those of the present case, the reasoning of LORD GREENE, M.R. ([1948] 1 All E.R. 60), wherein he stresses the distinction, in relation to domicile in proceedings for nullity, between marriages which are void *ab initio* and those which are merely voidable, is most

E helpful and instructive. A wife originally domiciled in this country and seeking a decree of nullity here against a husband domiciled abroad must fail if her claim is based on the marriage being voidable, for in that event, until a decree is pronounced, the marriage remains valid, so that the wife will have acquired the husband's foreign domicile. Where, however, the claim is based on the marriage being void *ab initio*, such a wife may successfully proceed in this country, for

F the effect of the decree for which she asks will be to preserve her English domicile, since in the absence of any valid marriage she will never have acquired her husband's domicile. Conversely, it seems to follow that such a wife, suing abroad in the court of her husband's domicile, shares a common domicile with her husband in the case of a marriage which is merely voidable, but not if the marriage is void *ab initio*. The view is expressed in DICEY'S *CONFLICT OF LAWS*, 6th ed.,

G p. 383, para. (d), that, where a husband domiciled abroad obtains in the court of his own domicile a decree of nullity in respect of a marriage void *ab initio*, this court will accept the foreign decree as binding only if this court is itself satisfied that the marriage is void in the sense that no decree of the court would have been required to avoid it. That, however, is hardly the case here. Here we have a marriage which was, undoubtedly, celebrated in accordance with the

H requirements of English law, the validity of which, but for the decree of the Maltese court, could not be questioned, nor could there be any question but that, under English law, the wife, by her marriage, must be regarded as having acquired her husband's domicile in Malta. In such circumstances is this court bound to accept as conclusive a decree of the Maltese court annulling a marriage which would clearly be valid by English law as against a wife who, unless for any other reason she acquired a Maltese domicile, must by the terms of the decree itself be regarded as still domiciled in England? There is no authority, so far

as I am aware, that is directly in point. The question is exhaustively discussed in CHESHIRE ON PRIVATE INTERNATIONAL LAW, 3rd ed., p. 464, but no opinion is expressed as to what the correct answer may be. Indeed, the learned author leaves the question with the remark:

"It is impossible to foresee what course the English court will adopt when confronted with a problem of this nature."

The nearest case which I have been able to find is *Ogden v. Ogden* (6). In that case a woman domiciled in England had married a domiciled Frenchman in circumstances which rendered the marriage voidable under French law. In due course the French court pronounced a decree of nullity at the suit of the French husband. The woman purported to contract a fresh marriage with another man in this country. In subsequent proceedings instituted by the second "husband" in this country it was held by the Court of Appeal that the French decree of nullity in respect of the first marriage was not binding in this country, with the result that in the eye of the law in this country the woman remained married to her original French husband. The actual decision of this case was clearly at variance with the decision in *Salvesen v. Austrian Property Administrator* (1), and must be taken to be overruled by the House of Lords in the latter case, for in *Ogden's* case (6) the marriage, being merely voidable, remained valid until avoided. Consequently the woman by her marriage acquired her first husband's French domicile, and, therefore, in accordance with the principles stated in *Salvesen's* case (1), the decree of the French court, being the court of the common domicile, ought to have been accepted as binding and conclusive in this country, but, in the course of delivering the judgment of the Court of Appeal, SIR GORELL BARNES, P., expressed the view ([1908] P. 78) that, if no valid marriage ever took place, the woman could never have acquired a French domicile, and it was, apparently, on that ground that the court (erroneously, as it proved) came to the conclusion that the French decree was not binding. The House of Lords, in *Salvesen's* case (1), while disapproving the actual decision in *Ogden's* case (6), were careful to express no dissent from the reasoning of SIR GORELL BARNES, P., but distinguished the case on the ground that in *Salvesen's* case (1) there was no doubt as to the common domicile of the parties in Germany: see *per* VISCOUNT HALDANE ([1927] A.C. 660), VISCOUNT DUNEDIN (*ibid.*, p. 662) and LORD PHILLIMORE (*ibid.*, 669, 670). In my judgment, if and so far as the wife's claim to have acquired a Maltese domicile depends on the fact of her marriage, I shall be, not departing from the principle laid down in *Salvesen's* case (1), but rather following the reasoning of the members of the House of Lords in the passages to which I have referred, if I hold, as I do hold, that this court will not accept as binding a decree of the court in Malta which, by its very terms, destroys the one and only ground on which the claim to exercise jurisdiction over the wife could be based. I do not think that the wife can, at one and the same time, claim a common domicile with her husband in Malta, and yet rely on the decree of the Maltese court which destroys the foundation on which that claim is based.

This, however, does not dispose of the matter for, as already pointed out, the wife claims that, quite apart from the effect of her marriage, she acquired a domicile of choice in Malta by her conduct in taking up residence with the husband in Malta with the intention of remaining there permanently. On the facts stated in the respective affidavits I can have no doubt that she did so acquire a domicile of choice in Malta, but the question remains whether she still retained her domicile of choice at the time when the proceedings in Malta were commenced. If she did, then notwithstanding what I have said as to the effect of the marriage, there would quite clearly, for other reasons, be a common domicile in Malta. In that event I should clearly be bound, on the authority of *Salvesen's* case (1), to hold that the decree of the court in Malta, being a decree of the court of common domicile, was binding and conclusive. I am, however,



unable to come to any conclusion on this question, because the facts on which its determination must depend are not yet fully before the court. If the husband is right in his assertion that the wife deserted him and left Malta for good in the autumn of 1941, *a fortiori* if she did so with the intention of living in adultery with the co-respondent in England, I should have no difficulty in concluding that long before the commencement of the husband's proceedings in Malta she had lost any right to assert a domicile of choice in Malta founded on her residence there. On this basis of facts, if the wife cannot rely on the marriage as conferring on her a Maltese domicile, I do not see how she is any better off by alleging a Maltese domicile based on residence. The wife has not yet pleaded to the husband's petition, and I do not know what her version of the material facts may be. In the circumstances it is impossible for me to reach any final determination of this question on the materials at present before me. Certainly I cannot reach a decision which would have the effect of halting the husband's petition *in limine*. The question whether the wife still retained her domicile of choice in Malta at the time when the Maltese proceedings were commenced can only be determined on the trial of the suit, when all the material facts have been proved in evidence. In the circumstances I think that this point must be kept open by leaving the wife free, if so advised, to allege in her answer that at the time when the husband commenced his proceedings in Malta she still retained a Maltese domicile by reason of her continued intention to reside in Malta. If she succeeds in establishing such a state of facts, it will still be open to her to contend at the trial that the decree of nullity pronounced by the court in Malta ought to be accepted by this court as binding and conclusive. For the reasons already given, however, in so far as the determination of this issue depends on the wife's acquisition of a Maltese domicile by reason of the marriage, my judgment must be in favour of the husband and against the wife. I cannot say, on the materials at present before me, that the decree of the Civil Court in Malta is conclusive to show that the marriage now sought to be dissolved is non-existent.

*Judgment for the husband on the preliminary issue. No order as to costs.*

Solicitors: *Silverman & Livermore*, Liverpool (for the wife); *Edwin Berry & Co.*, Liverpool (for the husband).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

## J.R.P. PLASTICS, LTD. v. GORDON ROSSALL PLASTICS, LTD. (HEXA PEN CO., LTD., CLAIMANTS).

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.), January 13, 1950.]

*Interpleader—Claim—Power of master to bar—Signature to claim by director of company in wrong capacity—Validity of claim—Competence of action by claimants against execution creditors—R.S.C., Ord. 57, r. 10, r. 16 (1).*

R.S.C., Ord. 57, r. 10 provides: "If a claimant [in interpleader proceedings], having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the court or a judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves."

A sheriff, who had levied execution on the goods of the defendants, G.R.P., Ltd., on behalf of the plaintiffs, received a letter on notepaper

headed: "The H.P. Co., Ltd.," giving the telephone numbers and the address of that company, and stating that the directors were G. and another. The letter read: "Dear Sir, Please take notice that we, the H.P. Co., Ltd., claim as our property the whole of goods and chattels at the above address, [specifying them]. Yours faithfully, For G.R.P., Ltd., G., Director." G. was a director of both the defendants, G.R.P., Ltd., and the claimants, H.P. Co., Ltd. The sheriff interpleaded, and then applied under R.S.C., Ord. 57, r. 10, for an order that the claimants be barred against him (the sheriff). Two affidavits were filed by G., one stating that the claimants had bought all the goods of the defendants, but not setting out any receipt, cheque or banking account, and the other explaining why he signed the notice as a director of the defendants instead of as a director of the claimants. The master made an order that the claimants be barred and that no action be brought against the sheriff.

**HELD:** (i) the notice of the claim by the H.P. Co., Ltd., did not require a signature and was not rendered invalid by the fact that G. had signed it in his capacity as a director of the defendants, because the signature, which was in any event unnecessary, could not have misled anyone.

(ii) the master's only power of barring a claim arose under Ord. 57, r. 10, and, as the claimants had appeared, had made out a claim, however nebulous it might be, and had not neglected or refused to comply with any order made after their appearance, the master had no jurisdiction to make the order, which would be set aside, and an issue would be directed between the claimants and the plaintiffs.

*Per curiam:* Even if the conditions of Ord. 57, r. 10, had been fulfilled and the claimants were barred against the sheriff, they were not barred from bringing an action against the plaintiffs if their (the claimants') goods were seized and sold.

*Per LYNKEY, J.:* If the notice of the claimants' claim had been invalid, the master's only power would have been to refuse the sheriff's application for an interpleader issue.

[AS TO THE CLAIM AND THE ORDER ON AN INTERPLEADER, see HALSBURY, Hailsham Edition, Vol. 18, pp. 615, 616, 620-623, paras. 1009, 1010, 1017-1025; and FOR CASES, see DIGEST, Vol. 29, pp. 475, 476, 478, 479, Nos. 247-256, 284-297.]

**APPEAL** by the claimants against an order of Master Moseley made on an interpleader summons under R.S.C., Ord. 57, r. 10, declaring that the claimants were barred and that no action be brought against the sheriff (the applicant on the interpleader summons). The claimants' claim had been signed by a director of the claimant company who was also a director of the defendant company and who had described himself in signing the claim as acting in his capacity as a director of the defendant company. In affidavits in support of the claim, the said director gave only vague and nebulous particulars thereof. The plaintiffs, the execution creditors, contended that the claim was bad. The claimants argued that the claim was valid and that the order was bad, and that an issue should have been directed between the plaintiffs and the claimants. The Divisional Court allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

*Boreham* for the claimants, Hexa Pen Co., Ltd.

*Asher* for the plaintiffs, J.R.P. Plastics, Ltd.

*Harold Brown* for the applicant, the Sheriff of Kent.

**LORD GODDARD, C.J.:** This is an appeal against an order of Master Moseley, made, on a sheriff's interpleader, in these terms:

"Upon hearing the solicitors for the plaintiffs, the defendants and for the sheriff for the county of Kent and upon reading the affidavits of G. St.

Clere-Smithe filed Sept. 9, 1949, it is ordered that the claimants be barred and that no action be brought against the above-named sheriff."

No reason why he barred the claim appears in the body of the order, as is contemplated by Form No. 50 in the ANNUAL PRACTICE, Appendix K. Counsel for the claimants contends that the master had no power to make that order, and that he ought to have directed an issue. In my opinion, though the matter comes before the court in a somewhat curious position, I think that argument is right.

Judgment having been obtained by the plaintiffs, J.R.P. Plastics, Ltd., against the defendants, Gordon Rossall Plastics, Ltd., a letter was written to the sheriff on notepaper headed "The Hexa Pen Co., Ltd.," giving the telephone number and the address of the latter company and stating that the directors were G. St. Clere-Smithe and R. Cloud, saying:

"Dear Sir, Please take notice that we, the Hexa Pen Co., Ltd., claim as our property the whole of goods and chattels at the above address, including furniture and pen parts, motors, ink, etc., with the exception of small quantity of plastic goods to the value of approximately £5 to £10. Yours faithfully, For Gordon Rossall Plastics, Ltd., G. St. Clere-Smithe, Director."

It appears that Mr. St. Clere-Smithe is a director both of the Hexa Pen Co., the claimants, and of the defendants, and the two are so identified in his own mind that he apparently forgot whether he was signing this as a director of the defendants or of the claimants. It is said that that letter is a bad notice, or that the claim therein made is a bad one.

When the matter came before the master, an affidavit was filed by the said Mr. St. Clere-Smith. He states that there were two companies, the defendants and the claimants, and the claimants bought all the goods of the defendants. He does not set out a single receipt or cheque, banking account or anything else. It is the vaguest of claims and no one could blame the master if he thought there was very little in it. He adjourned the summons (there seems to be no agreement why) and the same director made a further affidavit in which he explained, and endeavoured to excuse himself for, his having signed the notice as a director of the defendants instead of as a director of the claimants.

Order 57 (which now contains the whole of the law and practice on interpleader) provides by r. 16:

"(1) Where a claim is made to or in respect of any goods or chattels taken in execution under the process of the court it shall be in writing with the address of the claimant thereon, and such address shall be the address for service of the claimant."

I do not think this signature can have misled anybody because the notice is written on the claimants' paper, it is shown thereon that Mr. St. Clere-Smithe is a director of the claimants, and the document gives the name and address of the claimants because it says "... we, the Hexa Pen Co., Ltd., claim ..." The rule says nothing about signature, and it would be a perfectly good claim, as far as I can see, if the notice was simply: "Take notice that the Hexa Pen Co., Ltd., of" a stated address "claim these goods," whether it was signed or not. The object of the claim is simply to give notice to the sheriff that somebody is disputing his right at the instance of the execution creditor, to seize certain goods because they belong to somebody else.

The sheriff, when given that notice, has two courses open to him. He can ignore the notice, in which case, if he sells the goods and it turns out that they were the property of the person who sent him the notice, he will be answerable in conversion to that person. For the protection of the sheriff the alternative course, the interpleader proceeding, is devised.

The sheriff, when given that notice, has two courses open to him. He can ignore to the plaintiffs, the execution creditors, and to the Hexa Pen Co., Ltd., the



claimants. It may well be that the master said: "Let us get this matter clear first; let us clear up this question of how this signature comes on the notepaper," but I am bound to say that I can find no power in the master to direct anybody to serve another claim, and if another claim had been served, it seems to me that the sheriff would have had to begin all over again. The sheriff, having taken out his interpleader summons, cannot be heard to say, and, to do him justice, he does not say, that he did not understand that this was a claim by the Hexa Pen Co. It was because he did understand it was a claim by the Hexa Pen Co. that he took out the interpleader summons. There being an interpleader summons before the court, an affidavit was put in and, though one might come to the conclusion it was somewhat sketchy and strongly suspect that there was no genuine claim, there was a claim. The claim is set out, and it is said that the Hexa Pen Co. bought the goods, and some particulars are given of how they came to buy them.

A second affidavit was filed, and having regard to its terms the explanation which counsel for the sheriff was instructed to give us looked to me to be probably correct; but I do not think it is at all material. The deponent explains how he came to sign in the way he did, and repeats allegations about buying these goods, explaining how it was that in his claim he excepted the sum of £5 or £10 worth of goods. The master barred the claim, and not only that, he barred the claimants from bringing any action.

Let us see what power he had to do that. His only power of barring the claim arises under Ord. 57, r. 10:

"If a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the court or a judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves."

That rule, no doubt, would considerably affect many cases in which the person interpleading was not a sheriff but a stakeholder, but it seems to me that under this rule, as the sheriff is the applicant, the only effect of barring the claim is to bar the bringing of an action against the sheriff. It is true that the form of the order in the ANNUAL PRACTICE, Appendix K not only refers to barring the claim but goes on to say that no action shall be brought against the sheriff. What is the reason for saying that no action shall be brought against the sheriff in a sheriff's interpleader I do not know, for, if the claim is barred, the barring of the claim itself prevents an action being brought against the sheriff.

It seems to me that this order provides only that the claimants shall not bring any action against the sheriff, but it has not said what is to happen between the claimants and the plaintiffs, the execution creditor. That is left in the air. The claimants do not appear to me to be barred even under the terms of this order from bringing an action against the plaintiffs if their goods are seized and sold. Under this order they cannot bring an action against the sheriff, but that is all. On the other hand, it is complained here that this purports to dispose of the matter altogether, and that everything is left in the air and there is no direction as to what is to happen now. I think, therefore, that the court ought to set aside the order of the master, and we ought to direct an issue and that in the issue the claimants should be the plaintiffs and the execution creditors should be the defendants. [The claimants and the plaintiffs having agreed that the matter should be dealt with in a summary way, HIS LORDSHIP continued:] The court having clarified the matter to this extent, the parties may go back and ask a master, who should not, I think, in fairness to both parties be the master who made this order which we are reversing, to dispose of the matter in a summary way.

**LYNSKEY, J.:** I agree and have very little to add, but this is a matter of some importance in interpleader procedure, and I think it is desirable to state my reasons for supporting my Lord's judgment. The position is that under Ord. 57, r. 5, an applicant, whether he be a sheriff or whether he be a stakeholder, when he has received a claim can take out a summons calling on the claimant and the other party interested to appear and state the nature and particulars of the claim. The powers of a master or of a judge in dealing with these matters are defined by the rules of court and depend on the rules of court, and when that summons comes before a master or a judge, r. 7, r. 8 and r. 9 deal with the position if the claimant appears. Rule 7 provides that, if there is an action already in being, then the claimant may be made the defendant to the action, or the judge or the court may direct an issue to be joined between the parties. Rule 8 provides that, if the amount involved is small and only one claimant consents, the matter may be dealt with summarily by the court or the judge before whom the summons is heard. By r. 9:

"Where the question is a question of law, and the facts are not in dispute, the court or a judge may either decide the question without directing the trial of an issue, or order that a Special Case be stated for the opinion of the court . . ."

Those are the three rules which deal with the position when the claimant appears. There are also one or two Acts of Parliament which deal with the matter, such as the County Courts Act, 1934, which, by s. 66 enables the master to transfer the whole issue to the county court.

Rule 10 deals with the position if the claimant is in default, either by not appearing, or by failing to carry out some order of the court or the judge dealing with the matter. It is only under r. 10 that jurisdiction is conferred on a master or a judge, before the issue is directed, to make an order barring the claim and preventing proceedings against the sheriff. Unless, in a particular case, the facts can be brought within the ambit of r. 10, there is no power in the master, or in the judge for that matter, hearing it, to make such an order.

In this case, the claimants did appear. They did state the nature of their claim, however nebulous that claim might appear to be from the point of view of the lack of supporting material, and, in those circumstances, they were not in default in carrying out any order made by the master. No such default has been proved before us. In those circumstances, the master in this case, in my view, had no power under the rules to make the order which he in fact did make. If the contention of the plaintiffs, the execution creditors, is right, that there was no notice, or no proper notice, the only power the master had was to refuse the sheriff's application for an interpleader issue on the ground that there was no basis for the sheriff as applicant, to call on the claimants to come in. That being the position, in my view, this court ought to allow this appeal and the order should be made which my Lord has already indicated.

**SELLERS, J.:** I agree.

*Order of the master set aside. Direction that an issue be stated and tried summarily, the claimants being the plaintiffs and the execution creditor the defendant. Claimants' costs of appeal in any event. The sheriff to pay his own costs.*

Solicitors: *Temple & Co.* (for the appellants); *Sanders & Co.* (for the respondents); *Palmer, Bull & Mant* (for the Sheriff of Kent).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

## COPPS v. PAYNE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.), January 12, 1950.]

*Railway—Level crossing—Gate—Duty to close—Accommodation road converted into public highway—Railway Clauses Consolidation Act, 1845 (c. 20), s. 47, s. 75.*

The respondent, having opened the gates on both sides of a railway crossing and crossed the line, failed to close them. Charged with an offence under the Railway Clauses Consolidation Act, 1845, s. 75, he contended that, although at the time when the railway line was laid the crossing was an accommodation crossing within s. 75, the road which the railway crossed had since become a public highway, and, therefore, it was the duty of the Railway Executive under s. 47 of the Act to employ persons to operate the gates.

HELD : the time at which the obligations imposed on the railway company and members of the public by the Railway Clauses Consolidation Act, 1845, had to be ascertained was that when the railway was constructed ; there was nothing in the Act which displaced the obligation under s. 75 to shut gates at an accommodation crossing at any future time in the event of an occupation road becoming a public highway ; and, therefore, the respondent was guilty of the offence charged.

[AS TO LEVEL CROSSINGS OVER RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 86, 87, paras. 172-174 ; and FOR CASES, see DIGEST, Vol. 38, pp. 317, 318, Nos. 363-366.]

Case referred to :

- (1) *A.-G. v. Great Northern Ry. Co.*, [1916] 2 A.C. 356 ; 85 L.J.Ch. 717 ; 115 L.T. 235 ; 80 J.P. 337 ; 38 Digest 274, 136.

CASE STATED by Essex justices.

On May 3, 1949, a court of summary jurisdiction, sitting at Castle Hedingham, Essex, discussed an information preferred by the appellant, a constable in the Railway Executive Police, under the Railway Clauses Consolidation Act, 1845, s. 75, against the respondent alleging that he omitted to shut and fasten gates set up on either side of a railway for the accommodation of the owners or occupiers of the adjoining lands after he and the carriage under his care had passed over the crossing. When the railway was built the road leading to the gates was an occupation road for the use of the owners or occupiers of the adjoining land and the gates on either side of the railway were set up pursuant to the provisions of s. 68 of the Act, the crossing being an accommodation crossing, but since 1930 the road had become repairable by the inhabitants at large and its maintenance had been undertaken by the highway authority. Until 1929 the railway company employed men each weekday from about 5.30 a.m. to 9.30 p.m. to open and close the gates. The justices, being of opinion that, by providing persons to open and close the gates, the predecessors of the Railway Executive had relieved users of the crossing of the duty of closing the gates which divided one highway from another highway, and that the gates were no longer provided for the accommodation of the owners or occupiers of adjoining lands within the meaning of s. 75, dismissed the information. The Divisional Court now allowed the appellant's appeal and remitted the case to the justices with a direction to convict.

*T. F. Southall* for the appellant.

*Hines* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by Essex county justices before whom the respondent was charged with an offence under s. 75 of the Railways Clauses Consolidation Act, 1845. The question raised is: Is there a



duty on the Railway Executive to provide someone to open and shut these gates or must the gates at this level crossing be shut by the persons using them ? In my opinion, it is clear that the latter is the correct interpretation of the section.

The line of railway in question was part of the old Great Eastern Railway, and it was constructed under the Great Eastern Railway Act, 1862, which incorporated the Railways Clauses Consolidation Act, 1845. The Act of 1845 deals with the laying and making of railways, and it lays down certain obligations and duties on the railway company and on other persons. Before s. 46, which is the beginning of a *fasciculus* of sections dealing with the crossing of roads and the construction of bridges, the Act provides:

“ . . . with respect to the crossing of roads, or other interference therewith, be it enacted as follows:”.

By s. 47:

“ If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates.”

So, if the railway crosses a public road, the obligation is on the railway company to provide gates and also persons to open and shut them. Later sections deal with the accommodation of persons owning lands adjoining the railway. By s. 68:

“ The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway . . . ”

Among the works they shall make and thereafter maintain are gates for the accommodation of people living in the neighbourhood of the railway. Section 75 provides:

“ If any person omit to shut and fasten any gate set up at either side of the railway for the accommodation of the owners or occupiers of the adjoining lands as soon as he and the carriage, cattle, or other animals under his care have passed through the same, he shall forfeit for every such offence any sum not exceeding 40s.”

Therefore, there is an obligation on the company to set up gates for the accommodation of adjoining owners and an obligation on the persons using the gates to keep them shut. That seems a very reasonable provision because the gates are put up for the accommodation of people living on either side of the railway, and it seems right that the persons using the gates should shut the gates which the company have to provide for them and not require the company to keep servants at the gates to attend to them.

The facts found in this case are:

“ The said gates are set up on either side of the railway where a road and public footpath cross the railway and each gate carries a notice to the effect that failure to close the gates entails a penalty of 40 shillings. The said road and footpath lead off directly from the public highway. The said road runs to Borley Hall and Mill only and goes no further.”

It is set out that the railway was built by the Great Eastern Railway Company, under the provisions of the Great Eastern Railway Act, 1862, which incorporated the Railway Clauses Consolidation Act, 1845. It is found:

“ At the time that the railway was built, the said road to Borley Hall and Mill was an occupation road for the use of the owners or occupiers of Borley Hall and Mill and the gates on either side of the railway were set up pursuant to the provisions of s. 68 of the Railways Clauses Consolidation

Act, 1845, and the crossing was an 'accommodation crossing.' Having regard to the changes in motive power of road and agricultural vehicles the volume of traffic using the crossing has not materially increased nor has it materially changed in character since the railway was built. The road is used only by vehicles owned by or having business with the owners or occupiers of Borley Hall and Mill."

It is next found that until May 31, 1929, the railway company employed men to open and shut the gates between 5.30 a.m. and about 9.30 p.m., and that:

"In the year 1930 and afterwards the repair and maintenance of the road to Borley Hall and Mill was and still is the responsibility of the highway authority."

In other words, it had become a highway repairable by the inhabitants at large though there was no evidence to show how long before 1930 the road had become so repairable. The justices held

"that, by providing persons to open and close the said gates, the predecessors of the Railway Executive had relieved the respondent of the duty of closing the said gates which divided one highway from another highway, and that, in consequence, the said gates were not gates for the accommodation of the owners or occupiers of adjoining lands within the meaning of the said s. 75."

Counsel for the respondent has not argued that the fact that the company did for some time provide men to open and close the gates can make any difference in law. He argued that, as the road has become repairable by the inhabitants at large, and, therefore, was a public road, and as the railway crosses that road, the obligation is on the company to provide servants to open and shut the gates under s. 47, and that the obligation under s. 75 on the persons using the road no longer exists. In my opinion that is not sound. The question turns entirely on these few sections, and it seems to me clear that one has to look at what happened when the gates were erected. If the railway, when it was constructed, crossed a public road, then, as I have already said, the company had not only to erect the gates but also to maintain them and employ persons to open and shut them. If when the line was made gates were erected for the accommodation of persons living in the neighbourhood of the line, the obligation on the company was to set up gates, and the obligation as regards opening and closing them was on the persons using them. I can find nothing in the Act to suggest that an alteration in the character of the road alters the obligations which were imposed at the time when the line was made and the gates were erected. Those obligations remain so long as the gates are there. LYNSEY, J., called attention during the argument to a passage in LORD SUMNER's speech in *A.-G. v. Great Northern Ry. Co.* (1) ([1916] 2 A.C. 380), a case relating to bridges, in which he points out that the sections take no account, as he puts it, of "dis-turnpiking" the road. In other words, no change in the character of the road made any difference with regard to the respective obligations of the railway company and the public in that case, and so exactly, I think, is the case here. For these reasons I think the justices came to a wrong decision, and the case must go back to them with a direction to convict. In my view, the Railway Executive are not under any obligation to provide persons to open and shut these gates. The obligation of closing them is on the persons who use them.

LYNSEY, J.: I agree. I only desire to add that s. 68 of the Act of 1845 provides:

"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say), such and so many convenient gates,

bridges, arches, culverts, and passages, over, under, or by the sides of or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof . . .”

A That is the obligation on the railway company to provide what are now known as accommodation crossings, that is to say, crossings for the accommodation of land over which the company have taken their railway to enable the occupiers of those lands to pass to and fro over the railway. The justices find as a fact that at the time when the railway was built the crossing was an accommodation crossing. There is no suggestion that there was not evidence on  
B which they could find that this was a crossing which was set up for the accommodation of the owners or occupiers of the adjoining lands—in other words, a crossing which comes within the exact words of s. 75. The only suggestion made by the respondent is that the result of this road becoming a public highway is to impose on the company the obligation placed on them by s. 47 of the Act. The title of the Railways Clauses Consolidation Act, 1845, shows its objects:

C “An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the making of railways.”

The whole object was to provide clauses which would be incorporated in private Acts passed to enable undertakers to form and erect railways, and, in my view,  
D the provisions of s. 47 must be read in the light of that intention. When s. 47 uses the words

“If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road . . .”

E the time at which the obligation has to be fulfilled by the company is the time of the construction of the railway. There is no obligation imposed on them at any future time in the event of an occupation road becoming a public road. In my view, therefore, this case must go back to the justices with a direction to convict.

F **SELLERS, J.:** I agree.

*Appeal allowed; case remitted with direction to convict.*

Solicitors: *E. Coleby*, Regional Solicitor, Eastern Region Railway Executive (for the appellant); *F. G. Perks*, agents for *Bates, Wells & Braithwaite*, Sudbury (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

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WILLIAMS AND ANOTHER *v.* CARDIFF CORPORATION.

[COURT OF APPEAL (Somervell and Jenkins, L.J.J., and Romer, J.), January 11, 12, 1950.]

*Negligence—Licensee—Child—Trap—Waste land used for tipping—Child falling down sloping bank and being injured by broken glass.*

A  
A child, aged four and a half, met with an accident while playing on a piece of waste ground which belonged to the defendants and was used by them for tipping rubbish. The ground, which was not fenced in and on which there was no warning notice, comprised a piece of flat ground with a grass bank which sloped down steeply about eight feet and was littered with pieces of broken glass and tins. The child fell down the slope and cut his nose on a piece of broken glass. Children played on the ground every day and it was conceded by the defendants that the child was a licensee. In an action by the child (through his father) claiming damages for personal injury arising out of the negligence of the defendants,

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HELD: in the case of children the presence of broken glass on the piece of waste ground where the children were constantly allowed to play constituted a trap or concealed danger, and, therefore, the defendants were liable.

[AS TO DEGREE OF CARE REQUIRED TOWARDS CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 69, 70, Nos. 441-453.]

Cases referred to:

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(1) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; 103 L.J.K.B. 527; 151 L.T. 202; 98 J.P. 319; Digest Supp.  
(2) *Morley v. Staffordshire County Council*, [1939] 4 All E.R. 92; Digest Supp.  
(3) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest 70, 450.  
(4) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest 70, 453.  
(5) *Addie, R. & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.

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APPEAL by the defendant corporation from an order of His Honour JUDGE L. C. THOMAS, at Cardiff and Barry County Court, dated Aug. 5, 1949, whereby he gave judgment for the infant plaintiff (who sued through his father) in an action claiming damages for personal injury arising out of the negligence of the corporation. The infant plaintiff was injured by a piece of broken glass when he fell down a sloping bank on a piece of waste land which belonged to the corporation and was used by them for tipping rubbish. The Court of Appeal now held that the piece of land, littered with broken glass, constituted a trap for children, and they dismissed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

*F. D. Walters* for the corporation.

*David Pennant* for the plaintiff.

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SOMERVELL, L.J.: The claim in this case is by an infant, who was aged four and a half years at the time of the accident and sues by his father for damages for personal injury. The injury arose while the child was on a piece of waste land, which was the property of the defendants, the Cardiff Corporation. The evidence given on behalf of the child is shortly summarised in the learned judge's notes and is to this effect. The piece of waste ground, which was near the child's home, had been used by the corporation for tipping rubbish and sweepings for some eight years, but it was not fenced off and there were no notices on it. It comprised a piece of flat ground with a bank which sloped down

fairly steeply about eight feet, and was littered with broken bottles, old bedsteads, etc. The learned judge stated in his notes: "Children play there every day." On Feb. 12 the child's father heard him screaming and found blood and mud on his face. A scar was shown to the learned judge. The father stated that the child had had several smackings for going on to the ground, but that there was nothing to stop children getting on the land from the road. In cross-examination, he said: "Explained to child not to go there because of bottles." His evidence was supported by another witness, who said: "Children play there every day." The corporation called no evidence, and counsel for the corporation conceded that the site was used as a tip for rubbish. He also conceded that the child was a licensee, and I think that that would be the inevitable inference from the evidence which had been given as to the frequency with which children played there. It is not contested that the child rolled down the bank and so came into contact with the broken glass. The learned judge decided that the corporation were liable. In his notes he summarised his findings as follows:

"The tip in question was adjacent to the house where the child resided and, in so far as it may be a question of fact, I find further (i) that the defendants knew or ought to have known that children played there; (ii) that the tip with its bottles and cans constituted an 'allurement'; (iii) that the child did not know or could not be taken to have knowledge that there was any danger in playing on the tip. I held, therefore, that the particulars of negligence set out in the particulars of claim had been proved and that the plaintiffs were entitled to judgment for the amount claimed."

I will deal first with an argument which counsel for the corporation pressed on us and which he also pressed on the learned judge. He submitted that the accident was the falling down the bank; that the bank, being obvious, could not be a trap or an allurement in the sense in which those words are used in this class of case; and, therefore, that the accident was caused by something which did not give rise to liability. If—and he disputed that this inference was one which could be drawn—the child's injuries were due to glass, that was not the cause of the accident, but the cause of the injury. There are thus two points in the argument, and I will express my view about both of them. With regard to the second point, it seems to me, on the evidence set out in the learned judge's notes and having regard to the medical report showing the nature of the injury to the child's nose, to be plain that it was the kind of injury or cut which might well be caused by a piece of broken glass. I think that in those circumstances, having regard to the evidence that there was broken glass lying about on this piece of waste land where children were allowed to play, the learned judge was entitled to draw the inference, which, I think, it is plain he must have drawn, that the injury was caused by the broken glass. On the first point, I cannot accept the distinction which counsel for the corporation sought to draw, *viz.*, that the injury from the broken glass was not the accident, but that the accident was the rolling down the bank and that the injury could be separated from it. The accident seems to me to be the single occurrence of rolling down the bank at the base of which there was a piece of broken glass on to which the child fell and cut his nose. On that view of the facts it seems to me impossible to say that the learned judge went wrong in law.

I do not propose to review all the authorities cited to us, but I will refer to one or two passages on which counsel for the corporation particularly relied. In *Liddle v. North Riding of Yorkshire County Council* (1) SCRUTTON, L.J., said ([1934] 2 K.B. 112):

"In my opinion, to make the landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with knowledge that it might injure the children, or knowingly permitted the existence on his

land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable."

That statement was quoted and applied in *Morley v. Staffordshire County Council* (2). It seems to me that there was clearly evidence in the case now before us on which the learned county court judge could find that the existence of broken glass on a piece of land on which children were constantly allowed to play, and to which there was a sloping bank, constituted a trap within the principles which have been laid down with regard to liability in the case of occupiers of land on which children are allowed by those occupiers to go and play. The only criticism I would make on the learned judge's notes (which, as he said, were made some two months after the hearing) is that I think that the danger constituted a trap rather than an allurement. I think that the word "allurement," as used in these cases, has been generally applied to something like the turntable in *Cooke v. Midland Great Western Ry. of Ireland* (3), i.e., something which would be attractive to children to play with, or the attractive-looking berries which the child ate in *Glasgow Corp'n. v. Taylor* (4), rather than to circumstances such as the present where the corporation allowed children to play on the piece of land, which contained, as the corporation knew or ought to have known, bits of glass and possibly other objects such as tins which might be extremely dangerous if children fell down—as they are bound to do. For these reasons, I think that this appeal must be dismissed.

**JENKINS, L.J.:** I agree. It seems to me that the evidence was such that it could reasonably be inferred from it that the injury sustained by the infant plaintiff when he fell down the bank was due to his cutting himself on a piece of broken glass, an old tin, or some such sharp object, with which, according to the evidence, this piece of waste ground was littered. It seems to me that, once that inference is drawn, there could be only one result to the case. In my judgment, a piece of waste land on which children are known to be in the habit of playing cannot be otherwise described than as, at any rate, hazardous in the nature of traps or concealed dangers if it is littered with such objects as pieces of broken glass. From the point of view of an infant, I have no doubt that such objects scattered about the ground are traps or concealed dangers, whatever might be said of them from the point of view of an adult. On that matter I only wish to refer to the concluding passage in the speech of LORD SUMNER in *Glasgow Corp'n. v. Taylor* (4). The learned lord said ([1922] 1 A.C. 67):

"Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations."

Applying that observation to this case, the corporation knew of, or ought to have anticipated, the presence of young children on this piece of waste ground, and the standard of care due to such persons demanded that, unless and until the corporation took measures to prevent their presence on this ground, it was the duty of the corporation to keep the ground free from traps or concealed dangers of the type of such things as broken glass, the danger to be apprehended from which would clearly not be apparent to persons of tender years. I agree that the appeal fails.

**ROMER, J.:** I also agree. We are told that at the date of the accident the child in question was four and a half years old and that he was a licensee on the



land of the corporation. With regard to the fact that the claim is on behalf of a child of that age, who is admitted to be a licensee, in *Liddle's* case (1), to which SOMERVELL, L.J., has referred, GREER, L.J., citing a passage from the speech of VISCOUNT DUNEDIN ([1929] A.C. 371) in *R. Addie & Sons (Collieries) v. Dumbreck* (5) (to which we have not been referred), said ([1934] 2 K.B. 122):

A “It is well established law that licensees ‘must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they must run the risk of them.’”

B VISCOUNT DUNEDIN was relating those observations to a claim which was made on behalf of a boy of four years of age, and, therefore, they have considerable relevance to the claim in the present case. It is perfectly obvious, I think, that the mere presence of a grassy slope could not amount to a concealed danger, because it could be seen. I think, however, that it is equally clear on the evidence in the present case that the existence of the slope, coupled with the presence of tins and broken glass and other material on it, did amount, and the learned county court judge was right in saying that it amounted, to a concealed danger which would result in the corporation being liable for the damage sustained by the infant plaintiff. I agree, accordingly, that the appeal should be dismissed.

C *Appeal dismissed with costs.*

Solicitors: *Theodore Goddard & Co.*, agents for *S. Tapper Jones*, town clerk, Cardiff (for the corporation); *Stikeman & Co.*, agents for *Phillips & Buck*, Cardiff (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

D

## E AMALGAMATED RELAYS, LTD. v. BURNLEY RATING AUTHORITY AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.), January 12, 1950.]

*Rates—Assessment—Wireless relay service—Valuation on profits basis.*

F The ratepayers carried on the business of a wireless relay service for which they occupied a receiving station to which, by private telegraph wire rented from the Postmaster-General, programmes of the British Broadcasting Corporation were transmitted. These programmes were then amplified and re-transmitted to sub-amplifying stations whence they were relayed by wires, the property of the ratepayers, to individual subscribers. The wires were carried overhead by means of poles and brackets attached to walls and buildings. This system of wires had previously been rated at £924 and the rating authority proposed increasing the rateable value to £6,000. On appeal to quarter sessions it was agreed that, if the assessment was based on the profits earned by the ratepayers, £6,000 was a correct rateable value, but it was contended by the ratepayers that the correct method of assessment was the “contractor's theory,” in which case the figure would be £2,000. The learned recorder adopted a profits basis. On appeal by the ratepayers,

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HELD: where, as in the present case, there were two possible methods of arriving at the rent which a hypothetical tenant would pay for an exceptional hereditament (*i.e.*, one not susceptible to comparison with hereditaments of the same class let at a rent), which method was more likely to result in the ascertainment of the true rent was a question of fact, and the recorder could not be said to have been wrong in the method which he had adopted.

[AS TO VALUATION OF SPECIAL CLASSES OF PROPERTY, see HALSBURY, Hailsham Edn., Vol. 27, pp. 396-434, paras. 829-870; and FOR CASES, see DIGEST, Vol. 38, pp. 534-567, Nos. 796-1055 and Digest Supp.]

Cases referred to:

(1) *Surrey County Valuation Committee v. Chessington Zoo, Ltd.*, [1950] 1 All E.R. 154.

(2) *Kingston Union v. Metropolitan Water Board*, [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 38 Digest 547, 901. A

CASE STATED by the Recorder of Burnley.

The ratepayers, Amalgamated Relays, Ltd., carried on the business of a wireless relay service within the county borough of Burnley, to provide which they held a licence from the Postmaster-General. By an agreement, dated May 20, 1937, between Burnley Corporation and the ratepayers, the corporation consented, under s. 25 of the Public Health Act, 1925, to the ratepayers fixing wires across the streets within the borough subject to the terms and conditions contained in the agreement. The service was wholly within the borough and was at all material times the only wireless relay service therein, and it consisted of a receiving station to which, by private telegraph wire rented from the Postmaster-General, programmes of the British Broadcasting Corporation were transmitted, and were there amplified and re-transmitted to sub-amplifying stations. From the sub-amplifying stations the programmes were relayed by wires, the property of the ratepayers, to individual subscribers in each sub-amplifying area. These relay wires were carried overhead by means of poles, or, more usually, by brackets attached to walls and chimney stacks of buildings. Some subscribers paid 1s. 3d. a week and others 1s. a week, for different services. On Jan. 1, 1948, the ratepayers had 10,085 subscribers paying 1s. 3d. a week and 2,447 paying 1s. a week. On Mar. 24, 1948, the rating authority made a proposal that the rateable value of the wires from the sub-amplifying stations to the subscribers should be increased from £924 to £6,000. On May 11, 1948, Burnley Assessment Committee accepted the contention of the rating authority that the "profits basis" was the correct method of assessment and fixed the rateable value at £6,000. On appeal to quarter sessions it was contended by the ratepayers that the "contractor's basis" was the correct basis of assessment and that on that basis the rateable value would be £2,000. The recorder held that the proper basis of assessment was the "profits basis." The Divisional Court now dismissed the ratepayers' appeal against that decision. B  
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*H. B. Williams, K.C.*, and *James Booth* for the ratepayers.

*Rowe, K.C.*, and *Glidewell* for the rating authority.

**LORD GODDARD, C.J. :** This is a Case stated by the learned recorder of Burnley before whom the ratepayers appealed against an assessment made on them by the rating authority for the county borough of Burnley in respect of a system of wires which are admittedly a rateable hereditament and extend from various buildings owned by the ratepayers across the public streets in Burnley with the object of giving what is called a re-diffusion service of wireless programmes to people who pay a subscription to the ratepayers. This system had been assessed at £924 and the rating authority made a proposal to increase that rateable value to £6,000. The parties agreed that, if the assessment was to be based on profits which were earned by the ratepayers, the figure of £6,000 would stand because the amount of profits was not disputed. If, however, the "contractor's theory" was to be adopted, the figure would be £2,000. This court is not, therefore, concerned with any question of figures, nor is it suggested that any other basis is to be taken than the "profits basis" or the "contractor's basis." G  
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I think a certain confusion has crept into this case in the same way as it did in *Surrey County Valuation Committee v. Chessington Zoo, Ltd.* (1) by using the

expression "the" profits basis. As I pointed out in the *Chessington* case (1), where exceptional hereditaments are being dealt with—that is to say, hereditaments not of the ordinary class of houses, factories, shops or warehouses which can always be compared with others—rating surveyors have to find some formula by which a rent can be calculated for a hereditament which is not, in fact, let at a rent and probably never would be let at a rent. Among the formulae that have been devised from time to time is one applicable to public utility undertakings—it is an elaborate formula into which I shall not go in detail—which is based to a great extent on profits. That formula has come to be known as the profits basis, but it is not a formula which takes into account only profits. It has always been the law that in any case relating to a hereditament which is not of an ordinary class, the court can take profits into consideration. In the *Chessington* case (1), the rating authority took the view that profits formed the only basis on which they could fix a rent, and so it was said that the assessment was ascertained on "the" profits basis. If they had said "a" profits basis, it would have been better, and it is clear in the present case that the sort of formula that was approved in *Kingston Union v. Metropolitan Water Board* (2) had not been adopted.

The learned recorder has said: "Here is a profit-earning system. What is it likely that a tenant would pay if this system was let to him at a rent?" In considering what a tenant would pay one has also to consider what a landlord would take, because in fixing the rent one has to have regard to what is often called "the higgling of the market," and that depends on the landlord's willingness to accept a certain sum as well as on the tenant's willingness to pay it. It may be that, technically or legally, this elaborate system of wires which is being used for the diffusion of wireless programmes all over Burnley, is not a monopoly. As a matter of history, there were various companies supplying this service in different parts of Burnley and they have now amalgamated. Now, however, there is one system, and the learned recorder could take into account the fact that it would be unlikely, though not impossible, that, so long as this company was operating in Burnley and supplying this service, the corporation would allow still further wires to be put up by any other company. At any rate, the position at the present moment is that the company could say to any intending tenant, if they were minded to let at a rent: "Here we have a system which is working. Nobody else has such a system, and there is no competitor in the market." There is no guide from rents being obtained from comparable hereditaments to what a tenant would be likely to pay. The landlord would be in a position to say: "If I let this to you, I am putting you into a position in which you can make substantial profits. I am going to have a share of those profits." What share he would demand and what share the tenant would be willing to pay must be a question of fact which the tribunal of fact must assess in the best way it can.

Counsel for the ratepayers contended that that is a method which is not allowed by law, and he has said that the contractor's theory ought to be applied. It has been held in many cases, which were cited in the *Chessington* case (1), that it is legitimate to take into account the profits in considering what rent would be paid. It is also, no doubt, legitimate to adopt the contractor's theory, which is to take the cost of the building of the hereditament, the value of the land on which it is built, and a percentage as the return which a contractor would accept on his outlay. If it is legitimate to look at the profits and also at the building cost and the return which a builder would require, it seems to me that it remains a question of fact for the court as to which of the two methods is the one more likely to yield the true rent. It may be, as it worked out in this case, unfortunate for the ratepayers that the method which the court has taken as the one most likely to yield a true rent is against them because it requires them to pay a higher rate than they would have paid if the contractor's method had



been adopted. On the other hand, it might well be that, if the contractor's method were adopted in another case where the ratepayer was making a very small profit, the contractor's method might work out very much against him. In the present case, in my view, it was legitimate to take the ratepayers' profits into account and the recorder cannot be said to have gone wrong in so doing. If he found that that was the only, or the best, method to enable him to ascertain what the rent ought to be, I cannot say that he ought to have adopted some other. There are many reasons, some of which he sets out in his judgment, why he thinks the contractor's method is not the better. That seems to me entirely a question of fact, and I can see no ground for saying he has gone wrong in law. It follows that this appeal fails.

**LYNSKEY, J.:** I agree. I was reluctant to be convinced that the learned recorder was right in his decision, because it seemed to me that we were dealing entirely with fictitious circumstances, and if, by adopting one of two recognised methods of assessing the annual value, in the one case one got an annual value of £2,000, and in the other one of £6,000, that, in the interests of the ratepayers, it would have been preferable to adopt the method which would have given the lower valuation. It seems to me that the learned recorder posed himself the right question. He said (113 J.P. 234):

"I have to ask myself what rent would the 'hypothetical tenant' of the hereditament in question in this case as a tenant from year to year be reasonably willing to pay therefor. I am entitled to take into account all possible tenants, including the actual occupiers, the appellants herein. I am entitled... to take into account '... all that could reasonably affect the mind of the intending tenant...'"

In my view, that is undoubtedly the correct question and answer. In dealing with that question, he considered two methods which were put before him. One was what is known as the contractor's theory and the other was what he calls *the profits basis* but which, with my Lord, I prefer to call *a profits basis*. Having considered both these methods of arriving at the annual value of these hereditaments, he took the view that the contractor's method would not give him a true picture of the annual value, first, because this system was already in existence and it would be necessary to get licences and permits to introduce a competing system, and, secondly, that, even with a competing system, the competitor could only supply exactly the same article in exactly the same way as the ratepayers were supplying it. As I have pointed out, he said that one must take into account, among the hypothetical tenants, the existing occupier, the ratepayers. Therefore, one must visualise a hypothetical tenant, who would have to be in the same position as the ratepayers—who had his stations and sub-stations for re-diffusion, and the opportunity to let these wires. When one sees the number of people who are using this system and that there is a turnover of £39,000 odd a year, it seems to me that one cannot say that the learned recorder has come to a wrong determination in fact in reaching the conclusion that the contractor's method was not the correct one to apply. In those circumstances I do not think it is open to this court to say that, in adopting a profits basis, the learned recorder has gone wrong in law, and, accordingly, although with some reluctance, I agree that this appeal should be dismissed.

**SELLERS, J.:** I agree. The learned recorder came to this conclusion (113 J.P. 234):

"I have come to the conclusion that wires hung and utilised, as in this case, are, whilst a species of the genus hereditament, in a very special category of their own, and must be treated with a somewhat different approach from the methods one would apply in the case of what I have termed 'the normal type of hereditament'."

That was accepted by the parties before him. Only two alternatives were advanced—what is described as the profits basis, and the contractor's basis. The learned recorder applied his mind to both and came to the conclusion that the contractor's basis was not appropriate in ascertaining what would be a fair rent for a hypothetical tenant to pay for the premises. He said (*ibid.*, 235):

A "It, therefore, seems to me in the highest degree improbable that in the haggling to secure a rental from a potential hypothetical tenant the threat to go away and use £40,000 or any sum to erect a competing apparatus would be regarded on either hand as a threat susceptible of procuring a reduction of the rent asked."

B For the reasons given by my Lord and LYNKEY, J., I cannot see how it can be said that the recorder was wrong in law in applying the profits basis. Indeed, on the whole it seems to me that in the circumstances of this particular case that basis enabled him to arrive at a truer assessment than would the other basis. There were many difficulties in the way of applying the contractor's basis. All the restrictions and obstacles in the way of any competing business result in the ratepayers having, if not a monopoly, at any rate a business with monopolistic tendencies. I think that essential ingredient justified the learned recorder in applying the basis he did, and I agree that the appeal fails.

*Appeal dismissed with costs.*

Solicitors: *Bentleys, Stokes & Lowless*, agents for *H. G. W. Cooper*, Burnley (for the ratepayers); *Sharpe, Pritchard & Co.*, agents for *C. V. Thornley*, town clerk, Burnley (for the rating authority).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

E

## COUGHTREY v. PORTER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.), January 16, 1950.]

F Gaming—Common gaming house—Special warrant of arrest and search—Person not found on premises—Subsequent arrest elsewhere—Destruction of gaming instruments—Validity of order—Gaming Act, 1845 (c. 109), s. 3, s. 8.

G On June 21, 1949, a complaint was made by the respondent that the appellant was the occupier and keeper of an amusement arcade where there were in use automatic gaming machines. The justices issued a special warrant under s. 3 of the Gaming Act, 1845, and on June 25 police officers entered the premises and seized the machines. The appellant was not on the premises at the time, but later he visited the police station where an officer purported to arrest him under the warrant and then to grant him bail under s. 21 of the Criminal Justice Administration Act, 1914. On June 27 an information was laid against the appellant under s. 1 of the Betting Act, 1853, charging him with using the premises in connection with gaming. At the hearing of the informations he pleaded Guilty to the offence under the Betting Act, 1853, but he refused to plead to the charge under the Gaming Act, 1845. The justices found him Guilty under the Betting Act, 1853, and ordered the destruction of the gaming machines. On appeal,

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HELD: a special warrant under s. 3 of the Gaming Act, 1845, gave power only to arrest persons found on the premises when the warrant was executed; as the appellant was not found on the premises when the warrant

was executed he was not arrested under the warrant; and, therefore, he was not before the justices by virtue of a warrant issued under s. 3 and there was no power in the justices to order the destruction of the instruments of gaming under s. 8 of the Act of 1845.

[FOR GAMING AND GAMING HOUSES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 494-504, paras. 896-909; and FOR CASES, see DIGEST, Vol. 25, pp. 425-427, Nos. 269-278, and Digest Supp.]

Case referred to:

- (1) *Eyre v. Brumfield*, [1936] 2 All E.R. 1; 100 J.P. 209; 154 L.T. 696; Digest Supp.

CASE STATED by Nottingham justices.

At a court of summary jurisdiction sitting at Nottingham on June 21, 1949, a complaint was made by the respondent, a superintendent of police, that the appellant was the occupier and keeper of an amusement arcade where there were in use nine automatic gaming machines. The justices issued a special warrant under s. 3 of the Gaming Act, 1845. On June 25, 1949, three police officers entered the premises and seized and took away the nine machines. The appellant was not on the premises at the time. Later, he visited the police station where an officer purported to arrest him under the warrant, but discharged him on his entering into a recognisance of £5. On June 27, 1949, an information was laid against the appellant by the respondent under s. 1 of the Betting Act, 1853, and was served on the appellant on the same day. On July 11, 1949, the appellant pleaded Guilty to the charge under s. 1 of the Betting Act, 1853, but he refused to plead to a charge that he had used the amusement arcade as a common gaming house contrary to the Gaming Act, 1845, on the grounds (a) that the warrant had not been properly executed, and, that he was not before the court by virtue thereof, and (b) that there was no information or summons in respect of any offence under the Gaming Act, 1845. The justices dealt with the plea of guilty under the Betting Act, 1853, and found that the appellant having been arrested under the warrant under s. 3 of the Gaming Act, 1845, and released on entering into a recognisance had lawfully been brought before the court under the warrant, fined him £15 in respect of the offence under the Betting Act, 1853, and ordered the destruction of the nine gaming machines. The Divisional Court now allowed an appeal, holding that the justices had no power to order the destruction of the machines.

*John Hobson* for the appellant.

*Vernon Gattie* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by Nottingham city justices who made an order directing that certain instruments of gaming should be destroyed, and the question before the court is whether or not that order can be upheld.

There are no merits in the appellant's case, but that does not matter because an order cannot be made for the destruction of a person's property, even if it is gaming property used for the purpose of playing unlawful games, unless the statute justifies it. We, therefore, have to see what was the history of the case and what are the various sections which deal with the matter. The police laid an information against the appellant for unlawfully using certain premises for the purpose of money being received in respect of a contingency relating to a game, by means of three "fruit" machines, five clock machines and a "numbers" machine, contrary to s. 1 of the Betting Act, 1853. It should be noticed that that is a summons, not for using the premises for the purpose of betting, but for receiving money in relation to gaming. Six days earlier the police had laid an information stating that it was reasonable to suspect "that the pleasure park situate at Trent Lane in the city of Nottingham"—which the appellant occupies—is kept and used as a common gaming house within the meaning of the



Gaming Act, 1845." That information having been laid, a justice issued his warrant in the statutory form provided in the Act in these terms:

A

"This is therefore . . . to require you, with such assistants as you may find necessary, to enter into the said . . . place . . . and there diligently to search for all instruments of unlawful gaming which may be therein, and to arrest, search and bring before me or some other of the justices . . . as well the keepers of the same as also the persons there haunting, resorting and playing, to be dealt with according to law; and for so doing this shall be your warrant."

B

The police entered the place specified and seized instruments of gaming, but they did not find the appellant on the premises at the time. He went to the police station later in the day, and an officer then purported to execute the warrant by formally arresting him. He was granted bail. Subsequently he was served with the summons under the Betting Act, 1853, and, finally, he appeared before the justices.

C

The first point counsel for the appellant took was that the appellant was never lawfully before the justices under the Act of 1845. It was contended that the appellant could not lawfully be arrested at the police station under that warrant, and, therefore, he was not before the justices by "virtue of that warrant." Under s. 3 of the Act of 1845 there is power to justices in any case in which they themselves might enter premises where unlawful games are suspected to be played to issue a warrant allowing constables and others to enter and search and to bring before a justice "all such persons found therein as might have been arrested therein by such justice of the peace had he been personally present." To find out what persons the justice himself might have arrested, it is necessary to go back to the Unlawful Games Act, 1541, an Act of Henry VIII which is still on the statute book. That Act, by s. 9, enables justices, mayors, sheriffs, and so on, to enter premises

D

E

"... and as well the keepers of the same as also the persons there haunting resorting and playing to take arrest and imprison, and them so taken and arrested to keep in prison, unto such time as the keepers and maintainers of the said plays and games have found sureties to the King's use ..."

F

It seems clear, therefore, that under the Act of 1541, before the justices can arrest, they have to find the people on the premises, and that s. 3 of the Act of 1845 must also only be dealing with the persons the constables find on the premises when they execute their warrant. They did not find the appellant on the premises when they executed the warrant. They arrested him afterwards. In fact—this was in the interest of the appellant—they did not take him immediately before the justices. I dare say there were no justices sitting. The police officer bailed the appellant purporting to act under the provisions of s. 21 of the Criminal Justice Administration Act, 1914. Section 21 provides :

G

H

"(1) A justice on issuing a warrant for the arrest of any person may, if he thinks fit, by endorsement on the warrant, direct that the person named in the warrant be on arrest released on his entering into such a recognisance. (2) Where such an endorsement is made, the officer in charge of any police station to which on arrest the person named in the warrant is brought shall discharge him upon his entering into a recognisance, with or without sureties approved by that officer ..."

It has never been argued that the mere fact that the justice has made an endorsement authorising the police officer to take a recognisance is equivalent to the justice himself granting bail. At any rate, it appears doubtful, and I think we must resolve the question in favour of the appellant. Once the appellant

was released under that warrant by the police officer, he was not only released on bail but he was actually released, because I do not think the police officer had power to bail him, he not being the person named in the warrant. The justice can only direct by endorsement that the person named in the warrant be bailed and the police officer has only power to bail the person named in the warrant, and as nobody was named in the warrant, it follows that that section did not apply. Counsel for the appellant argued, I think rightly, that when the appellant was before the justices he was not before them by virtue of the warrant. He was there by virtue of the summons which had been issued under the Betting Act, 1853. In the first place, in my opinion, he had not been arrested under the warrant issued under the Act of 1845, and, secondly, by his being released, the effect of the warrant had expired. A

We have also to see what powers the justices have to order articles of gaming to be destroyed. Under the Act of 1853 they have power to have the articles found brought before them, but for some reason, probably an oversight, when Parliament was passing the Act of 1853, they did not provide that those articles might be destroyed. In s. 8 of the Gaming Act, 1845, it is provided: B

“... and it shall be lawful for the police magistrate or justices before whom any person shall be taken by virtue of the warrant or order to direct all such tables and instruments of gaming to be forthwith destroyed.” C

It has been decided in *Eyre v. Brumfield* (1) that that is the only section which enables justices to make an order for destruction. It follows that, if the appellant was not before the court by virtue of the warrant issued under the Act of 1845, there was no power to order the destruction of these articles of gaming. Another objection which was taken also seems to me to be good. When before the justices the appellant was asked to plead to the summons under the Act of 1845. He refused to plead one way or the other, because, he contended, he was not properly before the court. The justices thereupon did not say: “If you will not plead, we shall exercise our powers and enter a plea of Not Guilty and proceed with the case.” They accepted the position and allowed the matter to go without any plea at all, and they did not adjudicate thereupon. No evidence was given before them to show that these were articles of gaming. For all these reasons it seems to me that it is impossible to uphold the order in this case, and, although the appellant was properly convicted and fined under the Betting Act, 1853, the order for the destruction of these articles must be quashed. D E

LYNSKEY, J.: I agree. F

SELLERS, J.: I agree.

*Appeal allowed with costs. Order for destruction of gaming machines quashed.*

Solicitors: *Sidney C. Elphick*, agent for *H. B. Clayton, Sons & Ellis*, Nottingham (for the appellant); *Sharpe, Pritchard & Co.* (for the respondent). G

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

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## KEEBLE v. MILLER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Lynskey, J.), January 20, 1950.]

*Street Traffic—Light locomotive—Car converted to carry generating plant—Relevant date—Road Traffic Act, 1930 (c. 43), s. 2 (1) (b).*

A By s. 18 of the Road Traffic Act, 1930, it is provided : “ (1) The number of trailers, if any, which may be drawn by a motor vehicle on a highway shall not exceed—(a) in the case of a . . . light locomotive, three . . . (c) in the case of a . . . heavy motor car, one . . . (3) If any person causes or permits a trailer to be drawn in contravention of this section, he shall be guilty of an offence.” Light locomotives are defined by s. 2 (1) (b) as  
B “ mechanically propelled vehicles which are not constructed themselves to carry any load (other than [water, fuel, accumulators and other equipment used for the purpose of propulsion, loose tools and loose equipment]), and the weight of which unladen does not exceed eleven tons and a half, but does exceed seven tons and a quarter.” By s. 2 (4) it is provided: “ For the  
C purposes of this Part of this Act— . . . (b) in the case of a motor vehicle fitted with a crane, dynamo, welding plant or other special appliance or apparatus which is a permanent or essentially permanent fixture, the appliance or apparatus shall not be deemed to constitute a load, but shall be deemed to form part of the vehicle . . . ”

D The appellant, a fair proprietor, fitted a Diesel plant in a former army lorry and used the vehicle to provide power for a dynamo lighting set and for drawing three trailers. The unladen weight of the vehicle was seven tons and a half. Diesel oil for the plant, and planks and poles for use when loading the oil drums on to the vehicle, were carried in the vehicle. On a charge under s. 18 (1) and (3) the appellant was convicted of causing a heavy motor car to draw trailers in excess of the number prescribed. On appeal,

E HELD: in construing the word “ constructed ” in s. 2 (1) (b), regard should be had, not to the original condition of the vehicle, but to its condition at the time of the alleged offence; the fact that originally the lorry had been constructed as a heavy motor car did not prevent it becoming a light locomotive if, thereafter, a reconstruction took place which resulted in the vehicle coming within s. 2 (b); and the case should be remitted for further hearing.

F [FOR THE ROAD TRAFFIC ACT, 1930, s. 2 (1) (b), (d), (4) and s. 18 (1), (3), see HALSBURY'S STATUTES, Vol. 23, pp. 608-610, 624.]

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction, sitting at Thames Police Court, an information was preferred by the respondent, a police constable, against the appellant, that he, on Apr. 27, 1949, did cause a motor vehicle, viz., a heavy  
G motor car, to be on a highway, such motor vehicle drawing two trailers in excess of the number prescribed to be drawn by that class of vehicle, contrary to s. 18 (1) and (3) of the Road Traffic Act, 1930. On July 26, 1949, the magistrate, being of the opinion (i) that the word “ constructed ” in the definition of a light locomotive in s. 2 (1) (b) of the Road Traffic Act, 1930, meant “ originally constructed,” (ii) that the adaptation of the vehicle to carry a dynamo lighting  
H set was not such as to preclude the carrying of other loads, and (iii) that poles, planks and Diesel oil which were carried were not permanent or essentially permanent parts of the vehicle within s. 2 (4) (b) of the Act, held that the vehicle was not a light locomotive within the meaning of s. 2 (1) (b), but fell within the definition of a heavy motor car in s. 2 (1) (d), and he convicted the appellant and ordered him to pay a fine of 50s. and 50s. costs. The Divisional Court now directed that the case be remitted for further hearing. The facts appear in the judgment of  
LYNSKEY, J.



*Raeburn, K.C.*, and *Harris Walker* for the appellant.  
*Vernon Gattie* for the respondent.

**LYNSKEY, J.:** This is an appeal by way of Case stated by Robert Arthur Keeble against whom an information was preferred before the magistrate sitting at the Thames Police Court

"... for that he on Apr. 27, 1949, at the East India Dock Road, Poplar, E.14... did cause a motor vehicle, *viz.*, a heavy motor car, Index No. C A N 971, to be on a highway, such motor vehicle drawing two trailers in excess of the number prescribed to be drawn by that class of vehicle, contrary to s. 18 (1) and (3) of the Road Traffic Act, 1930."

The learned magistrate held that the offence was proved and fined the appellant 50s. and ordered him to pay 50s. costs.

The point is whether this vehicle which was pulling the three trailers was a light locomotive within the classification of motor vehicles contained in s. 2 (1) (b) of the Road Traffic Act, 1930, or whether it was a heavy motor car under para. (d) of the sub-section. Light locomotives are defined by s. 2 (1) (b) as

"... mechanically propelled vehicles which are not constructed themselves to carry any load (other than [any of the articles mentioned in s. 2 (1) (a), *viz.*, water, fuel, accumulators and other equipment used for the purpose of propulsion, loose tools and loose equipment]), and the weight of which unladen does not exceed eleven tons and a half, but does exceed seven tons and a quarter."

So far as weight is concerned, there is a finding of fact that the vehicle in question weighs seven tons and a half, which brings it within the weight classification. By s. 2 (1) (d) heavy motor cars are defined as

"... mechanically propelled vehicles (not being vehicles classified under this section as motor cars) which are constructed themselves to carry a load or passengers, and the weight of which unladen exceeds two tons and a half."

The learned magistrate has held that this vehicle was a heavy motor car. The appellant contends that it was a light locomotive. The circumstances of the case as found are that this motor vehicle was a converted army lorry and that at some time before the date of the alleged offence there had been fitted in it a Diesel plant secured to the vehicle itself and that from that time onwards the vehicle was used, not for the immediate purpose of carrying loads, but to carry the Diesel plant, which was used by the appellant in his business of a fair proprietor to provide power for a dynamo lighting set.

By s. 2 (4) of the Act of 1930 it is provided :

"For the purposes of this Part of this Act... (b) in the case of a motor vehicle fitted with a crane, dynamo, welding plant or other special appliance or apparatus which is a permanent or essentially permanent fixture, the appliance or apparatus shall not be deemed to constitute a load, but shall be deemed to form part of the vehicle."

The result was that when this vehicle was fitted with the Diesel engine and plant, they became part of the vehicle and not part of the load which it had to carry. The learned magistrate has found that

"the said motor vehicle had no load other than a Diesel plant and loose equipment for the said motor vehicle. The said Diesel plant was an apparatus secured to the motor vehicle... There was evidence that Diesel oil to drive the dynamo, and planks and poles to run the Diesel oil up to the back of the lorry, were carried."

Each of those articles would come within the class of articles set out in s. 2 (1) (a) of the Act, that is to say, "water, fuel, accumulators and other equipment used for the purpose of propulsion, loose tools and loose equipment." The learned magistrate goes on to find that there was evidence that there was room for other

loads when the vehicle was fitted with this Diesel engine. He does not find, in fact, that it was constructed to carry other such loads.

The learned magistrate says that he was of the opinion :

“that the word ‘constructed’ in the definition of a light locomotive in s. 2 (1) (b) of the Road Traffic Act, 1930, meant ‘originally constructed’”.

A In my view, “constructed” in that paragraph means constructed at the material time. The fact that originally a vehicle was constructed as a heavy motor car will not operate to prevent it being a light locomotive if, thereafter, a re-construction takes place. If, as a result of that re-construction, it is fitted with an appliance like a Diesel engine or a crane, it ceases to be a vehicle constructed for the purpose of carrying loads but becomes, by virtue of the provisions of s. 2 (4) (b), a vehicle for the purpose of carrying a special appliance. When the B magistrate read the word “constructed” in s. 2 (1) (b) as meaning “originally constructed,” that meant that he was considering this case from the point of view of the vehicle having been originally constructed as an army motor lorry. In my view, in construing the word “constructed,” he ought to have applied C his mind to decide whether, at the time the offence was committed, this vehicle was constructed for the purpose of carrying loads, in which event it would be a heavy motor car, or whether, having regard to the appliance which was fixed to it, it was not constructed for carrying loads, in which event it would be a light locomotive and, therefore, entitled as a light locomotive to draw three trailers behind it.

The magistrate goes on to say

D “that the adaptation of the vehicle to carry the dynamo lighting set was not such as to preclude the carrying of other loads.”

That, again, in my view, is not the true test to apply. What the learned magistrate ought to have done, as the satisfactory way of dealing with the case, was to see the vehicle and have its dimensions put before him, and having done so ask himself the question: Is that vehicle in that condition “constructed . . . E to carry a load or passengers,” apart from the driver and his mate? If, on his view of the vehicle and its dimensions, he were of opinion that, notwithstanding, the fact that a Diesel engine had been fitted to the vehicle, it was still a vehicle constructed to carry loads in addition to the Diesel engine which was part of the vehicle, then the conviction would have been right, but, if he could not come to that conclusion he ought to have dismissed this information. The only F other matter he dealt with was

“that poles, planks and Diesel oil which were carried were not permanent or essentially permanent parts of the vehicle.”

Nobody suggests that they were, and it is not necessary in determining this case to decide whether they were or were not. If they were not permanent parts of this vehicle, the poles, planks and Diesel oil were at least, one would have G thought—again a matter for the magistrate—either water, fuel, accumulators, or other equipment used for the purpose of propulsion, loose tools and loose equipment, and, if that were so, they would not rank as a load. In my view, the learned magistrate has not asked himself the correct questions and has not directed his mind correctly to the construction of this Act. This case ought H to go back to him so that he can deal with the matter on the basis of the construction which I have mentioned and come to a conclusion whether this vehicle in its condition at the material time was a vehicle constructed to carry loads.

**LORD GODDARD, C.J.:** I agree.

*Appeal allowed with costs; case remitted for re-hearing.*

Solicitors: *Woodman, Matthews & Co.* (for the appellant); *Solicitor for the Metropolitan Police* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister at-Law.*]

R. v. SOMERSET JJ., *Ex parte* ERNEST J. COLE AND  
PARTNERS, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.),  
January 17, 1950.]

*Quarter Sessions—Refusal to state Case—Mandamus—Power of High Court to issue—Criminal Justice Act, 1925 (c. 86), s. 20.*

Appellants to quarter sessions against an order of petty sessions under the Town and Country Planning Act, 1944 (which did not involve a conviction) failed to ask for a Case to be stated at the close of the hearing of their appeal, and when their application for a Case was made three weeks later quarter sessions refused it on the ground of the delay.

HELD: the High Court had no power to issue *mandamus* to quarter sessions at common law; the Criminal Justice Act, 1925, s. 20, provided for *mandamus* to be issued ordering quarter sessions to state a Case only in case of an appeal to quarter sessions against a conviction by a court of summary jurisdiction; and, therefore, in the present case *mandamus* could not issue directing quarter sessions to state a Case.

[FOR MANDAMUS TO QUARTER SESSIONS, see HALSBURY, Vol. 21, pp. 738, 739, para. 1279 and pp. 740, 741, para. 1281; and FOR CASES, see DIGEST, Vol. 33, pp. 449, 450, Nos. 1596-1611.]

Cases referred to :—

- (1) *R. v. Walsall Overseers*, (1878), 3 Q.B.D. 457; 47 L.J.Q.B. 711; 38 L.T. 665; 42 J.P. 644; *on appeal, sub nom., Walsall Poor Overseers v. London & North Western Ry. Co.*, (1878), 4 App. Cas. 30; 33 Digest 449, 1600.
- (2) *R. v. Pembrokeshire JJ.*, (1832), 2 B. & Ad. 391; 1 L.J.M.C. 92; 33 Digest 449, 1598.
- (3) *R. v. Effingham (Earl)*, (1871), 2 B. & Ad. 391 *n.*
- (4) *Ex p. Jarvin (Inhabitants)*, (1840), 9 Dowl. 120; Woll. 67; 33 Digest 437, 1465.
- (5) *Peat's Case*, (1704), 6 Mod. Rep. 228.

MOTION for *mandamus*.

The applicants appealed to quarter sessions against a decision of petty sessions in respect of a matter arising out of the Town and Country Planning Act, 1944. On the dismissal of their appeal they did not apply to quarter sessions to state a Case for the opinion of the High Court and when they made the application three weeks later quarter sessions refused to state a Case. The Divisional Court now held that they had no power by *mandamus* to compel quarter sessions to state the Case.

*Neligan* for the applicants.

*Squibb* for the respondents.

*J. F. E. Stephenson* for the justices.

LORD GODDARD, C.J.: In this case counsel for the applicants has moved for an order of *mandamus* directed to justices of Somerset compelling them to state a Case with regard to their decision in an appeal which came before them arising out of the Town and Country Planning Act, 1944. The appeal to quarter sessions was against an order of justices at petty sessions, and, on June 7, 1949, quarter sessions dismissed the appeal. According to the affidavit of the chairman, no application was then made to the quarter sessions to state a Case. Whether quarter sessions would have stated a Case if an application had been made, I do not know, but when an application was made to them some three weeks later, they refused to state a Case because of the delay which had taken place. Now we are asked to grant a *mandamus* directing quarter sessions



to state a Case. Before the Criminal Justice Act, 1925, there was no power in the court to grant a *mandamus* to quarter sessions compelling them to state a Case. It was often thought that that raised difficulties and might cause some injustice, and the Criminal Justice Act, 1925, s. 20, provided that either party to an appeal to quarter sessions from a court of summary jurisdiction could apply for a Case to be stated, and, if it were refused, could apply to this court for an order of *mandamus* compelling quarter sessions to state a Case. That section, however, is confined to cases where the matter before quarter sessions is an appeal against a conviction by a court of summary jurisdiction and this is not a matter involving such a conviction. That is the only matter with which the section deals.

When the history of the matter is looked at it is clear that this court has always disclaimed that they have the power to grant a *mandamus* to quarter sessions. The history of the power of quarter sessions to state a Case is very fully dealt with in the speech of LORD CAIRNS in *Walsall Poor Overseers v. London and North Western Ry. Co.* (1). He pointed out that, on going back to the ancient history of quarter sessions, it will be found that they were told not to proceed with a case of difficulty until the justices of assize came into the county, which, of course, was equivalent to telling them that they ought to consult the justices of assize before deciding a case of difficulty. Then it became the practice to consult the Court of King's Bench instead of the judge of assize, and whether they consulted the Court of King's Bench or not was always a matter entirely for the discretion of the quarter sessions.

In *R. v. Pembrokeshire JJ.* (2) (2 B. & Ad. 391), the marginal note is:

"When the sessions on determining an appeal have granted a Case, but none has been stated, the court will, under some circumstances, direct a *mandamus* to the justices who heard the appeal, to state a Case."

Attached to the report of that case is a report of *R. v. Effingham (Earl)* (3) in which an application was made to the court for a *mandamus* directed to the justices for the West Riding of Yorkshire (2 B. & Ad. 393)

"commanding them to state a Special Case on an appeal between the inhabitants of Northowram and the inhabitants of Hipperholme, determined by them at sessions, 13th of July last; on affidavit that, the order being affirmed, the appellants desired a Special Case to be stated, which the sessions unanimously consented to; and Mr. *Heywood*, counsel for the appellants, drew the Case; and in the afternoon both counsel tendered the Case to the sessions for their approbation. Mr. Wickham and Mr. Horton, who joined in making the original order, and Sir Watts Horton, who had an estate in each parish, and therefore declined giving any opinion in the morning, were the only justices remaining; when Sir W. H. refused to permit the Case to be stated; and he being joined by Mr. Horton, no Case was stated."

In other words, quarter sessions in the morning had agreed to state a Case, and later, when the case was tendered to the justices for signature, certain justices, who obviously had an interest in the matter, said that they were not going to state it. The report says (*ibid.*, 394):

"LORD MANSFIELD doubted whether a *mandamus* could go to compel justices to state a Case; but Mr. J. *Buller* saying, that in this instance the court of quarter sessions had actually agreed to state one, but Sir Watts Horton prevented it [he being a justice with an interest in the matter] a rule *nisi* was granted"

against the justices to state the Case, they having agreed to do so.

In *Ex p. Jarvin (Inhabitants)* (4) (9 Dowl. 120), the marginal note is:

"The court will not issue a *mandamus* to a court of quarter sessions,

commanding them to *grant* a case, although under special circumstances it may issue such a *mandamus* commanding the sessions to *state* a Case."

PATTESON, J., who was a judge of great authority in these matters, said:

"It seems to me that the first case cited, *R. v. Pembrokeshire JJ.* (2), is no authority for granting the rule. The case of *R. v. Effingham (Earl)* (3), is only an authority to shew that the court will, under special circumstances, grant a *mandamus* for the purpose of compelling the sessions to *state* a Case, but not to *grant* it, that being a matter which is purely for their discretion."

I note that the learned authors of ARCHBOLD'S QUARTER SESSIONS, a work of considerable authority, say (2nd ed., at p. 50):

"But it is perfectly optional with the sessions whether they will thus state a Special Case or not; neither the parties nor even the Queen's Bench itself can compel them to do so."

For that the authority is the case to which I have just referred, *Ex p. Jarvin (Inhabitants)* (4), and also *Peat's Case* (5). In those circumstances, I am of opinion that we have no power to grant *mandamus* in this case, and, therefore, this application fails.

LYNSKEY, J.: I agree.

SELLERS, J.: I agree.

*Application dismissed with costs. Costs to justices of filing an affidavit only.*

Solicitors: *Arbeid & Co.* (for the applicants); *Sharpe, Pritchard & Co.*, agents for *Harold King*, Taunton (for the respondents); *Collyer-Bristow & Co.*, agents for *P. A. Selborne Stringer*, Trowbridge (for the justices).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

## BELL AND ANOTHER v. GOSDEN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.J.J.), January 16, 17, 1950.]

*Emergency Legislation—Evacuation area—Recovery of rent—Limitation of action—When time begins to run—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), s. 3 (1) (2)—Liabilities (War-Time Adjustment) Act, 1944 (c. 40), s. 2 (2)—Defence (Evacuated Areas) Regulations, 1940 (S.R. & O., 1940, No. 1209) (as amended by S.R. & O., 1945, No. 1453), reg. 4 (1), reg. 4A (1)—Limitation Act, 1939 (c. 21), s. 17.*

*County Court—Appeal—Raising in Court of Appeal of point of law not argued in court below.*

The Defence (Evacuated Areas) Regulations, 1940, as amended by S.R. & O., 1945, No. 1453, provide: "4 (1) Subject to the following provisions of this regulation—(a) no rent ... payable in respect of any premises in an evacuation area which are unoccupied at the date when the area is declared an evacuation area, or subsequently become unoccupied, ... shall be recoverable during the evacuation period ... Provided that this paragraph shall not apply ... (ii) to any such rent ... as aforesaid which accrued due and payable before the commencement of the evacuation period ... 4A (1) Where an order has been made appointing a day on which the evacuation period is to come to an end in relation to any evacuation area all debts owing on that day to which para. (1) of reg. 4 ... has applied in relation to that area ... shall only be recoverable and enforceable by means of an application to the court under s. 2 of the Liabilities (War-Time

Adjustment) Act, 1944, and no other proceedings or remedies shall be taken or exercised in respect of such debts . . . ”

Premises, which were within an evacuation area within the meaning of reg. 4 (1), were let to G. who failed to pay rent falling due on Sept. 29, 1940. G. was at that date occupying the premises, and continued so to occupy them until Feb. 26, 1942. On Nov. 4, 1948, the landlord commenced proceedings for the unpaid rent. Before the county court judge, G. submitted that (i) the Limitation Act, 1939, s. 17, barred the landlord's claim, and (ii) the regulations of 1940 (as amended) applied to the claim. The judge rejected the first submission, but accepted the second, and stood the case over so that proceedings might be brought under the Act of 1944. On the second proceedings the county court judge ordered the defendant to pay the sum in question. On appeal, the defendant sought to argue that the regulations had no application, that the second proceedings were started under a misapprehension, and that the claim was barred by s. 17 of the Limitation Act, 1939.

HELD: (i) the argument that the regulations had no application was not raised before the county court judge, and, being a matter of law, was not now open to the defendant.

*Dictum of LORD HALSBURY, L.C., in Smith v. Baker & Sons* ([1891] A.C. 333), *applied*.

(ii) so long as the rent was irrecoverable by the terms of reg. 4, the running of time under s. 17 of the Act of 1939 was suspended; that suspension was not terminated by the Liabilities (War-Time Adjustment) Act, 1941; and, therefore, although there was stronger ground for saying that time began to run as from the date of the coming into force of the Act of 1944, whether it did or not, the landlord's claim was not barred.

[FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, s. 3 and s. 21, see HALSBURY'S STATUTES, Vol. 34, pp. 26-29, 47; and FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1944, s. 2, see HALSBURY'S STATUTES, Vol. 37, pp. 14-18.]

Cases referred to:

- (1) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 13 Digest 527, 789.
- (2) *Rhodes v. Liverpool Commercial Investment Co.*, (1879), 4 C.P.D. 425; 13 Digest 538, 901.
- (3) *Seymour v. Coulson*, (1880), 5 Q.B.D. 359; 49 L.J.Q.B. 604; 13 Digest 538, 902.
- (4) *Clarkson v. Musgrave*, (1882), 9 Q.B.D. 386; 51 L.J.Q.B. 525; 13 Digest 527, 788.

APPEAL by the defendant from orders of His Honour JUDGE ARCHER, K.C., sitting at Eastbourne County Court, dated Sept. 28, 1949, directing the defendant to pay to the executors of the landlord the sum of £74 in respect of rent which had accrued due on Sept. 29, 1940, and to pay the costs both of an application under the Liabilities (War-Time Adjustment) Acts, 1941 to 1944, on which the order to pay the rent was made, and also of abortive proceedings which had been adjourned. The Court of Appeal heard the appeals in both proceedings together, and affirmed the decision of the county court judge except in regard to the costs of the adjourned proceedings. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

*S. Terrell* for the defendant.

*R. G. Dow* for the plaintiffs, the executors of the landlord.

SIR RAYMOND EVERSLED, M.R.: This judgment is on two appeals which have been called on and heard together. It will be convenient if I state first the nature of the two actions. The first in date, in which the summons



was issued on Nov. 4, 1948, is a proceeding by two persons suing as the executors of a deceased landlord for a sum of £74 rent which accrued due on Sept. 29, 1940. The second proceeding is entitled: "In the matter of the Liabilities (War-Time Adjustment) Acts, 1941 to 1944," the parties to it being the same as in the earlier proceedings, and the claim being under the Acts for relief in respect of the same sum of rent. The particulars of claim in the second proceedings are dated July 8, 1949. The reason why there are before us these two proceedings is that when the first case came to be heard before the learned county court judge two points were taken on behalf of the defendant. First it was said that the claim was barred by virtue of the Limitation Act, 1939, s. 17, and, secondly and alternatively, that rent claimed was covered by the terms of an order made pursuant to the Emergency Powers (Defence) Acts, 1939 and 1940, namely, an order known as the Defence (Evacuated Areas) Regulations, 1940 (S.R. & O., 1940, No. 1209), and a further and later regulation (S.R. & O., 1945, No. 1453), the effect of which regulations, it was alleged, was that this sum of rent could be claimed only in proceedings under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944. The learned county court judge rejected the defence based on the Limitation Act, 1939, but he was of opinion that the sum claimed was covered by the regulations with the result that the first plaintiff was incompetent. After some hearing, therefore, he stood over the first case giving liberty to the plaintiffs to start proceedings under the Acts of 1941 and 1944. When the matter came again before him, he made an order, as it is conceded he had power to do, under the Act of 1944, directing the defendant to pay the sum in question, and he also ordered that the defendant should pay the plaintiffs' costs not only of the proceedings under the Liabilities (War-Time Adjustment) Acts, but also of the other proceedings which had been adjourned.

The first point which counsel for the defendant sought to take before us was that the whole basis on which the first case had been adjourned and the second proceeding started was a misapprehension, and that, on the true construction of the regulations, they had not and never had had any application to the sum claimed. To make the matter a little more clear I will refer, first, to the regulations of 1940. Regulation 4, so far as is relevant, provides:

"(1) Subject to the following provisions of this regulation,—(a) no rent . . . payable in respect of any premises in an evacuation area which are unoccupied at the date when the area is declared an evacuation area, or subsequently become unoccupied . . . shall be recoverable during the evacuation period."

These premises, beyond doubt, were in what is there defined as being an evacuation area. They were, however, at the time when this rent became due, namely, Sept. 29, 1940, still occupied by the defendant. He ceased to occupy them on Feb. 26, 1942. It is conceded that as from that date this regulation would have applied, since the premises were in an evacuation area, but the regulation contains the following proviso:

"Provided that this paragraph shall not apply . . . (ii) to any such rent . . . as aforesaid which accrued due and payable before the commencement of the evacuation period."

I have indicated that the evacuation period would not properly begin to run until the premises became unoccupied, and, since they were not unoccupied on Sept. 29, 1940, on that date, when the rent became due, the regulation had no application to the sum in question.

At this stage I can conveniently complete the matter by reference to the later order of 1945. That order amended the regulations of 1940 and inserted therein a new regulation, reg. 4A, of which the relevant words are:

"(1) Where an order has been made appointing a day on which the evacuation period is to come to an end in relation to any evacuation area

all debts owing on that day to which para. (1) of reg. 4 . . . has applied in relation to that area . . . shall only be recoverable and enforceable by means of an application to the court under s. 2 of the Liabilities (War-Time Adjustment) Act, 1944, and no other proceedings or remedies shall be taken or exercised in respect of such debts . . . ”

An order was made terminating the relevant evacuation period on Mar. 31, 1947.

- A On the footing that this sum which was claimed as rent was a debt to which reg. 4 of the regulations of 1940 applied, then it follows by virtue of reg. 4A that the first action was incompetent and was an infringement of the terms of that regulation. On the hypothesis that the debt was covered by the regulations of 1940 there is no doubt whatever that the action was improperly constituted and it became necessary—or was, at any rate, proper—to do as the learned judge did—to adjourn the action and give liberty to the plaintiffs to bring proceedings under the Liabilities (War-Time Adjustment) Act, 1944. Counsel for the defendant, therefore, sought to say: “ I should have observed that by the terms of proviso (ii) to reg. 4 (1) the evacuation period had not begun at the relevant date, and, therefore, the regulations of 1940 and 1945 never had any application to the case. That enables me to say that the statute of limitation which began to run on Sept. 29, 1940, had run its course long before the action was brought, and on that ground I should succeed.” In my judgment, it is plain that that point is not open to the defendant in this court. To sustain the argument it is necessary, according to the rules which apply to county court appeals, for the defendant to show that the point that the regulations had no application was raised in the court below. The fact that the regulations were referred to clearly does not provide an answer to the objection to counsel’s point, for the regulations were relied on, not to show that in the circumstances they had no application, but was for the contrary purpose of showing that they did apply and rendered incompetent the first action.

- E It is as well to emphasise afresh the importance of this rule for the proper administration of justice in the county court and also in this court and in order that there may be an end of litigation and that proceedings may be prevented from becoming protracted and expensive. In *Smith v. Baker & Sons* (1), LORD HALSBURY, L.C., put the matter plainly ([1891] A.C. 333):

“ A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned judge. That question was decided in *Rhodes v. Liverpool Commercial Investment Co.* (2). In *Seymour v. Coulson* (3) the principle was affirmed that the point of law must be taken; and finally in *Clarkson v. Musgrave* (4), where all the cases were reviewed, it was established (and I think has been accepted ever since) that the raising of the point of law at the trial is a condition precedent to any appeal from the decision of the county court.”

- G It seems to me to be plain that the point sought to be taken, namely, the non-applicability of these regulations, was never taken by the defendant in the county court, and is not, therefore, open to him now. The result is that we have to treat these cases on what is a somewhat unreal hypothesis, namely, on the assumption that the debt claimed was a debt to which the regulations of 1940 did apply. Nevertheless, counsel for the defendant has argued that the effect of the application of the regulation is not to stop the running of the statute of limitation. Alternatively, he says, even if it did arrest the running of the period until the Liabilities (War-Time Adjustment) Act, 1941, was passed, from that date at least time did run against the plaintiffs.

I have already read the relevant parts of reg. 4 of the regulations of 1940. Section 17 of the Limitation Act, 1939, provides:

“ No action shall be brought . . . to recover arrears of rent . . . after the expiration of six years from the date on which the arrears became due.”

There is nothing in the regulations of 1940 which refers in terms to the Limitation Act, 1939. Regulation 4 (1) provides that the rent shall not be recoverable during the evacuation period. That plainly means that no action shall be brought during that period for the recovery of the rent, but it is said that the fact that it cannot be recovered by action is not sufficient. The rent was due in 1940, it is argued, and it remained due although during the period of the so-called moratorium it could not be recovered by action as the result of the regulation, and s. 17 states in unequivocal terms that after the expiration of six years no action can be brought. In my judgment, the necessary effect of the regulation, which has, of course, the effect of an act of Parliament, when set beside the Limitation Act, is that, so long as it applied and the rent was irrecoverable by its terms the running of time under s. 17 must be treated as suspended. The matter may be tested in this way. Supposing this evacuation period was some fixed period, as, for example, seven years. The regulation would then provide, in effect, "during the seven years period of the evacuation no action shall be brought to recover rent." As a necessary implication from that language, when that period was over, the ban on the bringing of an action would cease, and that in turn necessarily involves that the running of the limitation period under the statute must be regarded as having been suspended for that period. That is, I think, clear from the language of s. 17 itself—"No action shall be brought . . ." The basis of the section is that, if, during the period a person can bring an action but he does not do so, but delays for six years, then thereafter he shall be barred. So far as that aspect of the matter is concerned, I do not propose to elaborate it.

Some reference was made during the argument to such a case as that of a claim against an enemy alien where the rights of action are suspended as a result of a war. It has, I think, never been suggested that, if the war goes on long enough, the alien's claim is forever destroyed. It revives when the conditions cease to exist which have prevented the exercise of the remedy. That, I think, is a fair analogy, and it reinforces the argument on which my conclusion is based, namely, that the period of limitation set by s. 17 is regarded as a period during which the ordinary remedy exists, and, if the right to bring an action and recover is for any reason removed, then the basis on which the running of the time under the statute operates goes with it.

The matter is less easy when one comes to the Liabilities (War-Time Adjustment) Act, 1941, for by that Act in certain circumstances a right was given both to a debtor and to a creditor in respect of a claim which was caught by the regulations of 1940 to apply to the court and obtain what is referred to in the Act as a protection order, or, in some cases, a liabilities adjustment order. That right is bestowed by s. 3 of the Act which provides:

"(1) An application may be made to the court for the adjustment and settlement under this Part of this Act of the affairs of any person, on the ground that, owing to war circumstances . . ."

Then there are two paragraphs, (a) and (b), the substance of which is that the ground is that the person concerned is financially embarrassed owing to war circumstances. The sub-section goes on:

" . . . and any such application may be made—(i) by the debtor; (ii) by any creditor who is prevented, by reason of the provisions of reg. 4 or para. (2) of reg. 6 of the Defence (Evacuated Areas) Regulations, 1940, from commencing or prosecuting any proceedings or exercising any remedy in respect of a debt which would be a provable debt."

Section 3 (2) provides that, if the court thinks a *prima facie* case has been made out that the debtor is within para. (a) or para. (b) of sub-s. (1), i.e., that, as a result of the war, he is in financial difficulties, the court may make a protection order. The effect of a protection order is, so to speak, to place in cold storage



the debtor's assets *vis-a-vis* all his creditors. No creditor can sue. The assets are held in suspense and protected for the benefit of all the creditors and of the debtor himself. Sub-section 6 provides that in addition in certain circumstances the court may make a liabilities adjustment order following a protection order. The court may also dismiss the application. What it appears that the court can in no circumstances do on an application under s. 3 (1) apart from a general liabilities adjustment order is to order the debtor to pay the claim of the creditor

- A who is prevented by the regulations of 1940 from bringing ordinary proceedings to recover his rent. It will be seen, therefore, pausing at this stage, that s. 3 in certain circumstances gives a limited right to go to the court, not only to the debtor but also to the creditor, who is, as one must assume this creditor was here, prevented from suing by the regulations of 1940, but the right is limited by the circumstance that the court cannot make an ordinary order for the debtor to pay the creditor the amount claimed. There is the further limitation that it is only if the court is of opinion that the debtor's financial difficulties prevent him from paying his debts and that they are due to the war that the court can make a protection order and an adjustment order. An example was given of a man who had to leave his premises because they were in an evacuation area, but was in no way financially embarrassed as a result of the war or otherwise.
- C In such a case as that it is plain, from what I have stated, that the landlord claiming the rent could not invoke the provisions of this Act to obtain a protection order or a liabilities adjustment order. It is to be observed, therefore, that such remedy as this section gives to the creditor is of a very limited nature. Its existence depends on the state of the debtor's financial circumstances, and it cannot, in my judgment, fairly be described as a right to recover the debt in question by any form of proceeding or action.

D Counsel for the defendant relied also on another matter, not without significance, to be found in s. 21 (2) of the Act which is to the effect that when a protection order is in due course revoked under the later part of the Act, then

- E "... for the purposes of the Bankruptcy Act, 1914, Part V of the Companies Act, 1929, any enactment relating to the limitation of actions and any other enactment whereby any liability of the debtor may be affected by the passage of time ... "

the period of the protection order is disregarded. Counsel says that since in terms the Act thus provides that a protection order, while it lasts, shall have the effect of suspending the running of time under the Limitation Act, it should follow, according to well recognised principles, that other results which flow from the operation of the Act do not have the effect of stopping the running of time, but I think the answer is that, if a protection order is made, it operates not only as regards the debt claimed by the creditor who makes the application, but as regards all debts owing by the debtor to all his creditors, whether or not those creditors were persons who would be prevented by the regulations of 1940 or

G by any other regulations from suing in the ordinary way for their debts. Since all the creditors are affected, it is understandable that it was thought necessary to provide by express language in the Act that during the operation of the protection order the running of time should be suspended so that on its revocation the debtor could not rely on that passage of time in setting up a defence based on the statute.

- H One other point I should refer to under s. 3 (1), to which I now return, and that is the language which I have read at the end of the provision relating to the creditor, and which I will repeat:

"An application may be made ... by any creditor who is prevented, by reason of ... reg. 4 or reg. 6 (2) of the Defence (Evacuated Areas) Regulations, 1940, from commencing or prosecuting any proceedings or exercising any remedy in respect of a debt which would be a provable debt ... "

There are other references in this Act to provable debts, and it is beyond doubt that for bankruptcy purposes a debt which is barred by a statute is not a provable debt, but what in this context is the significance of the phrase "a debt which would be a provable debt"? I cannot doubt that it means, and can only mean, a debt which, but for the regulation, and for the regulation alone, would be a provable debt. That, I venture to think, somewhat reinforces the view that the effect of reg. 4 of the regulations of 1940 was to suspend all remedies, and by so doing to suspend also the running of time under the Limitation Act. A

In my judgment, therefore, the operation of the Act of 1941 did not put an end to the suspension caused by reg. 4 of the regulations of 1940. It did not cause the running of time, so to speak, to re-start. If that is so, then, as I follow the arguments in this case, nothing else really matters. The debt became due originally on Sept. 29, 1940. The evacuation period began when the defendant left the premises, which was on Feb. 26, 1942. Then, and then only, the regulations of 1940 applied. Between the two dates I have mentioned a period of one year and five months (approximately) had elapsed. The Liabilities (War-Time Adjustment) Act, 1944, which amended the Act of 1941, came into operation on Oct. 26, 1944. For reasons which I will state presently, there may well be a stronger argument for saying that that Act did put an end to the suspension of the Limitation Act, 1939, s. 17. Suppose it did. In the first proceeding the claim was issued on Nov. 4, 1948, which is slightly more than four years after the coming into operation of the Act of 1944. So that, if to that period of four years and a week is added the one year and five months which had elapsed between Sept. 29, 1940, and Feb. 26, 1942, the period during which time was running against the plaintiff is still less than six years at the time when the present proceedings were started. In those circumstances, it would appear that time never ran so as to bar the claim of the plaintiffs in the action. B C D

It would, therefore, perhaps seem unnecessary to pursue the matter further, but it is right to say a few words in deference to the argument that the Act of 1944, which amended the earlier Act in important respects, differed from it in two vital characteristics. Whereas under the Act of 1941 the right of the creditor to invoke the court's jurisdiction was limited to cases in which the debtor was financially embarrassed as a result of the war, that characteristic is absent from the Act of 1944. Section 2 (1) of the Act of 1944 provides that "Any person who owes any such debt"—and that for the present purposes includes a debt such as we are concerned with here rendered irrecoverable by the regulation of 1940—"or the person to whom he is so indebted . . . may apply to the court," that is to say, the right to invoke the jurisdiction of the court is irrespective of the financial circumstances of the debtor. Further, the court in the exercise of its discretion may do what the learned county court judge here did, namely, simply order the defendant to pay the debt. So that there is, by virtue of the powers given by s. 2 of the Act of 1944, a right vested in the creditor to claim and to bring proceedings to recover the debt without regard to any other debts owing by the debtor. The matter may, I think, be carried one stage further by reference again to reg. 4A of the regulations of 1940 which was added by the Order of 1945. It provides that where an order has been made putting an end *quoad* any particular premises to an evacuation period, then any debts owing on the date when that order comes into operation which were the subject of suspension under the earlier regulation shall only be recoverable and enforced by virtue of proceedings under s. 2 of the Act of 1944, and no other proceedings shall be taken in respect of them. Always on the hypothesis that this sum of rent was covered by the regulations of 1940, it follows that, when the evacuation period in reference to this house ended, as it did, on Mar. 31, 1947, no longer could it be said that the old rights of action survived. The ordinary rights for suing in the courts in the ordinary way were taken away for ever and instead. E F G H

of them the only remedy was under s. 2. I find it difficult to suppose that no statute of limitation would apply to this remedy left to the creditor so that he could wait ten, twenty, or a hundred years before he made his application under s. 2. If that is so, then it seems to follow that the remedy given by s. 2 of the Act of 1944 may well have been regarded, at least from the end of the evacuation period, as a right to recover equivalent to an action which, unless brought within the requisite period, would be barred in the ordinary course by the statute of limitation. It is, I think, unnecessary to express a concluded opinion on the matter, but, at least, it is plain from what I have said that there is a much stronger case for saying that from the time the Act of 1944 began to operate, or, at any rate, from the end of the evacuation period, the suspension of the running of time under the Limitation Act, 1939, came to an end, but, for reasons which I have already indicated, as it turns out, that does not matter, the plaintiffs having started their proceedings in due time when all the periods during which the statute ran against them are added together. For these reasons, therefore, I think the learned judge was right in concluding, as he did, that the statute of limitations was not a bar to the claim under the Act of 1944, and it has not been suggested, that being so, that there is any ground for quarrelling with the learned judge's conclusion that this was a debt which the defendant should be ordered to pay.

There is one final point, and that is in regard to the costs of the first action before application under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944, was made. As I stated, in the order which the learned judge made, it was provided that the respondent pay to the applicants their costs not only of that application (the application under the Liabilities (War-Time Adjustment) Acts) but also of the first action. On the hypothesis on which the whole of this argument has proceeded, this was a debt covered by the regulations of 1940 and so was a debt in respect of which, by the express language of reg. 4A added by the Order of 1945, no proceedings would be taken other than by way of application under the Liabilities (War-Time Adjustment) Acts. On the matter of costs it is plain and needs no emphasis that this court is exceedingly slow to interfere with the discretion of the learned judge below, but it seems to me in face of that regulation that an order that the defendant should pay the costs of proceedings which the judge had held to be incompetent was not a proper exercise of his discretion in regard to costs. I, therefore, would vary the learned judge's order accordingly. In other respects, for the reasons which I have given, I think the order made was correct, and that the appeal must be dismissed.

**SOMERVELL, L.J.:** I agree that this appeal fails. I agree with what has been said by the Master of the Rolls with regard to the regulations of 1940, namely, that in respect of the debts which are made irrecoverable by reg. 4 (1) the statute of limitation did not run. That regulation effected what has been called a moratorium. At that time no one could forecast what provisions would ultimately be made by regulation or by statute. One can imagine a case in which, debts of a certain kind having been made irrecoverable, it is possible that they never should be recoverable but are ultimately wiped out altogether and the creditors are unable to get any relief in respect of them. In another case one can imagine at the end of the period the full common law right of issuing a writ or any other common law or statutory right which normally exists being restored, so that the position as from that date is precisely as if no regulation had ever been made. In considering, therefore, over what period the statute of limitation was made inoperative by reg. 4 of the regulations of 1940, it is necessary to consider the right which it is now being sought to exercise and, indeed, to consider—as we can in the present circumstances where everything has come to an end and the final provision has been made—the last chapter as well as the intermediate chapters of the story.

In the course of the argument, I gave an illustration which, perhaps, makes



clear the sort of point I have in mind. One can imagine theoretically, though it is not very probable, a case in which debts were made irrecoverable as from Jan. 1 in the year 1. The statute of limitation, therefore, ceased to run. At the end of two years, on Jan. 1 in the year 3, fifty per cent. of those debts were made recoverable by ordinary process, and a creditor who was owed £100 claimed £50. On Jan. 1 in the year 5 the remaining fifty per cent. was made recoverable. It seems to me that in respect of that last fifty per cent. the statute of limitation would only run as from Jan. 1 in year 5, whereas in respect of the fifty per cent. made recoverable on Jan 1 in year 3 it would run as from that date. In the present case, when the matter was finally dealt with, as it was, by the order of 1945, there was not restored to the creditors their pre-existing right of issuing a writ at common law, but it was provided that, when the evacuation period was brought to an end by an order, which, as has been said, happened in 1947, creditors in respect of debts owing on that day had the right to use the procedure which had been in existence since October, 1944, under the Liabilities (War-Time Adjustment) Act, 1944, s. 2. In those circumstances, it seems to me that *quoad* any rights which were restored in respect of rent or other debts covered by the regulations of 1940, the statute of limitation began to run at the time when those rights could have been exercised, which was when the Liabilities (War-Time Adjustment) Act, 1944, came into force. Therefore, though I arrive at the same conclusion as the Master of the Rolls, I arrive at it, perhaps, on slightly different grounds.

Counsel for the defendant sought to say that the statute of limitations began to run in 1941, when, at any rate, some right was conferred on creditors whose debts had become subject to this regulation. I will assume (without deciding) in counsel's favour, as he so argued, that under an adjustment order made under the Act of 1941 the county court judge could have made an order for the payment of rent made irrecoverable under reg. 4 of the regulations of 1940. I think he would be very unlikely to have done so because, as has been pointed out by the Master of the Rolls, so far as one can see in the case of a man who was not in financial embarrassment, the creditor had no legal means of enforcing payment, but I will assume for the purposes of this decision that the county court judge under s. 3 of the Act of 1941 could have made an order for the payment of the sum made irrecoverable by the regulation. That, in the view I take, would not assist counsel in his argument, because, whatever the powers of the county court judge may have been under that Act, it is plain that the position of the creditor and his rights were less than those under s. 2 of the Act of 1944. Broadly speaking, under s. 3 of the Act of 1941 he is given a *locus standi*. He is put in a position in which he may be taken into account in the liability adjustment order, or he may not. It is discretionary, but under s. 2 of the Act of 1944 he may make an application, and on that application the court has to determine how the debt is to be paid. It is in respect of those rights, the rights under s. 2, which are plainly different from and greater than the rights under s. 3 of the Act of 1941, that we have to consider when the statute of limitation began to run. For the reasons which I have given, it seems to me it cannot have begun to run until the time when these rights themselves were able to be exercised, namely, in October, 1944. I do not wish to add anything with regard to what happens as a result of that because that has been fully stated by the Master of the Rolls. For these reasons, I think this appeal fails.

**JENKINS, L.J.:** I agree. It seems to me that reg. 4 (1) (a) of the Defence (Evacuated Areas) Regulations, 1940, involves, by necessary implication, the result that, during the period for which the rent is made irrecoverable, the Limitation Act, 1939, s. 17, has no operation. I agree with the Master of the Rolls that the necessity for that implication is best brought out by reading the section as if a specific period exceeding six years had been prescribed as the evacuation period. For example, one might do that by taking in the present

A case the fullest extent of the evacuation period, namely, the period from Sept. 12, 1940, the date of the declaration, to Mar. 31, 1947, the date when the area ceased to be an evacuation area. Starting with a suspension during the evacuation period of the operation of s. 17 of the Act of 1939, I pass to consider whether there is anything in the Liabilities (War-Time Adjustment) Acts to remove that suspension. So far as the Act of 1941 is concerned, I entirely agree with the Master of the Rolls that there is nothing in it which would justify the conclusion that it had the effect of removing the suspension. Nothing in the remotest degree equivalent to the ordinary right of action is given to a creditor in the position of the landlord here.

B I do not think that the defendant can derive any substantial assistance from references to "provable debts." I do not think the reference in s. 3 (1) (ii) of the Act of 1941 to a debt which would be a provable debt carries the matter any further, for the use that is sought to be made of it by the defendant really begs the question. It is clear that the debt is to be considered a provable debt notwithstanding the Defence (Evacuated Areas) Regulations, 1940, but the question whether, being by the express terms of the Act of 1941 a provable debt notwithstanding the moratorium imposed by those regulations, it is taken out of the category of provable debts for the purposes of the Act of 1941, brings one back to the original question: Did the Defence (Evacuated Areas) Regulations have the effect of suspending the operation of the Limitation Act, 1939? Again, the reference in s. 21 (2) of the Act of 1941 to any enactment relating to the limitation of actions in relation to the effect of revoking a protection order cannot, I think, be regarded as indicating that time would otherwise continue to run as regards debts of the kind with which this case is concerned. It must be remembered that the Liabilities (War-Time Adjustment) Act, 1941, related to debts of all kinds and not merely to debts affected by the Defence (Evacuated Areas) Regulations. If, on the true construction of the Defence (Evacuated Areas) Regulations, the operation of the Limitation Act, 1939, was thereby suspended, it is plain that the reference to any enactment relating to the limitation of actions in s. 21 (2) of the Act of 1941 would be irrelevant so far as those debts were concerned.

E To the Liabilities (War-Time Adjustment) Act, 1944, somewhat different considerations apply. As the Master of the Rolls has pointed out, a creditor under that Act is given a different and much more effective remedy. I agree with him that there is considerable ground for holding that the introduction of the new remedy by s. 2 of the Act of 1944 may have made time under the Limitation Act, 1939, begin to run again, but I also prefer with him to express no concluded opinion on that matter, and to content myself with holding that, having regard to the suspension brought about by the Defence (Evacuated Areas) Regulations, 1940, of the running of time under the Limitation Act, 1939, and to the absence of anything in the Act of 1941 to affect such suspension, it is clear that time can at earliest only have begun to run again as from the date of the commencement of the Act of 1944. It being unnecessary for the decision of this case to express any concluded opinion on the question whether the suspension of the running of time did end on that date or continued until the cesser of the evacuation period on Mar. 31, 1947, I refrain from doing so. I agree that the appeal fails.

H *Appeal dismissed with costs save that the order of the county court judge that the defendant should pay the costs of the first action was struck out.*

Solicitors: *Kenneth Brown, Baker, Baker* (for the defendant); *A. J. Wright*, agent for *Lawson, Lewis & Bairstow*, Eastbourne (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

**GOLDSACK v. SHORE.**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.),  
January 18, 19, 1950.]

*Agriculture—Agricultural holding—Agreement to let land for interest less than tenancy from year to year—Whether agreement capable of taking effect as tenancy from year to year—Need for agreement to be enforceable at law—Jurisdiction of county court—Agricultural Holdings Act, 1948 (c. 63), s. 2 (1) (2).* **A**

The appellant applied to the county court for an order for possession of land owned by him and occupied by the respondent for grazing. It was alleged that "during the winter of 1948-49" the appellant "without valuable consideration orally granted to the respondent a tenancy at will or licence" to graze sheep, and that, such tenancy at will or licence having been duly terminated, the respondent had remained in occupation as a trespasser. The county court judge ruled that he had no jurisdiction to hear the matter because of the provisions of the Agricultural Holdings Act, 1948, s. 2, which, by sub-s. (1), makes certain provisions regarding the letting, under an "agreement" made on or after Mar. 1, 1948, of agricultural land for less than from year to year, and, by sub-s. (2), provides that any dispute as to the operation of sub-s. (1) in relation to any agreement shall be determined by arbitration under the Act. **B**

**HELD:** an "agreement" within the meaning of s. 2 (1) meant a contract enforceable at law, *i.e.*, a contract supported by valuable consideration flowing from the grantee to the grantor and capable of being enlarged into a tenancy from year to year; the county court had jurisdiction to determine whether or not a transaction was within s. 2 (1); and the case would be remitted to the county court for further proceeding. **C**

[FOR THE AGRICULTURAL HOLDINGS ACT, 1948, see HALSBURY'S STATUTES, Second Edn., 1948 STATUTES, p. 23.] **D**

**APPEAL** by the plaintiff from an order of His Honour JUDGE ERNEST EVANS, K.C., sitting at Holywell County Court, dated Oct. 13, 1949, holding that, in consequence of the provisions of s. 2 (2) of the Agricultural Holdings Act, 1948, the county court had no jurisdiction to hear an action arising out of an agreement for letting agricultural land for less than year to year. The Court of Appeal allowed the appeal and remitted the case for hearing and determination. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R. **E**

*Sutton, K.C., W. Russell Lawrence and H. Emlyn Jones for the plaintiff.  
J. Edward Jones for the defendant.* **F**

**SIR RAYMOND EVERSLED, M.R.:** This appeal raises a question of jurisdiction under the Agricultural Holdings Act, 1948, s. 2. The action was started in the Mold County Court by the plaintiff, Mr. Goldsack, who claimed possession of certain land called Black Mountain or Castell Mountain. According to the particulars of claim the plaintiff (admittedly the owner of the land) alleged that "during the winter of 1948-49" he "without valuable consideration orally granted to the defendant a tenancy at will or licence to occupy the said land by having sheep thereon." It is pleaded that the tenancy at will or licence was duly determined and that thereafter the defendant became a trespasser and still is. The defendant denied that the arrangement was of the character pleaded in the particulars of claim and set up that there was a contract of tenancy as understood by the law, or, alternatively, that there was an agreement of a nature which is now converted into a contract of tenancy from year to year by virtue of s. 2. The case was opened, and the plaintiff gave evidence. The point then arose whether the question of the applicability of the section to the transaction, whatever it was, was one which it was competent for the court **G**



to decide, or whether that question was one exclusively referred to arbitration by s. 2 (2) of the Act. The county court judge thought that the latter was the correct course, and he, therefore, stopped the case, regarding himself as bereft of jurisdiction to decide the preliminary question: Aye or no, was the transaction between the two parties within or without the ambit of s. 2 (1) ?

A It is against that decision that counsel for the plaintiff has appealed to this court. He has pointed out that it is not open to us—indeed, he does not ask us—to express any view as to what in truth the transaction was and what were its real characteristics, but it is plain from the pleading, that, if the plaintiff's evidence is accepted, the transaction was one granting some privilege to the defendant without any valuable consideration and was, in other words, a transaction incapable of being enforced in the courts by the defendant. It is plain from the discussion that another possible view may emerge, namely, that the privilege B was one (whether for consideration or not) limited to the period of the year known as "the winter." The county court judge in a brief judgment expressed his conclusion thus:

C "The word 'agreement' [in s. 2 (1)] bears its ordinary meaning. From what I have heard it would appear that the plaintiff at least agreed to grant defendant a licence."

That is one of the situations mentioned in s. 2 (1) and, therefore, he said he had no jurisdiction to try the issue.

Section 2 of the Act provides:

D "(1) Subject to the provisions of this section, where under an agreement made on or after Mar. 1, 1948, any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for use as agricultural land, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the Minister before the agreement E was entered into, the agreement shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year: Provided that this subsection shall not have effect in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some F specified period of the year, or to an agreement for the letting of land, or the granting of a licence to occupy land, by a person whose interest in the land is less than a tenancy from year to year and has not by virtue of this section taken effect as such a tenancy. (2) Any dispute arising as to the operation of the foregoing subsection in relation to any agreement shall be determined by arbitration under this Act."

G It is plain from what I have read that the county court judge thought that the word "agreement" was used in the loose, popular sense as meaning the assent of two minds to a certain transaction taking effect and was not an agreement in the sense of a contract as understood by and known to the law. In my judgment, the judge was in error in that respect. I accept the submission of counsel for the plaintiff that the jurisdiction of the King's courts must not H be taken to be excluded unless there is clear language in the statute which is alleged to have that effect. Illustrations were given during the course of the argument of results that might arise if the courts were wholly debarred from adjudicating in respect of a transaction of this character. In such a case the party whose land was affected might be left wholly without any remedy. In any event, on the terms of the proviso the sub-section is not to have effect in the case of the letting of land or the granting of a licence of land for some specified period of time. If the section does not affect a transaction, then it

must, in my judgment, follow that the provision for reference to arbitration as to the operation of the section thereon can have no effect. The arbitrator would have no jurisdiction. It is plain that, if the transaction is one which by its terms is excluded from the Act, the courts have jurisdiction to deal with any consequences arising out of the transaction which call for the invocation of the powers of the court. Equally, to my mind, the court must have jurisdiction to decide, aye or no, whether a transaction is or is not within the proviso—that is, is, or is not, excluded from the section. A

If the nature of the transaction is proved to be merely an arrangement (I will use for the moment a colourless word) limited to “the winter of 1948-49,” and if the county court judge is satisfied that in using that formula the parties intended and meant some season of the year which is capable of reasonably clear ascertainment, it seems to me the transaction would be taken out of the section in any case as being for a “specified period of the year,” namely, the winter, which was the period specified in this case. That may not, of course, be the conclusion on the facts, and it is not in those terms that the plaintiff has pleaded the case. On his pleading he has put forward his case as being a transaction entered into *during* the winter, but being without valuable consideration—that is to say, a transaction granting to the defendant a privilege which imposed no obligations and was not a transaction that was enforceable at the suit of the defendant. B C

The main question which has been debated is whether such a transaction is within the terms of s. 2 (1). I have come to the conclusion that it is not. It is true that the early part of the sub-section uses the word “agreement,” and, secondly, refers to the grant to a person of a “licence to occupy land.” If the matter had depended on that alone it might be said that it covered the giving of a purely voluntary licence—something without any consideration whatever and *prima facie* revocable at will. It is to be observed that the sub-section goes on to say that the transaction which has been previously described must be such that, if the interest given were capable of being translated into a tenancy from year to year, then it shall take effect as such with the necessary modifications. It follows, therefore, that, if the sub-section applies to it, it must be capable of being so modified (and that must mean modified consistently with its own terms) as to become enlarged into a tenancy from year to year. Further, it follows, I think, from the sentence “unless the letting or grant was approved by the Minister before the agreement was entered into,” that the word “agreement” is being used in the more precise sense of a contract, that is, an enforceable contract, and it makes it plain that the grant of a licence is a grant comprehended in an “agreement” as later mentioned. D E F

Some corroboration for my view may be derived from the fact that the cross-heading (which it is at least legitimate for us to look at) immediately preceding the section is in these terms: “Provisions as to Contracts of Tenancy.” When all these matters are taken into account, and, particularly, when regard is had to the very remarkable results that might arise if this section is to be treated as applicable to a purely voluntary arrangement without any consideration, I conclude that “the agreement,” which it is postulated must, in every case to which the sub-section applies, exist, means a contract enforceable at law, that is to say, a contract supported by valuable consideration flowing to the grantor from the grantee. If that be right, then, if the judge, on further pursuing this matter, comes to the conclusion that, whatever was the arrangement, it was voluntary in the sense that no consideration flowed from the defendant to the plaintiff, the transaction will be outside the section, and no question can arise for the arbitrator to determine as to the operation of the section on it or the modification of the terms of the arrangement in order to enlarge it into a tenancy from year to year. Of course, all kinds of conclusions may emerge from a full hearing of the facts. The judge might reach the G H

conclusion that there was some consideration, though it was not a consideration in money or by way of rent. I think it would be impossible for this court to imagine every result that could be arrived at on the hearing of the facts of this case and endeavour to state in the form of some exegetical code what would be the effect of the section, or whether it would have any effect, on any possible view. Counsel for the plaintiff argued that this was a transaction entered into without consideration on the part of the defendant, that on that view the section does not apply, and that in any case it is competent for the courts to determine whether the transaction, being of the nature alleged, was or was not within the section.

The first contention of counsel for the plaintiff was that the privilege granted to the defendant was that of a mere non-exclusive licence—that is to say, that he was entitled to graze his sheep on the mountain, but not so as to have the exclusive right at any time so to do. If that be the right view and there was no consideration for it, *a fortiori* the matter would be outside the section. In reference to that I should mention the point taken by counsel for the defendant, namely, that the real test is whether the privilege or right, whatever it may be, gave to the person to whom it was granted a right to occupy—by which he means, I think, exclusively to occupy. In a sense that may beg the question, for, if the nature of the privilege given is a mere licence unsupported by consideration, it cannot strictly be stated that any “right” to occupy had been conferred. No doubt, until it was revoked the licensee could not be said to be a trespasser, but he could not claim and enforce in the courts any right to continue in occupation, still less in exclusive occupation, of the property. It might be that there could be a tenancy at will without consideration. In so far as there was a tenancy, that would appear to involve an exclusive right of occupation. The point of counsel for the defendant was that, assuming, against him, that the problem of determining whether the transaction was within or without s. 1 (1) is, by s. 1 (2), a matter not for the arbitrator but for the court (which I have already dealt with), then the test whether the transaction is within the sub-section depends on whether an exclusive right of occupation is given and not on the presence or absence of consideration. He supports that by the reference in the sub-section to the word “occupy” in the sentence “granted a licence to occupy land for use as agricultural land.” Reference has also been made to the obligations imposed on occupiers of agricultural land by s. 11 of the Agriculture Act, 1947. I think the right test for present purposes is whether there was or was not valuable consideration—in other words, whether the transaction was a contract as understood and known to the law, whether or not an exclusive right of occupation was given or purported to be given thereby.

If that view is right, then the judge was wrong in treating himself as barred from determining the question of the applicability of the Act as distinct from its operation and he should not have stopped the case when he did. He should have continued to hear the matter out, and then, according to his decision on the facts, he should have determined whether on the view I have stated the case is one to which sub-s. (1) applies. If it is, the results are not for him to adjudicate on. The problem is referred to arbitration. If, however, the transaction is not covered by the sub-section, the matter is one which he can decide and determine according to the ordinary law. I am not attempting to lay down for the guidance of the judge what the answer would be in every possible circumstance. I have confined myself to the two most probable solutions emerging either from the application of the proviso or the presence or absence of consideration, and I prefer to leave the matter there. It may be that other problems may arise. It is the judge who must decide, and it is within his jurisdiction to decide, whether the case is within the Act or not. If he comes to a conclusion to which one of the parties objects, it would be open to that party to come to this court again. For the reasons that I have stated, I think



the judge should not have stopped the case, and that it should be referred back again that he may pursue the inquiry.

**SOMERVELL, L.J.:** I agree.

**JENKINS, L.J.:** I also agree.

*Case referred back to county court. Appellant to have costs of appeal. Costs of first hearing to be in discretion of county court judge at second hearing.*

Solicitors: *Pritchard, Englefield & Co.*, agents for *Mason & Moore Dutton*, Chester (for the plaintiff); *Lovell, Son & Pitfield*, agents for *Walker Smith & Way*, Mold (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## J. LYONS & CO., LTD. v. SECRETARY OF STATE FOR HOME AFFAIRS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.), January 18, 23, 1950.]

*Requisition—Compensation—Damage to land—Work done on land—Air-raid shelter erected during possession by Crown—Shelter removed after possession yielded up—Period between return of possession and restoration to original condition—Compensation (Defence) Act, 1939 (c. 75), s. 3 (2)—Requisitioned Land and War Works Act, 1948 (c. 17), s. 11 (2).*

By s. 11 (2) of the Requisitioned Land and War Works Act, 1948: "Nothing in s. 3 of the [Compensation (Defence) Act, 1939] (which provides for compensation in respect of the doing of work on land) shall apply, or be deemed ever to have applied, to damage to land occurring while possession of the land is retained."

On Dec. 14, 1942, the Crown took possession of certain basement premises, the property of the claimants, and converted them into an air-raid shelter. On July 26, 1945, the Crown returned possession of the premises to the claimants. The restoration of the basement to its original condition was then carried out by the local authority on behalf of the Crown, this work being completed on May 28, 1946. The claimants claimed compensation under s. 3 (2) of the Compensation (Defence) Act, 1939, for the period from July 26, 1945, to May 28, 1946.

**HELD:** the words "damage to land" in s. 11 (2) of the Act of 1948 included physical damage ascribable to the doing of work on the land, and, as that damage occurred in the present case during a period while possession was retained by the Crown, no compensation was payable even although the effects of the damage persisted after possession had been yielded up.

[FOR THE COMPENSATION (DEFENCE) ACT, 1939, s. 3 (2), and THE REQUISITIONED LAND AND WAR WORKS ACT, 1948, s. 11 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 993, 1117.]

CASE STATED by the General Claims Tribunal under s. 7 of the Compensation (Defence) Act, 1939, for the opinion of the High Court whether the claimants, who were the owners of premises on which works were carried out during requisitioning by the Crown, were entitled to compensation under s. 3 (2) of that Act for the period from the date when possession of the premises was

returned to the claimants to the date when the premises had been restored to their previous condition by the Crown. The Divisional Court held that no compensation was payable during this period. The facts appear in the judgment of the court delivered by LYNSEY, J.

*Salmon, K.C., and J. P. Ashworth for the claimants.*

*H. L. Parker for the Crown.*

A

*Cur. adv. vult.*

Jan. 23. LYNSEY, J., read the following judgment of the court. This is a Special Case for the opinion of the court stated by the General Claims Tribunal under s. 7 of the Compensation (Defence) Act, 1939. The claimants for compensation under the Act are J. Lyons & Co., Ltd., who at all material times were the owners of a basement known as 538/540 Oxford Street, London. On Dec. 14, 1942, possession of these premises was taken on behalf of His Majesty under the powers conferred by reg. 51 (1) of the Defence (General) Regulations, 1939. About the end of 1942 or the beginning of 1943, while possession was still retained on behalf of His Majesty, brick walls were constructed and other works were done on behalf of His Majesty in the said basement in order to adapt the same for use as an air-raid shelter. Possession was yielded up to the claimants on July 26, 1945, with the brick walls and other works in the said basement still in being. On Jan. 3, 1946, the St. Marylebone Borough Council on behalf of His Majesty and by agreement with the claimants entered on the said basement in order to remove as far as practicable the walls and works and to restore the basement to the condition in which it was before possession was taken in 1942. The removal of these walls and works was completed by May 28, 1946.

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The question submitted for the opinion of the court is whether, on the facts stated, the claimants are entitled to compensation under s. 3 (2) of the Compensation (Defence) Act, 1939, during the period from the date when possession of the premises was yielded up to the claimants to the date when the premises were restored so far as practicable to the condition in which they would be but for the doing of the work, that is to say, for the period from July 26, 1945, to May 28, 1946. The answer to this question depends on what is the proper construction to be given to ss. 1, 2 and s. 3 of the Compensation (Defence) Act, 1939, as amended by s. 11 (2) of the Requisitioned Land and War Works Act, 1948.

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Section 1 of the Act of 1939 provides:

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“(1) Where, in the exercise of emergency powers during the period [of the emergency] (a) possession of any land has been taken on behalf of His Majesty, or (b) any property other than land has been requisitioned or acquired on behalf of His Majesty, or (c) any work has been done on any land on behalf of His Majesty . . . then, subject to the following provisions of this Act, compensation assessed in accordance with those provisions shall be paid, out of moneys provided by Parliament, in respect of the taking possession of the land, the requisition or acquisition of the property, or the doing of the work, as the case may be.”

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This section not only gives the subject a right to compensation for interference by the Crown with his proprietary rights, but also fixes that compensation and limits the right to compensation which he might have had at common law. However great the hardship a subject may suffer as a result of the exercise by the Crown of these emergency powers, the subject has no redress apart from the compensation given to him by the Compensation (Defence) Act, 1939. Section 2 (1) of the Act of 1939 purports to fix the compensation payable under the Act in respect of the taking possession of any land. Section 3 (1) of the Act purports to fix the compensation payable in respect of “the doing of any work on any land” and ss. 4, 5 and 6 purport to fix the

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compensation to be paid in respect of any property other than land which has been requisitioned or acquired on behalf of His Majesty. Section 2 (1) reads:

"The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums . . ."

Then follow four heads, the first of which (a) provides for a payment of a sum equal to a reasonable rent payable under a lease on the terms set out. The second head, (b), provides for a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession is retained, unless made good during that period, fair wear and tear and damage caused by war operations excepted. The third head, (c), deals with agricultural land, which does not arise in this case, and the fourth head, (d), a sum equal to the amount of any expenses reasonably incurred for compliance with directions given on behalf of His Majesty in connection with the taking of possession of the land. If this section were read alone it would seem clear that by its terms it fixed the total of the compensation payable in respect of the taking possession of any land. Section 3 provides for payment of compensation in respect of the doing of any work on any land and fixes that compensation as being a sum calculated by reference to the diminution of the annual value of the land ascribable to the doing of the work. It is to be paid in instalments quarterly in arrear to the person for the time being entitled to occupy the land. This compensation must be paid until either the land is restored, so far as practicable, to the condition in which it would be but for the doing of the work or until a notice is served on the person for the time being entitled to occupy the land of an intention to discharge the liability by payment not earlier than a specified date of a lump sum equal to the amount of the depreciation in the value of any estate or interest which any person has in the land caused by the doing of the work. This is the effect of sub-ss. (2), (3) and (4) of s. 3. It will be noticed that the compensation is to be paid to "the person who for the time being is entitled to occupy the land" and notice is to be given to "the person for the time being entitled to occupy the land." If possession of the land had been taken by or on behalf of the Crown, there would be no person other than the Crown or its representatives who would be "for the time being entitled to occupy the land" and this fact suggests that s. 3 is dealing with the doing of work on land of which possession has not been taken by the Crown.

The real difficulty in construing s. 3 arises from the provisions of sub-s. (8) of that section. This sub-section provides:

"No compensation under this section shall, in relation to any land, be payable in respect of any period for which possession of that land is taken on behalf of His Majesty in the exercise of emergency powers."

It is said that the sub-section leads to the inference that where works have been done on any land, compensation under s. 3 is payable during any period during which possession of the land is not retained by or on behalf of the Crown even although the works have been done while the land was in the possession of the Crown. On the other hand, it is said that this sub-section is only intended to apply when work has been done on land which was not in the possession of the Crown, but possession of which had subsequently been taken on behalf of the Crown, and that the real object of sub-s. 8 was to prevent double compensation being payable during the period of possession. It seemed to us that the sub-section was ambiguous and open to either interpretation as it stood in the Act of 1939. The question was, however, re-considered by the legislature in 1948. The Requisitioned Land and War Works Act, 1948, s. 11 (2), provides:

"Nothing in s. 3 of the Act of 1939 (which provides for compensation in respect of the doing of work on land) shall apply, or be deemed ever



to have applied, to damage to land occurring while possession of the land is retained."

Unless it can be said that the "doing of work on land" is something different from "damage to land" this sub-section would seem to make it quite clear that no compensation is payable under s. 3 for works done during the period when possession was retained by or on behalf of the Crown. Having regard to the wide description of "doing work" in s. 17 (2) of the Act of 1939 and the fact that s. 3 only gives compensation where the annual value is diminished by the doing of the work, we are satisfied that "damage to the land" in s. 11 (2) of the Act of 1948 includes damage ascribable to the doing of work on the land. Further, in our view, "damage to land" means physical damage to the land or houses or buildings thereon, and, if such damage occurs during a period while possession is retained, s. 3 of the Act of 1939 gives no compensation for such damage even although its effects may persist after possession has been yielded up.

Our answer, therefore, to the question submitted to us is that the claimants are not entitled to compensation under s. 3 (2) of the Act of 1939 in respect of the diminution of the annual value of any part of their premises ascribable to the doing of work during the period from the date when possession of the basement was yielded up to the date when the premises were restored as far as practicable to the condition in which they would be but for the doing of the work.

*Order accordingly.*

Solicitors: *Bartlett & Gluckstein* (for the claimants); *Treasury Solicitor* (for the Crown).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

## Re HENDERSON. HENDERSON v. SECRETARY OF STATE FOR HOME AFFAIRS AND ANOTHER.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), July 28, November 7, 1949.]

*Extradition—Discharge of fugitive—Power of court to make order—Circumstances influencing exercise of power—"Unjust or oppressive or too severe a punishment to return the fugitive"—Fugitive Offenders Act, 1881 (c. 69), s. 10.*

By the Fugitive Offenders Act, 1881, s. 10: "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

In 1944, while serving with the Indian Army, the applicant was charged with cheating and dishonestly inducing delivery of property, contrary to the Indian Penal Code, 1860, s. 420, the allegation being that he was involved in a conspiracy which had defrauded the government of large sums of money. The investigations were still proceeding when the applicant was repatriated to England for demobilisation in February, 1948. On

his failure to return to India for the trial, a warrant was issued in India for his arrest and was indorsed, under the Fugitive Offenders Act, 1881, s. 3, by the metropolitan magistrate at Bow Street, and on June 22, 1949, the applicant was committed to prison, under s. 5 of the Act, to await his return to India. On an application to the Court of Appeal for relief under s. 10 of the Act, the applicant contended *inter alia* (a) that it would not be possible for him to defend himself properly in India owing to the difficulties caused by the delay, and (b) that a fair trial in India was no longer possible as the constitution of the special tribunal which had been set up to try the case had entirely changed since it was first set up and the present members would not see and hear the witnesses for the prosecution themselves, but would merely read their evidence. He submitted that, in these circumstances, it would be too severe a punishment, within the meaning of s. 10, to return him, and that the court had a discretion to discharge him from custody.

HELD: (i) assuming that the correct interpretation of s. 10 of the Act of 1881 was that the court had a discretion to make an order under the section in any case where "having regard to the distance, the facilities for communication, and to all the circumstances of the case, it appears to the court that it would be oppressive, or too severe a punishment, to return the fugitive ..." (as was submitted by the Attorney-General in *R. v. Brixton Prison (Governor), Ex parte Waite* (1921) (THE TIMES, Feb. 22) and accepted by the Divisional Court for the purpose of that case), the court would make an order for the release of a fugitive only (a) where it appeared that the contemplated proceedings, although, perhaps, lawful by the law of the country concerned, would be conducted in a way contrary to natural justice, or (b) if it appeared that the charges were trivial and that the punishment entailed in being returned was out of all proportion to the gravity of the alleged offence.

(ii) the difficulties which the applicant would experience in presenting his defence as a result of the length of time that had elapsed since the proceedings started were matters for the consideration of the tribunal dealing with the case and were factors which would be considered by the tribunal of any civilised country when dealing with a criminal matter.

(iii) the facts that the constitution of the tribunal had changed since the trial started and that the rules of procedure were different from those in England were not a ground for assuming that the applicant would not obtain justice.

(iv) the charges against the applicant were serious ones, and it was impossible to say that he would be unduly punished by having to return to India for the trial or that the action of the government of India in seeking his extradition was, in the circumstances, oppressive, and, therefore, he had failed to make out a case for the intervention of the court under s. 10 of the Act of 1881.

[AS TO RETURN OF FUGITIVES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 544-551, paras. 1046-1062; and FOR CASES, see DIGEST, Vol. 24, pp. 890-893, Nos. 150-161.]

Case referred to:

(1) *R. v. Brixton Prison (Governor), Ex parte Waite*, (1921), THE TIMES, Feb. 22.

ORIGINAL MOTION for relief under the Fugitive Offenders Act, 1881, s. 10.

The applicant, who had resided in India since he was three years old, obtained a commission in the Indian Army, as an officer of the Royal Indian Engineers, in 1941 and saw service in Burma. Early in 1944 he was arrested in connection with a series of serious frauds which were alleged to have been committed by

contractors and others in connection with repair and constructional work during the retreat from Burma, but he was later released on bail. The alleged frauds and conspiracies were on such an extensive scale that it became necessary for a special tribunal to be constituted under Indian Ordinances to deal with them. The evidence and matters that had to be considered were extremely complex, hundreds of witnesses had to be examined, and the examination of the witnesses for the prosecution and some of the witnesses for the defendants continued from June, 1945, to May, 1947, the applicant, together with a number of other defendants, being charged with cheating and dishonestly inducing delivery of property, contrary to the Indian Penal Code, 1860, (Act 45 of 1860), s. 420. In the summer of 1947 the applicant and some of the other defendants entered into negotiations with the government of Burma with a view to compounding the proceedings, which would have been permissible under Indian law if the tribunal and the government of India consented. A tentative agreement was reached whereby the proceedings would be discontinued and the defendants would allow the prosecution to take their assets, which, as the alleged proceeds of the frauds, had been attached pending the proceedings. The compounding negotiations broke down, however, apparently owing to the fact that it was not practicable to secure the release of the attached moneys unless and until the defendants had either been prosecuted to conviction or acquitted. As a result of the division of India into the dominions of India and Pakistan and the communal riots which followed, and also owing to the death of one of the members of the tribunal and other changes in the constitution of the tribunal (which were provided for by the Ordinances under which the tribunal was set up), the progress of the inquiry was delayed. In the meanwhile the applicant was serving with the army in Lahore (which became part of Pakistan on the partition of India on Aug. 15, 1947), and in November, 1947, he was transferred to Karachi. Owing to some oversight by the British military authorities in Pakistan, who were aware of the fact that the applicant should not be released until the charges had been disposed of, he was returned to England for demobilisation in February, 1948, and had remained in England since then, having obtained civilian employment here. On Apr. 1, 1948, he was required to attend again before the tribunal in Simla and after his non-appearance his brother in India, who had gone surety for him, made some financial arrangements to enable him to return to India so as to appear before the tribunal, but the applicant did not avail himself of these arrangements. On Sept. 23, 1948, the special tribunal issued a warrant for his arrest and the warrant was indorsed under the Fugitive Offenders Act, 1881, s. 3, by the metropolitan magistrate, sitting at Bow Street, on Mar. 28, 1949. On June 22, 1949, after considering the material before him, the magistrate at Bow Street decided that a *prima facie* case had been made out against the applicant and committed him to prison, under s. 5 of the Act of 1881, to await his return to India. On July 26 (three days before the applicant was to be returned to India) an application on his behalf was made to the Court of Appeal for leave to serve short notice of a motion for relief under the Fugitive Offenders Act, 1881, s. 10. The application for leave to serve the motion was made *ex parte*, but notice of the intention to make it was given to the Home Secretary and the High Commissioner for India (the proposed respondents to the motion). The application was granted and the motion, asking that the applicant should be discharged from custody and not returned to India, was part heard by the Court of Appeal on July 28, 1949, but was adjourned over the Long Vacation to enable the parties to produce further information which the court desired to have. The Court of Appeal now held that the applicant had failed to make out a case under s. 10 of the Act of 1881, and dismissed the application.

*Edward Steel and Wallis-Jones* for the applicant.

*H. L. Parker* for the Home Secretary.

*MacKenna* and *D. A. McI. Kemp* for the High Commissioner for India.



**TUCKER, L.J.:** This is an application which is made to us under the original jurisdiction which we have in this matter under the Fugitive Offenders Act, 1881, s. 10; which provides:

"Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

The Act was passed to deal with the return of "fugitives," and s. 2 provides:

"Where a person accused of having committed an offence (to which this Part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive. A fugitive may be so apprehended under an indorsed warrant or a provisional warrant."

Thus, although the word "fugitive" is used, it applies, not merely to a person who has left one part of His Majesty's dominions for the express purpose of avoiding trial, but to any person who is accused of having committed an offence in one part and is found in another part of His Majesty's dominions. We have been referred to the Indian Independence Act, 1947, s. 1, s. 5 and s. 18, which make it clear that India is at the present time a part of His Majesty's dominions within the meaning of the Act of 1881.

The applicant, Mr. Henderson, was at one time serving in the army in India and is now in this country, having been demobilised from the army. In dealing with the application, counsel for the High Commissioner of India, who is one of the respondents, has taken the same attitude with regard to the proper interpretation of s. 10 of the Act of 1881 as was taken by the Attorney-General in *R. v. Governor of Brixton Prison, Ex parte Waite* (1), which was heard by the Divisional Court on Feb. 21, 1921. In that case the Attorney-General, dealing with the punctuation of s. 10, and the difficulties which might arise in regard to interpretation, having regard to the use of the words "or otherwise" in the section said:

"... upon reflection, one cannot help thinking that the words 'or otherwise' in the fourth line leave it to the discretion of the court to make the order in any case upon any ground where, having regard to the distance, and the facilities for communication, and to all the circumstances of the case, it appears to the court that it would be oppressive, or too severe a punishment, to return the fugitive immediately."

Counsel for the High Commissioner is quite content that the case should be dealt with on that basis, and that we should make an order for the release of the applicant if we were satisfied that in all the circumstances, having regard to the matters referred to, it would be oppressive or too severe a punishment to return him. In the opinion at which I have arrived, and accepting that as the basis for our decision in this case, it does not become necessary for me to express a final view as to whether or not that is the correct interpretation of the section, but, assuming that it is, and applying that test, I pass to the facts relating to this particular application.

[HIS LORDSHIP set out the facts, and continued:] It is clear from the facts that, whoever is to blame in regard to the applicant having been returned to

England, it is not the government of India who are asking for his extradition. They have done nothing other than that which was inevitable owing to the nature of the proceedings and the course of events in India, which has, in my view, unduly prolonged these proceedings. It is contended on behalf of the applicant that, by reason of the length of the proceedings, we ought to make the order. I think that the proceedings were of necessity lengthy, and I see nothing to indicate that any delay that has occurred could have been reasonably avoided by the government of India. The delay has, of course, been very much increased by the return of the applicant to this country. It is said by counsel for the applicant (and this, I think, is the part of the application which needs careful consideration) that, whoever is to blame for the delay, or assuming that no one is to blame for it, after the length of time that has elapsed the applicant cannot deal with the matters raised against him or adduce the witnesses to deal with it. We do not know nearly enough about the facts of the case to form any opinion as to the nature of the applicant's defence or the extent to which he will be prejudiced in the presentation of it by the delay which has taken place. These are all matters which can—and, no doubt, will—be considered by the tribunal of any civilised country which is dealing with a criminal matter. The length of time that has elapsed will, no doubt, be a relevant consideration for this tribunal to consider in weighing the evidence, but there is nothing in the material evidence which would, in my view, show that it is impossible for the applicant to obtain justice.

Counsel for the applicant then based his claim for relief on the fact that the constitution of the tribunal had entirely changed since it was first set up. In fact, the tribunal now has a different name and is called the East Punjab Special Tribunal. It has been constituted by special further legislation since August, 1947. It is said that all the original members are either dead or retired and some, or all, of the present members will have to deal with most or all of the evidence for the prosecution on paper, without having seen the witnesses, and that that is a very unsatisfactory state of affairs. I agree that it does seem that that is a matter which presents very serious difficulties, but the tribunal was set up under legislation by Act or Ordinance, which expressly provides that new members can be appointed to the tribunal in case of a vacancy during the progress of the case. It was, I suppose, thought to be inevitable that the delay might be such, or the circumstances might be such, that that would be necessary. Although a provision of that kind may appear strange to us, I do not think we could possibly say that, by reason of that special provision of the Act, it is impossible for a defendant to obtain justice before the tribunal. I certainly do not take that view.

I think that the kind of matters with regard to which this court would act would be where it appears that the contemplated proceedings, although, perhaps, lawful by the law of the country concerned, are really going to be conducted in a way contrary to natural justice or contrary to our ideas of it. A case of that kind has, in my view, certainly not been made out on the material laid before us. It is not sufficient to say: "That would not be the procedure in this court. That would appear to entail hardship." It is, of course, necessary for us to weigh up the nature of the charges when we are considering whether a man should be returned. After all this delay, with this long distance, if it appeared to us that the charges were trivial and that the punishment entailed in being returned was in the circumstances out of all proportion to the gravity of the offence (of which, for this purpose, it must be assumed that the applicant is guilty), this court would, no doubt, intervene. The charges against him, however, are very serious. They are numerous, they involve large sums of money, and I think it is quite impossible to say that the applicant would be unduly punished by having to go back to take his trial, nor do I think that it has been made out that the action of the government of India in seeking his extradition is, in all the circumstances,

oppressive. This is an unusual case, unusual chiefly on the ground of the inevitable delay that has taken place, and it is one which, I think, requires our careful investigation and consideration, but, having considered all the matters which have been laid before us, I have come to the conclusion that the applicant has not made out his case under s. 10 of the Act of 1881, and this application shall fail.

**SINGLETON, L.J.**, in concurring, said: I recognise that it is not pleasant for an officer to be extradited or to be sent back to India as a fugitive offender, but, unless the conditions specified in the early part of s. 10 of the Act of 1881 are complied with, this court has no right to interfere. If we were satisfied that those conditions were fulfilled, we could, of course, make an order. It is, however, impossible to say that the charges against the applicant are trivial or that there are, on the evidence, circumstances which ought to cause us to say that it would be "unjust or oppressive or too severe a punishment" to return him to India. I have listened anxiously to see if there was any ground on which this court could properly make an order under s. 10. I am satisfied that there is not, and it is for that reason that I agree that the application must be dismissed.

**JENKINS, L.J.**, in concurring, said: As regards the argument that the applicant will not get a fair trial, it seems to me that for the present purpose this court must assume that the trial will be properly conducted by the tribunal which was set up in India for the purposes of this inquiry in a fair and regular manner in accordance with its rules of procedure. It does not seem to me that it is material for the purpose of this application to see whether those rules of procedure are in all respects, according to our ideas, as satisfactory as our own. I agree that a case for the intervention of this court under s. 10 of the Act of 1881 is not made out, and, accordingly, I agree that the application should be dismissed.

*Application dismissed.*

Solicitors: *Mewburn, Walker & Cato* (for the applicant); *Treasury Solicitor* (for the Home Secretary); *Assistant Solicitor to the High Commissioner for India.*

[Reported by E. P. WALLIS-JONES, Esq., Barrister-at-Law.]

## BUTSER TURF AND TIMBER CO., LTD. v. PETERSFIELD RATING AUTHORITY AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Morris, JJ.), January 23, 24, 1950.]

*Rates—Agricultural land—"Nursery grounds"—Turf cutting—Rating and Valuation (Apportionment) Act, 1928 (c. 8), s. 2 (2)—Local Government Act, 1929 (c. 17), s. 67 (1).*

By s. 67 (1) of the Local Government Act, 1929: "No person shall . . . be liable to pay rates in respect of any agricultural land . . ." By s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928 "agricultural land" is expressed as including, *inter alia*, "nursery grounds."

By an agreement in writing dated Sept. 2, 1946, between the owners of a farm and the ratepayers, the ratepayers were entitled to remove for sale turf from certain areas of the farm. Before it was cut the turf was rolled, mown and treated with weed killer and artificial manures.

**HELD:** the areas used for turf cutting were not "nursery grounds" within the meaning of s. 2 (2) of the Act of 1928, and, therefore, the rate-



payers were not exempt from liability to pay rates under s. 67 (1) of the Act of 1929.

[FOR THE LOCAL GOVERNMENT ACT, 1929, s. 67 (1), see HALSBURY'S STATUTES, Vol. 10, p. 927; and FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 2 (2), see *ibid.*, Vol. 14, p. 714.]

A Case referred to:

(1) *James & Daniel Provan, Ltd. v. Croydon Corpn.*, (1938), 29 R. & I.T. 277.

CASE STATED by the Rating Appeals Committee of Southampton Quarter Sessions.

Quarter sessions dismissed an appeal by the ratepayers, Butser Turf and Timber Co., Ltd., from a decision of the second respondents, the Petersfield Assessment Committee, by which, on a proposal by the first respondents, Petersfield Rating Authority, the committee determined to amend the valuation list in respect of a hereditament described as "land used for turf cutting at Basing Home Farm," of which the ratepayers were occupiers. The farm was owned by the third respondents, G. & G. Curtis, Ltd., and, by an agreement in writing dated Sept. 2, 1946, between the ratepayers and the third respondents, it was agreed that the ratepayers should be entitled to enter on the farm and remove from parts thereof the turf therein. The ratepayers rolled and fertilised the ground to produce turf fit for cutting, and on their behalf it was contended that the hereditament was at all times agricultural land or that their operations made the hereditament "nursery grounds" within the meaning of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, and, therefore, exempt from rates by virtue of s. 67 (1) of the Local Government Act, 1929. The Divisional Court now held that the ratepayers' operations on the hereditament did not make it "nursery grounds" within the meaning of s. 2 (2) of the Act of 1928, but remitted the case to quarter sessions for them to define more exactly the hereditament in respect of which they held the ratepayers to be rateable.

E *Harold Williams, K.C.*, and *Squibb* for the ratepayers.

*Rowe, K.C.*, and *Ramsay Willis* for the rating authority and assessment committee.

*J. T. Molony* and *A. C. M. Kerr* for G. & G. Curtis, Ltd.

LORD GODDARD, C.J.: This is a Case stated by the Southampton Quarter Sessions which raises a question with regard to the rateability of certain land on which turf cutting operations have been in progress.

By an agreement between the ratepayers, the Butser Turf & Timber Co., Ltd., and the third respondents G. & G. Curtis, Ltd., who are farmers, the ratepayers have the right, for a period of six years from the date of the agreement, to cut turf for sale from land in the occupation of the third respondents to the extent of one hundred acres providing that the turf so cut is within an area coloured pink and blue on a plan attached to the agreement. Under the agreement the ratepayers have to cut a minimum of ten acres a year, and, therefore, it might be possible that during the six years of the agreement they would cut only sixty acres instead of the one hundred acres which they have a right to cut. From time to time the ratepayers put fencing round the land on which they were cutting, but at present the court is completely in the dark as to what is the hereditament the assessment of which quarter sessions have confirmed. Therefore, the Case must go back to be properly stated.

The point which has been raised is whether this land can be regarded as "nursery grounds" within the meaning of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, so that it is exempt from rating as agricultural land by virtue of s. 67 (1) of the Local Government Act, 1929. It appears that it is a pasture field which is rolled and fertilised with artificial fertilisers, and that the weeds are removed. When that operation has been carried on for a

certain length of time (which depends on whether the turf is to be sold as first class turf or as second class turf) the turf is cut and sold for golf links, lawns, and so forth. In our opinion, we cannot hold that this field is a nursery ground. It is old turf being put into good condition by fertilising and weeding, but it is in no sense a rearing or tending of young plants for the purpose of transplanting. In construing such a section as s. 2 (2), the court must consider what the ordinary person reading it would think was contained in the words "nursery grounds." In my view, nobody would consider that turf in a field which was being prepared so that its quality would be higher than it would be if it was cut without such preparation could be described as being turf in a nursery ground. The case which was to some extent relied on by the ratepayers, *James & Daniel Provan, Ltd. v. Croydon Corpn.* (1) is, in my opinion, quite different. There the ratepayers had prepared special beds of hard core, sand, ashes and clinkers, for taking low quality, immature, turf from Cumberland, and, by bedding it on to these foundations and tending it, they turned from rough, immature grass into good quality turf. On those facts the court held that quarter sessions were justified in holding that there was some evidence that the hereditament was a nursery ground. We do not find the same evidence here. In any case we think the question is largely a question of fact, and the court is satisfied that quarter sessions were justified in finding that this was not a nursery ground.

**BYRNE, J.:** I agree.

**MORRIS, J.:** I agree.

*Case remitted.*

Solicitors: *Gibson & Weldon*, agents for *Burley & Geach*, Petersfield (for the ratepayers); *Shield & Son*, agents for *Mackarness & Lunt*, Petersfield (for the rating authority and assessment committee); *Brash Wheeler & Co.*, agents for *Glanvilles*, Portsmouth (for the second respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## ZEIDMAN v. OWEN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Lynskey, J.), January 19, 1950.]

*Gaming—Pool betting—Football pools—Collector appointed by promoters—House used to receive coupons and stake money—Offence against statute—Betting and Lotteries Act, 1934 (c. 58), s. 3 (2).*

The promoters of a football pool appointed a collector to whose house persons took coupons and stakes relating to football pools.

**HELD:** football pool competitions were "pool betting transactions" within the meaning of the Betting and Lotteries Act, 1934, s. 3 (2), and, accordingly, the collector was guilty of using "premises . . . as a place where persons resorting thereto may effect . . . pool betting transactions" within the meaning of that sub-section.

*Dictum of LORD GREENE, M.R., in Elderton v. United Kingdom Totalisator Co., Ltd. ([1945] 2 All E.R. 626), dissented from.*

[As to BETTING HOUSES generally, see HALSBURY, Hailsham Edn., Vol. 15, pp. 510-519, paras. 917-923; and for THE BETTING AND LOTTERIES ACT, 1934, s. 3 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 785.]

Cases referred to:

- (1) *Elderton v. United Kingdom Totalisator Co., Ltd.*, [1945] 2 All E.R. 624; [1946] Ch. 57; 115 L.J.Ch. 81; 173 L.T. 384; 2nd Digest Supp.

- (2) *Stovell v. Jameson*, [1939] 4 All E.R. 76; [1940] 1 K.B. 92; 109 L.J.K.B. 259; 161 L.T. 355; 103 J.P. 369; Digest Supp.
- (3) *Thomson v. Clanmorris (Lord)*, [1900] 1 Ch. 718; 69 L.J.Ch. 337; 82 L.T. 277; 9 Digest 132, 703.
- (4) *Bretherton v. United Kingdom Totalisator Co., Ltd.*, [1945] 2 All E.R. 202; [1945] K.B. 555; 114 L.J.K.B. 517; 173 L.T. 126; 110 J.P. 45; 2nd Digest Supp.
- A (5) *A.-G. v. Luncheon & Sports Club, Ltd.*, [1929] A.C. 400; 98 L.J.K.B. 359; 141 L.T. 153; Digest Supp.

CASE STATED by London Quarter Sessions.

At a court of quarter sessions for the county of London on June 28, 1949, the appellant appealed against his conviction on May 31, 1949, by a court of summary jurisdiction sitting at Old Street magistrates' court on an information laid by the respondent, a police officer, charging the appellant with having, between Mar. 11 and Apr. 1, 1949, used premises at 4, Hobson's Cottages, Woodseer Street, London, E.1, as a place where persons resorting thereto might effect pool betting transactions, contrary to s. 3 (2) of the Betting and Lotteries Act, 1934. The appellant contended that, having regard to the words used by LORD GREENE, M.R., in *Elderton v. United Kingdom Totalisator Co., Ltd.* (1) football pool competitions were not pool betting transactions within the meaning of s. 3 (2) of the Act. The respondent argued that the words in question of LORD GREENE, M.R., were *obiter* and not necessary for the decision, and that the law was as laid down in *Stovell v. Jameson* (2). Quarter sessions dismissed the appellant's appeal with costs, and the Divisional Court now dismissed his appeal against that decision.

*Curtis-Bennett, K.C.*, and *G. Hardy* for the appellant.

*Melford Stevenson, K.C.*, and *Vernon Gattie* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeals committee of London Sessions which raises a question of some importance with regard to the construction of s. 3 of the Betting and Lotteries Act, 1934. The appellant had been appointed a collector by the promoters of certain football pools. People took to him the coupons which they had filled in and the stakes which they were "investing," if that be the right word, in these pools. As they physically resorted to the house where the appellant lived, paid the money to him there, and did not conduct the business by post, it is said that he committed an offence against s. 3 (2) of the Act which provides:

"Save as is permitted by the preceding sub-section, no person shall use any premises whether situate on a track or not, or cause or knowingly permit any such premises to be used, as a place where persons resorting there-to may effect pari-mutuel or pool betting transactions."

G In *Stovell v. Jameson* (2) this court decided, on facts which are indistinguishable from those in the present case, that an offence had been committed, but it is submitted that in *Elderton v. United Kingdom Totalisator Co., Ltd.* (1), which was decided after *Stovell v. Jameson* (2), LORD GREENE, M.R., clearly indicated that, in his opinion, football pools were not pool betting transactions within the meaning of the Act. The Court of Appeal in that case was considering s. 26 of the Act, and not s. 3, so LORD GREENE's observations were *obiter* and it is not suggested that they are binding on this court, though, naturally, we should pay great attention to what the learned Master of the Rolls said and, if we thought that the *dicta*, though *obiter*, expressed the true construction of the Act, we should feel we ought to follow them. Where I venture to differ from LORD GREENE is that he has construed the section as though the words "pari-mutuel or pool betting transactions" referred to one and the same thing. He was construing the words "pool betting transaction" as a translation of the words "pari-



mutuel." I prefer to read the section in this way: "... as a place where persons resorting thereto may effect pari-mutuel transactions or as a place where persons resorting thereto may effect pool betting transactions." We have then to consider whether football pools are pool betting transactions within the meaning of that section.

When the Act of 1934 was passed, football pools had become well established. They were the only form of pool betting transaction then known, except in so far as the totalisator was being used on racecourses, and there are separate provisions in the Act dealing with them. In construing an Act of this sort, I bear in mind the words of LINDLEY, M.R., in *Thomson v. Clanmorris (Lord)* (3). That case arose under the Directors' Liability Act, 1890, and this is what he said ([1900] 1 Ch. 725):

"In construing s. 3 of the Act of 1833, as indeed in construing any other statutory enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided."

Bearing those words in mind, I cannot resist the conclusion that Parliament, in using the expression "pool betting transactions," had in mind this form of transaction, which at that time was just becoming widespread.

It is true that other sections in the Act deal expressly with what are called prize competitions. It is also true that in *Bretherton v. United Kingdom Totalisator Co., Ltd.* (4) this court held that football pools were prize competitions within the meaning of s. 26 (1) of the Act, but it does not seem to me that because they are prize competitions so as to be caught by the words of s. 26, they may not also be betting transactions. Section 26 (1) of the Act prohibits the conduct of

"... in or through any newspaper, or in connection with any trade or business or the sale of any article to the public—(a) any competition in which prizes are offered for forecasts of the result either of a future event, or of a past event the result of which is not yet ascertained or not yet generally known... Provided that nothing in this sub-section with respect to the conducting of competitions in connection with a trade or business shall apply in relation to pari-mutuel or pool betting operations carried on by a person whose only trade or business is that of a bookmaker as defined in Part I of this Act."

That seems to recognise that a thing may be a pool betting transaction although at the same time it is a competition, otherwise it would be very difficult to see that the proviso had any meaning.

The operation of football pools is well known and I do not think I need describe them in any detail. I think the true view of them is that the entrants to the competition are betting one against the other. They are, no doubt, competing for the pool, but they are also staking a sum of money, not actually on the result of a particular football match or matches, but on the chance that their forecast will be more accurate than the forecasts of the other entrants to the pool.

In *A.-G. v. Luncheon and Sports Club* (5) where the question was whether a company which owned and carried on a club and there maintained and operated a totalisator machine was a bookmaker with whom the members of the club made bets, the House of Lords held that the club was not a bookmaker. LORD BUCKMASTER and LORD SUMNER in their speeches both indicated that, in their opinion, in totalisator betting there was betting by the members one with another. So, in these football pool competitions, I think, there is a betting by the entrants one with another. They are not betting with the promoter. He merely organises things and enables the persons to bet one with another, but the fact that that is a competition does not, in my opinion, prevent its also being a pool betting transaction,

LYNSKEY, J., calls my attention to the definition of bookmaker in s. 20 of the Act of 1934:

A "... 'bookmaker' means any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets or conducting pari-mutuel or pool betting operations, or who in any manner holds himself out, or permits himself to be held out in any manner, as a person who receives or negotiates bets or conducts such operations, and 'bookmaking' shall be construed accordingly; so, however, that a person shall not be deemed to be a bookmaker by reason only of the fact that he operates, or is employed in operating a totalisator, and the operating of a totalisator shall be deemed not to be bookmaking."

B That again, I think, shows that pool betting and totalisator betting are different things. For these reasons I think the appeals committee came to a right conclusion, and this appeal fails.

C **LYNSKEY, J.:** I agree with the judgment just delivered by my Lord. I only desire, in view of the fact that LORD GREENE, M.R., took a different view of the construction of this Act, to add that, in my view, ss. 3 and 26, when they use the phrase "pari-mutuel" or "pool betting transaction" are referring to two different types of transaction. The pari-mutuel transaction is a well known transaction, and for the purposes of this Act, apparently, includes the use of a totalisator. By s. 20 the totalisator means

D "... the contrivance for betting known as the totalisator or pari-mutuel, or any other machine or instrument of betting of a like nature whether mechanically operated or not."

E By 1934 pool betting transactions were well known. I asked counsel for the appellant in the course of the argument if he could suggest anything else to which those words referred if they did not refer to football pool betting or similar types of betting, and he could not suggest any other type of transaction of a general nature to which the Act was likely to be referable. In those circumstances, I am of opinion that in 1934 Parliament was referring to such transactions as are generally made through the medium of football pools and their promoters. That seems to me to be confirmed by the definition of a bookmaker to which my Lord has already made reference.

F **LORD GREENE, M.R.,** took the view that "pool betting transaction" was simply an explanation in English of the French phrase "pari-mutuel." With every respect to LORD GREENE, I am afraid I am unable to accept that. My view of this matter is borne out to some degree by the terms of the Act itself and by Parliament's use of the same phrase in later legislation. By the Finance (No. 2) Act, 1947, s. 6 (1), a duty was imposed on pool betting. The sub-section provides:

G "There shall be charged on all bets made by way of pool betting, other than bets made by means of a totalisator set up on an approved horse racecourse by or under the authority of the Racecourse Betting Control Board, a duty of excise, to be known as the pool betting duty, equal to ten per cent. of the amount of the stake money paid."

H By s. 6 (5) it is provided:

"Bets shall be deemed for the purposes of this section and ... sched. V [to the Act] to be made by way of pool betting whenever a number of persons make bets on terms that the winnings of such of those persons as are winners shall be, or be a share of, or be determined by reference to, the stake money paid or agreed to be paid by those persons, whether the bets are made by means of a totalisator, or by filling up and returning coupons or other printed or written forms, or otherwise howsoever."

That definition would obviously include the transactions which were carried on by the promoters of the football pools with which we are concerned in this case. The matter was also dealt with in the Finance Act, 1948, s. 14, where the tax on pool betting was increased from ten per cent. to twenty per cent. It was provided by sub-s. (2):

"Subject to the provisions of this section, bets shall be deemed for the purposes of [s. 6 of and sched. V of the Act of 1947] to be made by way of pool betting whenever a number of persons make bets on terms that the winnings of such of those persons as are winners shall be, or shall include, an amount (not determined by reference to the stake-money paid or agreed to be paid by those persons) which is divisible in any proportions among such of those persons as are winners. Nothing in this sub-section shall be construed as restricting the definition of pool betting contained in sub-s. (5) of the said s. 6 as originally enacted."

It may be true to say that those Acts were both passed after the opinion expressed by LORD GREENE, M.R., in *Elderton v. United Kingdom Totalisator Co., Ltd.* (1), and it may be that that is why they were passed. In my view, if those words were put in for that reason, they were put in to make clear what the term which Parliament had already used in 1934 meant. That confirms me in the view that "pool betting" as used in the Act of 1934 was intended by the legislature to refer to transactions of the same nature as that of those which we are considering in this case. I agree with my Lord that this appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the appellant); *Solicitor for the Metropolitan Police* (for the respondent).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law.*]

## BRYAN v. FORROW.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Morris, JJ.), January 24, 1950.]

*Street Traffic—Driving uninsured motor vehicle—Insurance covering the "proposer or his paid driver"—Car driven by paid driver not in general employment of proposer—Road Traffic Act, 1930 (c. 43), s. 35 (1).*

The respondent, the owner of a motor lorry, was insured in relation to the user thereof by a cover note which specified "the above named proposer or his paid driver" under the heading: "Person or persons allowed to drive." On the day in question the respondent, being unable to drive the lorry owing to ill health, agreed with one of his customers, for whom he was carrying certain goods, that the lorry should be driven by a driver employed and paid by the customer and that the driver's wage for the time so occupied should be reimbursed by the respondent to the customer. On a charge against the respondent under s. 35 (1) of the Road Traffic Act, 1930, of permitting the lorry to be on the road without there being in force in relation to the user of the vehicle a policy of insurance in respect of third-party risks,

HELD: on the true construction of the cover note "his paid driver" meant a driver who was driving for the proposer and who was paid as a driver, although not necessarily paid by, or in the general employment of, the proposer, and, therefore, the respondent was covered against third-party risks and was not guilty of the offence charged.



[FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Vol. 23, p. 636.]

CASE STATED by Essex Quarter Sessions.

A At a court of summary jurisdiction, sitting at Witham, the respondent was convicted on an information preferred by the appellant that he did permit a certain motor vehicle to be on the road without there being in force in relation to the user of the said motor vehicle such a policy of insurance in respect of third-party risks as complied with the requirements of the Road Traffic Act, 1930. Quarter sessions allowed an appeal by the respondent, and the appellant appealed to the High Court.

B At the hearing before quarter sessions it was proved or admitted that the respondent was the owner of a motor lorry and was carrying on business as a haulage contractor; that he contracted to transport certain goods for one Platt; that the respondent, being unwell and unable to drive his lorry, agreed with Platt that his (the respondent's) lorry should be driven by one Norton (who was in the regular employment of Platt as a lorry driver); and that, on the final statement of account between the parties, the wages of Norton and the price of petrol purchased by Norton should be credited to Platt by the respondent. The only policy of insurance in operation was comprised in a cover note covering the respondent in relation to the user of the lorry while it was driven by the respondent or "his paid driver." The Divisional Court now dismissed the appeal.

*T. F. Southall* for the appellant.

D *Alwyn Bolton* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeals committee of Essex Quarter Sessions, who heard an appeal by William Alfred Bryan, the respondent to the present appeal, against a conviction by justices of Witham who found him guilty of using a certain motor vehicle when there was not in force in relation to the user of the vehicle a policy of insurance in respect of third-party risks.

E The respondent had undertaken to transport certain goods, the property of a Mr. Platt. As a rule the respondent drove his lorry himself, but he was unable to drive on the day in question owing to ill-health. Accordingly, he arranged with Mr. Platt that one Norton, a driver in the employment of Mr. Platt, should drive, and that he (the respondent) would reimburse to Mr. Platt the wage which he (Platt) would pay to the driver for the time so occupied. While Norton was driving, the lorry was stopped and the police took proceedings. The persons allowed to drive under the policy of insurance held by the respondent were "the above-named proposer" (i.e., the respondent), "or his paid driver," and it was said that, as Norton remained the general servant of Platt, he was not the respondent's paid driver. At first I thought that was a good submission because the appellant did not pay Norton. The person who paid Norton, to whom alone Norton could look for his wages, was Platt, but when one comes to look at the policy I do not think that the construction advanced by the appellant is the true construction so far as the liability of the insurance company is concerned, and, if the insurance company would be liable under the policy, then no offence has been committed. The policy provides that the persons who are allowed to drive may be one of three classes :

H " (a) the above-named proposer only ; (b) the above-named proposer or his paid driver ; (c) the above-named proposer or his paid employee or any friend or relative of the proposer driving with his unremunerated permission provided such person holds a licence to drive such motor vehicle or has held and is not disqualified by order of a court of law for holding or obtaining such licence."

Apparently, if a friend were remunerated he would become a paid driver. When one considers the whole of that portion of the cover note, one sees that the contrast is between the professional driver and the non-professional driver—the paid driver and the paid employee. The paid employee must not drive the vehicle. It must be a paid driver, and the words “paid driver” are capable of two constructions. They can either mean “the above-named proposer and the driver paid by him,” or they can mean “the above-named proposer and a driver driving for him who is a paid driver.” In my view, quarter sessions were justified in holding that the latter construction was right, and on this document, I think, the insurance company would have been liable if there had been an accident while Norton was driving, because he was a paid driver and was driving for the proposer on that day. Therefore, I think the respondent was covered by the policy and quarter sessions came to a correct decision in point of law, and this appeal must be dismissed.

**BYRNE, J.:** I agree.

**MORRIS, J.:** I agree.

*Appeal dismissed with costs.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Prosecuting Solicitor, Chelmsford (for the appellant); *Lewis Lloyd & Co.* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

## JONAS v. ROSENBERG.

[COURT OF APPEAL (Somervell and Jenkins, L.JJ., and Romer, J.), January 12, 26, 1950.]

*Rent Restriction—Application of Rent Control Act—Retrospective effect—Proceedings for possession commenced by landlord and case heard before coming into operation of Act—Judgment reserved—No order made until after Act in operation—“Anything done”—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 10.*

*Statute—Retrospective effect—Statute coming into force after hearing of action, but before judgment—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 10.*

The Landlord and Tenant (Rent Control) Act, 1949, s. 9, provides, *inter alia*, that where the tenant of any premises, being a house or part of a house, has sublet a part of the premises, then as against his landlord no part of the premises shall be treated as not being a dwelling-house to which the Rent Restrictions Acts, 1920 to 1939, apply by reason only that the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons. Section 10 provides: “The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period.”

On Feb. 21, 1949, the landlord issued a plaint claiming possession of a dwelling-house to which the Rent Restrictions Acts applied. By an amendment made on May 6, 1949, the landlord alleged that the house was no longer a separate dwelling-house because the tenant shared the kitchen with sub-tenants to whom part of the premises were let. On May 31, 1949, the hearing was concluded and judgment was reserved. On June 2, 1949, the Act of 1949, came into operation. On July 7, 1949, following a letter written by counsel for the tenant to the registrar referring to the possible

application of the Act of 1949, the parties appeared before the county court judge, when counsel for the landlord successfully resisted the suggestion that there should be further argument. On Aug. 4, 1949, the county court judge gave judgment for the landlord on the ground that the tenant shared the kitchen and so was not protected. On appeal by the tenant,

**A** HELD: the hearing on May 31 when judgment was reserved was not "anything done" within s. 10; there was not "anything done" within the section until the order was made; and, therefore, s. 9 applied, and the order of the county court judge should be set aside.

*Hutchinson v. Jauncey* (ante, p. 165), applied.

[AS TO THE RETROSPECTIVE EFFECT OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513-517, paras. 670-672; and FOR CASES, see DIGEST, Vol. 42, pp. 701-707, Nos. 1169-1249.]

**B** AS TO SEPARATE DWELLINGS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 368-373; and FOR CASES, see DIGEST, Vol. 31, p. 557, Nos. 7044-7048.]

Cases referred to:

(1) *Turner v. Baker*, [1949] 1 All E.R. 560; [1949] 1 K.B. 605.

**C** (2) *Hutchinson v. Jauncey*, ante, p. 165.

**D** APPEAL by the tenant from an order of His Honour JUDGE NEAL, made at Willesden County Court on Aug. 4, 1949, granting possession of a dwelling-house to the landlord on the ground that the tenant was not protected by the Rent Acts because he shared the kitchen with sub-tenants. The Court of Appeal now reversed JUDGE NEAL's decision on the ground that, although the hearing was concluded before the operation of the Landlord and Tenant (Rent Control) Act, 1949, judgment was not delivered until after that date, and that, therefore, s. 9 of that Act applied. The facts appear in the judgment of the court.

*L. Moules* for the tenant.

*F. Hallis* for the landlord.

*Cur. adv. vult.*

**E** Jan. 26. **SOMERVELL, L.J.**, read the following judgment of the court. This is an appeal by the defendant against an order for possession made against him by His Honour JUDGE NEAL. The first ground to be considered is set out in para. 3 of the notice of appeal:

**F** "That the learned judge was wrong in law and misdirected himself in holding that the Landlord and Tenant (Rent Control) Act, 1949, s. 9 and s. 10, were not applicable to the facts before him."

It will be convenient to read these sections and say a word or two about them before recounting the facts. Section 9 provides:

**G** "Where the tenant of any premises, being a house or part of a house, has sublet a part, but not the whole, of the premises, then as against his landlord or any superior landlord (but without prejudice to the rights against and liabilities to each other of the tenant and any person claiming under him, or of any two such persons) no part of the premises shall be treated as not being a dwelling-house to which the principal Acts apply by reason only—(a) that the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons, or (b) that part of the premises is let to any such person at such a rent as is mentioned in proviso (i) to sub-s. (2) of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (which relates to furnished lettings)."

**H** Section 10 provides:

"The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this Act, but not so



as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period."

We are not concerned with s. 9 (b). The principal Acts mean the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. It had been held that under those Acts such a sharing of accommodation as is referred to in s. 9 (a) took the house out of the protection of the Acts on the ground that it was not "let as a separate dwelling" within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1): see *Turner v. Baker* (1). The Act of 1949 came into force on June 2, 1949, at a time when the present proceedings before the county court judge had reached a certain stage, but no order had been made.

The house in question was let by the landlord to the tenant in October, 1942, for a term of three years from Nov. 9, 1942, with an option to renew for twelve months, which was exercised. The tenant remained in possession after Nov. 9, 1946, as a statutory tenant, the house being one to which the Rent Acts applied unless circumstances arose which took it outside the protection of those Acts. In the particulars of claim as delivered and first amended, certain matters were relied on as entitling the landlord to possession with which we are not concerned. The learned judge did not think it reasonable to make an order on any of those grounds, and there is no appeal by the landlord from that decision. The plaint was issued on Feb. 21, 1949. There was a first hearing on Apr. 4. The amendment which raises the issue with which we are concerned was made on May 6. It alleged that the house was no longer let as a separate dwelling. There was a further hearing on May 31. The evidence as accepted by the learned judge was that the kitchen was being shared with certain sub-tenants to whom the tenant had let part of the house. This, therefore, *prima facie* brought it within the principle of *Turner v. Baker* (1). Counsel for the tenant sought to distinguish the case from *Turner v. Baker* (1) on the ground that the sub-tenants had been brought in as a result of the registration of the premises under the statutory scheme contained in the Defence (General) Regulations, 1939, reg. 68CB, headed "Provisions to facilitate lettings of parts of dwellings" which had been added by S.R. & O., 1945, No. 1452. The tenant relied on the words of the regulation.

At the conclusion of the hearing on May 31, the learned judge reserved judgment. On June 2, as stated above, the Landlord and Tenant (Rent Control) Act, 1949, came into operation. On June 23, 1949, counsel for the tenant wrote the following letter to the registrar:

"Dear Mr. Registrar, *Jonas v. Rosenberg*, Plaint No. E.483. As counsel for the tenant in the above case, in which His Honour JUDGE NEAL has reserved judgment, I am writing to you to point out something which ought to be drawn to His Honour's attention. My opponent, Lloyd-Davies, knows that I am writing to you on this subject and I am sending him a copy of this letter, but in deference to his suggestion I am not writing direct to the judge. On May 31 last, when judgment was reserved, the Landlord and Tenant (Rent Control) Act, 1949, had not come into force and His Honour was given to understand that the Act would have no bearing on the case he was trying. There is, however, more than a possibility that Lloyd-Davies and I have unintentionally misled the judge on this very important point, because s. 9 and s. 10 of the Act, which came into force on June 2, appear to be retrospective in effect and to deal with the very question which we were arguing. In these circumstances, it occurs to me that His Honour might like this case to be argued further before he delivers judgment. Certainly he should not be left under a misapprehension caused by the late publication of the statute. Copies were not on sale at H.M. Stationery Office until after it came into force."

On July 7 the parties appeared before the learned judge. Judgment was

delivered on Aug. 4. The learned judge decided that the attempt to distinguish the case from *Turner v. Baker* (1) by reason of the terms of the statutory scheme failed. With regard to the point raised on the Act of 1949 and the hearing on July 7 he said :

A "This brings me to another point. This case was heard on Apr. 4 and  
May 31. On the latter day I reserved judgment. Before this was delivered  
my registrar received a letter from the tenant's counsel suggesting that  
I might have been misled owing to his not having taken the point that the  
B Landlord and Tenant (Rent Control) Act, 1949, altered the position. I had  
several cases in which this point arose. Accordingly, I had this case and  
several others in my list for July 7 as I thought that the point as to the  
effect of the new Act might be argued. On this day, however, in my view  
quite properly, the landlord's counsel chose to resist any further argument.  
C And though, no doubt, I could have requested that it should take place I  
did not think it right to do so and so deprive the landlord of what might be  
an important argument in the higher court. In fact, I carefully considered  
the argument in similar cases with reference to the new Act and gave very  
full reasons, which I do not propose to repeat now, for holding that it was  
not retrospective so as to affect a case such as this, where the landlord's  
right had become complete as a result of a notice to quit ending the  
contractual rights of the tenant before June 2 of this year when the Act  
came into force."

D We are not sure that we follow the penultimate paragraph. If in the events  
which had happened the law to be applied was the law as amended by s. 9,  
the fact that the landlord's counsel resisted further argument would, we think,  
be irrelevant. These Acts affect the jurisdiction to make an order. If, on the  
other hand, the learned judge was right in the conclusion set out in the last  
paragraph, then clearly the Act of 1949 had no application.

E Since the date of this judgment, there has been a decision of this court on the  
construction of s. 9 and s. 10—*Hutchinson v. Jauncey* (2). In that case it was  
conceded that there was a sharing of accommodation which would, apart from  
the Act of 1949, have deprived the tenant of the protection of the Acts. A  
valid notice to quit had been served expiring on Apr. 25, 1949. Proceedings for  
possession were started on May 25. The hearing was subsequent to June 2 and  
the issue as to the effect of s. 9 and s. 10 was argued before the learned county  
F court judge who held that the landlord had acquired rights prior to June 2  
which were not affected by the two sections. That decision was reversed by  
this court. The first argument was based on the principle that when the law is  
altered during the pendency of an action the rights of parties are decided according  
to the law as it existed when the action was begun. It is unnecessary to re-  
capitulate the reasoning on which the court based their conclusion that that  
G principle did not apply to the legislation being considered. It was further argued  
that the concluding words of s. 10 themselves precluded the application of the  
sections. It was said that the issue of the plaint was within the words "anything  
done" and that it would be affected if the sections were applied. SIR RAYMOND  
EVERSHEE, M.R., held that the words "anything done" could not refer to the  
issue of a summons or the service of a notice to quit. ASQUITH, L.J., did not  
H disagree with this, but in a short judgment said that, assuming the issue of the  
plaint was something done, it was not affected by the application of s. 9.  
COHEN, L.J., said that the issue of the plaint was no doubt an act done, but did  
not prevent the application of s. 9, presumably for the reason stated by  
ASQUITH, L.J. Whichever way it is put, the court decided that the initiation of  
proceedings did not in itself preclude the tenant from relying on these sections.  
The present case is sought to be distinguished on the ground that the hearing  
had taken place on May 31, and there would in the ordinary course have been

no further evidence or argument. If it can be distinguished, it must be on the ground that the hearing on May 31 was within the words "anything done" and would be affected by the application of s. 9.

On the view expressed by the Master of the Rolls that the words "anything done" could not refer to the service of a notice to quit or the issue of a summons, it seems to us quite plain they could not refer to the stage reached on May 31. The issue of a notice to quit does prospectively affect the rights of the parties. The issue of a summons is for certain purposes a relevant date for determining those rights, but a hearing when judgment is reserved, when either party is free to apply to be allowed to produce further argument or evidence, when the court can itself ask for further argument, is, in our opinion, *a fortiori* outside the words. Assuming, however, that the issue of a summons or plaint is not within the words, then, in our opinion, there is not, so far as the proceedings are concerned, "anything done" within the section until an order is made. We think COHEN, L.J., was expressing this view when he said (*ante*, p. 170): "The issue of a plaint is, no doubt, an act done within s. 10, but it is not equivalent to judgment". It is, therefore, unnecessary to consider whether, if it had been within the words, it could be said that it was not affected by the application of the sections. We have not overlooked a passage *ibid.* in the judgment of the Master of the Rolls in which he emphasises the fact that, in *Hutchinson v. Jauncey* (2), the hearing in that case was "a thing not done when the Act was passed". The Master of the Rolls was not addressing his mind to the present problem, and when he referred to the "hearing" he had in mind, no doubt, the ordinary case when the order is made at the conclusion of the hearing.

The appeal, therefore, succeeds. The rights of the parties fall to be determined in accordance with the provisions of s. 9 and s. 10, and, applying those provisions, the ground on which the order was made is not available to the landlord. It is unnecessary to consider whether if the tenant had failed on this point he could have succeeded in distinguishing *Turner v. Baker* (1). The appeal will be allowed with costs.

*Appeal allowed with costs. Order in the court below for "No Costs" to stand.*

Solicitors: Lieberman, Leigh & Co. (for the tenant); Alfred Kerstein & Co. (for the landlord).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## JOHNSON v. YODEN AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lynskey, JJ.), January 19, 1950.]

*Housing—Purchase price—Limitation—House constructed under building licence—Sale of house at price in excess of permitted price—Knowledge of vendor's solicitors—Aiding and abetting—Building Materials and Housing Act, 1945 (c. 20), s. 7 (1), s. 7 (5).*

On the sale of a house which was built under a licence from the local authority that contained a condition limiting the price for which it could be sold, the builder, contrary to the Building Materials and Housing Act, 1945, s. 7 (1), induced the intending purchaser to agree to pay £250 more than the permitted price, but concealed this fact from the three respondents, the partners in the firm of solicitors whom he had instructed to act for him on the sale. On receiving a letter from the purchaser's solicitor saying: "I have felt compelled to report to the town clerk what I consider to be a breach by your client of the provisions of s. 7" of the Act, the third



A respondent, the partner who was dealing with the matter, asked the builder for an explanation and was told that the extra £250 was received by the builder and placed by him in a separate deposit account to be used in payment of work to be done on the house in the future. The third respondent accepted this explanation and called on the purchaser to complete. The first and second respondents knew nothing of the matter. The builder was convicted of an offence against the Building Materials and Housing Act, 1945, s. 7 (1), and the three respondents were charged, under s. 7 (1) of the Act of 1945 and s. 5 of the Summary Jurisdiction Act, 1848, with aiding and abetting the commission of the offence.

B HELD: (i) as the first and second respondents did not know of the essential matters which constituted the offence, they were not guilty of aiding and abetting its commission.

(ii) the arrangement alleged by the builder, even if true, was a transaction with which the sale was associated, within the meaning of s. 7 (5) of the Act of 1945, and was plainly a colourable evasion of s. 7 (1), and, therefore, the third respondent was guilty of aiding and abetting the builder in the commission of the offence.

C [FOR THE BUILDING MATERIALS AND HOUSING ACT, 1945, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 642-644.]

CASE STATED by Dover justices.

D At a court of summary jurisdiction sitting at Dover informations were preferred by the appellant, the town clerk of Dover, acting for Dover Corporation, (i) under the Building Materials and Housing Act, 1945, s. 7 (1), against Frederick E George Dolbear, charging him with having unlawfully offered to sell for £1,275 a dwelling-house, 5, Mount Road, Dover, constructed under a licence subject to a condition limiting the price for which it might be sold to £1,025, and (ii) under the Building Materials and Housing Act, 1945, s. 7 (1), and the Summary Jurisdiction Act, 1848, s. 5, against the three respondents charging them with having, while carrying on practice as solicitors in partnership, aided, abetted, E counselled and procured Dolbear unlawfully to commit the said offence. The informations were heard on July 5, 1949, when the court convicted Dolbear. The justices found that the first two respondents did not know that the extra £250 was being paid and that the third respondent knew of it at a late stage and then acted on an explanation given to him by Dolbear. It was contended by F the appellant (a) that *mens rea* was not a constituent of the offence with which the respondents were charged, (b) that, if it were, the absence of such words as "knowingly" or "wilfully" in the Building Materials and Housing Act, 1945, s. 7 (1), placed the *onus* on the respondents to show the absence of *mens rea* and they had failed to discharge the *onus*, and (c) that the fact that the three respondents were partners in a firm *prima facie* made the act of one of them the act of them all. The justices dismissed the information against the respondents. G The Divisional Court now dismissed the appellant's appeal from their order in respect of the first two respondents, but sent the case back to the justices with an intimation that an offence had been committed by the third respondent and a direction to convict him.

Paget, K.C., and E. L. Bradley for the appellant.

H Bassett for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices for the borough of Dover before whom the three respondents were charged with aiding, abetting, counselling and procuring a builder, named Dolbear, to commit an offence against the Building Materials and Housing Act, 1945, s. 7 (1). By that subsection, when a person obtains from a local authority a licence to build a house, the authority can attach to the licence a condition limiting the price for which the house may be sold, if it is sold within a stated time. Section 7 contains

elaborate provisions for preventing colourable devices to evade the Act, *e.g.*, if the maximum price which may be charged is fixed by the licence, the vendor cannot obtain an increased price by making separate bargains which are associated with the purchase. In this case the builder had a licence which entitled him to sell the house for £1,025. He induced a railway porter to agree to buy the house for £1,275, *i.e.*, £250 more than the controlled price, and he instructed a firm of solicitors, in which the three respondents are partners, to act as his solicitors for the sale. The builder was charged with an offence against s. 7 (1) of the Act of 1945 and was convicted, but the three respondents were acquitted on charges of aiding and abetting him. A

In regard to the respondents, the justices found that, until Apr. 6, 1949, none of them knew anything about the extra £250 which the builder was receiving, and that the first two respondents, Mr. Henry Wallace Youden and Mr. George Henry Youden, did not know about it at any time, as the builder deliberately concealed the fact and even refused to give the purchaser a receipt for that £250. The justices, therefore, were right, in our opinion, in dismissing the information against the first two respondents on the ground that they could not be guilty of aiding and abetting the commission of the offence as they did not know of the matter which constituted the offence. If they had known that the builder was receiving the extra £250 and had continued to ask the purchaser to complete, they would have committed an offence by continuing to assist the builder to offer the property for sale, contrary to the provisions of s. 7 (1) of the Act of 1945, and, as ignorance of the law is no defence, they would have been guilty of the offence even if they had not realised that they were committing an offence, but a person cannot be convicted of aiding and abetting the commission of an offence if he does not know of the essential matters which would constitute the offence. B C D

In regard to their partner, Mr. Brydone, the third respondent, the facts are different. Until Apr. 6 or 7, 1949, he was as ignorant as were his partners that the builder had insisted on receiving £250 beyond what he was entitled to charge, but on Apr. 6 he received a letter from the purchaser's solicitor saying: E

"I duly received your letter of Mar. 26 informing me that you are ready to settle at any time and that the amount payable on completion is £925."

The sum was £925, because the controlled price was £1,025, and £100 had been paid as deposit. The letter continued:

"I think I ought to let you know the reason why I have not as yet proceeded to completion. It is that I have felt compelled to report to the town clerk what I consider to be a breach by your client of the provisions of s. 7 of the Building Materials and Housing Act, 1945." F

This letter naturally put the third respondent, who was dealing with the matter, on inquiry, and he thereupon read the relevant provisions of the Act of 1945 and also spoke to the builder who told him a story which, even if it were true, was on the face of it obviously a colourable evasion of the Act. The builder's story was that he had placed the extra £250 in a separate deposit account and that it was to be spent on payment for work as and when he (the builder) would be lawfully able to execute it in the future on the house on behalf of the purchaser. G

It seems impossible to imagine that anyone could believe such a story. Who has ever heard of a purchaser, when buying a house from a builder, putting money into the builder's hands because he may want some work done thereafter? I think that the third respondent could not have read s. 7 (5) of the Act as carefully as he should have done, because I cannot believe that any solicitor, or even a layman, would not understand that the bargain which the builder described was just the kind of transaction which the Act prohibits. Section 7 (5) provides; H

“In determining for the purposes of this section the consideration for which a house has been sold or let, the court shall have regard to any transaction with which the sale or letting is associated . . .”

If the third respondent had read and appreciated those words he would have seen at once that the extra £250 which the builder was getting was in regard to a transaction with which the sale was associated, and was, therefore, an unlawful payment. Unfortunately, however, he did not realise it, but either misread the Act or did not read it carefully, and on the following day he called on the purchaser to complete. He was, therefore, clearly aiding and abetting the builder in the offence which the builder was committing. The result is that, so far as the first two respondents are concerned, the appeal fails and must be dismissed, but, so far as the third respondent is concerned, the case must go back to the justices with an intimation that an offence has been committed, and there must be a conviction.

**HUMPHREYS, J.:** I agree.

**LYNSKEY, J.:** I also agree.

*Appeal dismissed in respect of the first two respondents and allowed in respect of the third respondent. Case remitted to the justices with a direction to convict the third respondent. No order as to costs.*

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the appellant); *William Charles Crocker* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

## *Re* MACADAM (a bankrupt). *Ex parte* GUILLAUME AND ANOTHER v. THE TRUSTEE.

[CHANCERY DIVISION (Harman and Danckwerts, JJ.), January 23, 1950.]

*Bankruptcy—Property available for distribution—Settlement within two years of bankruptcy—Valuable consideration—Purchase of house for bankrupt by trustees of settlement—Contribution by bankrupt of part of purchase price—Settlement by bankrupt of his contribution on trusts of original settlement—Bankruptcy Act, 1914 (c. 59), s. 42 (1).*

On Mar. 15, 1944, M. settled certain stock exchange securities on himself on protective trusts with remainders over. The trustees of the settlement were given power to lay out the trust fund in the purchase of freehold hereditaments in England for an estate in fee simple to be held on the trusts of the settlement. In July, 1948, M. requested the trustees to purchase a dwelling-house as a residence for himself and his family. In August, 1948, the trustees decided to exercise their power to buy a house, but at a price not exceeding £3,500. M. had meanwhile decided on the house which he wished to have, but its price was £4,250. M., therefore, agreed to pay to the trustees the sum of £750 in cash, plus legal and survey expenses and stamp duty, if the trustees would purchase this property for £4,250. In due course, the trustees took a conveyance of the house, paying therefor £4,250 of which £750 was supplied by M. On Oct. 26, 1948, after the transaction was complete, M. executed a settlement expressed to be made between him and the trustees and to be supplemental to the settlement of 1944. It was thereby recited that the settlor was desirous of making a further addition to the funds settled by the settlement of 1944, and it was witnessed that he had paid £750 to the trustees and that the said money was to be held on the trusts of the settlement of 1944. The



surveyor's report procured by the trustees indicated that the house purchased might fetch £4,000, but that it was not worth £4,000 as an investment. On June 24, 1949, a receiving order was made against M. on his own petition, and he was adjudicated bankrupt on the same day. On July 13, 1949, the trustee in bankruptcy was appointed and he claimed to have the supplementary settlement of 1948 set aside under the Bankruptcy Act, 1914, s. 42 (1), on the ground that it was made within two years of the bankruptcy and was not made in favour of a purchaser for valuable consideration.

HELD: in expending the £3,500 for the purchase of the house, the trustees of the settlement of 1944 had merely substituted one asset for another, and, therefore, the settlement of 1948 had not been "made in favour of a purchaser . . . for valuable consideration" within s. 42 (1) and could be impeached by the trustee in bankruptcy.

*Re Parry, Ex p. Salaman* ([1904] 1 K.B. 129), criticised and applied.

[AS TO AVOIDANCE OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 360-367, paras. 486-495; and FOR CASES, see DIGEST, Vol. 5, pp. 837-852, Nos. 7078-7163.]

Cases referred to:

- (1) *Re Pope, Ex p. Dicksee*, [1908] 2 K.B. 169; 77 L.J.K.B. 767; 98 L.T. 755; 5 Digest 843, 7106.
- (2) *Hance v. Harding*, (1888), 20 Q.B.D. 732; 57 L.J.Q.B. 403; 59 L.T. 659; 5 Digest 843, 7109.
- (3) *Re Parry, Ex p. Salaman*, [1904] 1 K.B. 129; 73 L.J.K.B. 83; 89 L.T. 612; 5 Digest 845, 7117.
- (4) *Ex p. Hillman, Re Pumfrey*, (1879), 10 Ch.D. 622; 48 L.J. Bey. 77; 40 L.T. 177; 5 Digest 842, 7117.

APPEAL by the trustees of a settlement from a decision of His Honour JUDGE ARCHER, K.C., at Brighton and Lewes County Court on Nov. 10, 1949.

The county court judge held that a settlement made by the bankrupt within two years of the bankruptcy was not made in favour of a purchaser for valuable consideration and so was void under the Bankruptcy Act, 1914, s. 42 (1). The Divisional Court of the Chancery Division now affirmed the decision of the county court judge. The facts appear in the headnote.

*M. J. Albery* for the trustees of the settlement.

*Stanley Rees* for the trustee in bankruptcy.

**HARMAN, J.:** This is a rather puzzling case in which the trustee in bankruptcy of one William Stevenson Macadam sues the trustees of a certain settlement under the Bankruptcy Act, 1914, s. 42 (1), on the ground that it was a settlement made within two years of the bankruptcy and was not made in favour of a purchaser for valuable consideration. The trustees contend that they were purchasers for valuable consideration, and that is the issue in the case.

In 1944 the bankrupt settled certain stock exchange securities for himself with protective interests and remainders over. Under that settlement, there was a power in the trustees to vary investments and to lay out the trust fund in the purchase of any freehold hereditaments in England for an estate in fee simple and so forth, to be held on the trusts of the settlement. In 1948 the bankrupt's affairs were involved. He was occupying, subject to a mortgage, a house which he could not afford to occupy. He could not afford to keep up the instalments on the mortgage and it was necessary for him to contract his liabilities in some way or other. The house was sold for a fair sum of money, but not enough, after paying off the incumbrances to which it was subject, to enable the bankrupt to buy another house. In July, 1948, therefore, through his solicitors he applied to the solicitors for the surviving trustees of the settlement of 1944 requesting them to purchase what he calls a small house as a residence

for himself and his family, and there were some negotiations on that footing. It appears that the bankrupt did not wait for the upshot of those negotiations, but fixed in his own mind on a house he would like to buy, called Shaw Cottage, for which he was asked to pay £4,250. It appears to have been a reasonably good cottage, but it was only worth £4,250, or anything like it, under the artificial conditions of the last few years. He induced his solicitors to put down £425 on his behalf in payment of the deposit. For that they had a charge, no doubt, on the larger property which they were selling for him. In August, 1948, the trustees of the settlement of 1944 came to the conclusion that they would exercise the power they had to buy a house, but that £3,500 was all that they were prepared to pay. They communicated that to the bankrupt's solicitors, who, on Aug. 31, write in these terms:

B "We thank you for your letter. Mr. Macadam [the bankrupt] agrees to pay to the trustees the sum of £750 in cash, plus legal and survey expenses and stamp duty, if the trustees will purchase this property for £4,250."

C That is relied on by the trustees as being an offer which they accepted. They did, in fact, raise £3,500 out of the funds of the settlement of 1944 and take a conveyance of the property, Shaw Cottage, from the owner of it for a consideration expressed to be £4,250, of which £750 was supplied by the bankrupt through his solicitors.

D After the whole transaction was complete, the bankrupt executed the supplementary settlement attacked in this case. It is dated Oct. 26, 1948; expressed to be made between the bankrupt, of the one part, and the trustees, of the other part and to be supplementary to the settlement of 1944. It reads:

E "Whereas the settlor is desirous of making a further addition to the funds settled by him under the settlement and is solvent apart from the property hereinafter settled, now this deed witnesseth: 1. The settlor has this day paid to the trustees the sum of £750 and the trustees shall hold the said sum upon similar trusts from the date hereof as those made in the settlement in respect of the investments set out in the schedule hereto. 2. All the trusts powers and provisions of the settlement shall apply to the said sum of £750 as though from the date hereof the cash had been inserted in the schedule of the said settlement."

F That is, of course, a highly unreal document. No sum of £750 ever flowed into the coffers of the trustees. They had got this property, but all they had paid out of the funds of the settlement of 1944 was £3,500. The trustees, as they were in duty bound to do, procured a surveyor's report on the value of the property, and he said that he thought it might fetch £4,000 in the market, but he added a rider to the effect that, in his opinion, it was not worth that sum as an investment. The trustees, therefore, had no right to pay £4,250 for it, and it is very likely (though it is not necessary, I think, for me to decide that in this case) they committed a breach of trust. That will depend on whether the property eventually fetches the full money and on other circumstances which I do not propose to deal with at this point.

H Now, it is said that, although the settlement of 1948 is, on the face of it, a voluntary settlement, yet it is open to the parties *dehors* the document to prove there was good and valuable consideration for it. That is a principle that nobody disputes. The suggestion put forward is that the trustees are purchasers for valuable consideration in one of two ways. One of them is that they would not have exercised their statutory power of buying a house with the settled funds but for the bringing in of the £750 by the bankrupt. The other is that they would not have committed this breach of trust but for the fact that the bankrupt contributed £750. It is said that in either of those ways the settlement is one in which they are not volunteers but purchasers. That

is supported by counsel for the settlement trustees by reference to *Re Pope, Ex p. Dicksee* (1), of which I will read the headnote:

"In order to constitute a person a 'purchaser' for valuable consideration within the exception mentioned in s. 47 of the Bankruptcy Act, 1883, it is not necessary that either money or physical property should be given; the release of a right, or the compromise of a claim, may be sufficient to constitute a person a 'purchaser' within the meaning of that section."

There the bankrupt executed a settlement, and the consideration was that his wife should not bring divorce proceedings against him. I can well see that that was a good consideration. It was a detriment to her, because she might have got alimony. It was an advantage to him, because he avoided the publicity and also the costs of divorce proceedings. *Hance v. Harding* (2) was also relied on. In that case, a post-nuptial settlement was made by a man who went bankrupt within two years. He brought in certain assets of his own, but his father also brought in certain assets, and it was held that there was good consideration because the beneficiaries under the settlement got something from a source which was not the bankrupt, but was his father.

The question here, therefore, is whether there was a *quid pro quo*, and the case relied on for the trustee in bankruptcy is *Re Parry, Ex p. Salaman* (3), on which also the learned county court judge relied for his decision. In that case there was a post-nuptial settlement by a settlor on himself with remainders for his widow and children and a power to revoke in the settlor, but with the consent of the trustees, about which they had an absolute discretion. He applied to them for consent to revoke the settlement to a certain extent to pay certain debts which he had incurred. They replied that they would only do so if he would bring into settlement certain other assets of his, namely, first, the life interest under the settlement, and, secondly, a reversion or remainder to which he was entitled. WRIGHT, J. (who was an experienced bankruptcy judge) came to the conclusion that that did not make the trustees "purchasers for value." His judgment is in these terms ([1904] 1 K.B. 133):

"The view I take of this case is based entirely upon the fact that the trusts are revocable at the request of the settlor with the consent of the trustees; and, having regard to that fact, it seems to me that I ought not to hold that this transaction is a purchase for valuable consideration within the meaning of s. 47 . . . What took place in truth was this. The settlor being anxious to obtain a present use of portions of the settled assets, which were capable of being realised at the time, was willing to bring in other assets, which probably were not capable of being realised at the time, on the terms that the trustees, who had a discretionary power of consenting to revocation of the trusts, should exercise their discretionary power and consent to his taking out of the old assets the portion which he required. Now the only question is, whether the consent which they gave was a consent given by them as 'purchasers for valuable consideration' within the meaning of the section. I do not think it was really a transaction of purchase at all in the sense in which the word 'purchaser' is construed in the two cases to which I have referred [*Hance v. Harding* (1) and *Ex p. Hillman, Re Pumfrey* (4)]. They did not, as it seems to me, purchase for any price whatever. The proper description of what they did is, that they only exercised a fiduciary power to consent to terms which satisfied them that the trusts would not suffer. In one sense it may be said that the consideration which was given for a sale of assets for £1,600 really came from the debtor himself; but the ground for the view which I take is that it was not a bargain of purchase at all as between vendor and purchaser, but merely a partial substitution of one trust asset for another in the discretion of the trustees. I think, having regard to the decisions in the cases to which



I have referred, that that cannot properly be described as a purchase by the trustees for valuable consideration within the meaning of s. 47."

That bears a very strong resemblance to the present case, except that, in the learned judge's view, the trustees there had a perfect right to do what they did. For myself, I doubt whether that is the right view to take of those facts. The trustees, having a discretion to consent to a revocation, cannot, I think, take other things into account, collateral advantages, when exercising their discretion.

It, therefore, is true, I think, to say that the learned judge's judgment, which he says went entirely on the fact that there was a discretion, may be criticised from that point of view. Nevertheless, his view that this was not a transaction of purchase at all is very pertinent to the present case. His description of it as "a partial substitution of one trust asset for another" is exactly what happened

here. What the trustees have now got, instead of the £3,500 of investments under the settlement, is a property which is, or must be taken for this purpose to be, worth £3,500. They are no better off, nor are the beneficiaries; nor are they worse off. It seems to me that they have merely, in what may be breach of trust, substituted one asset for another. It would be entirely a travesty to call this a purchase in any sense of the word. They did not buy anything of

the bankrupt, and he did not sell anything to them. He wanted to get hold of a part of the trust assets. He did it in this way. In truth and in fact, he and the trustees combined their resources to buy this house. He then settled his contribution to it, and that settlement, in my view, was a voluntary settlement. In my judgment, the trustees cannot properly be described as "purchasers for valuable consideration" and the trustee in bankruptcy can, as he is entitled

to do under the circumstances, impeach the settlement which has been made. That will give him, I think, a charge on the settled funds in which this £750 has been intermingled to the extent of £750. I would dismiss the appeal.

**DANCKWERTS, J.:** I agree. It seems to me that this case is really resolved on its particular facts. There is no doubt that consideration, to make a person a "purchaser" for the purpose of the Bankruptcy Act, 1914, s. 42 (1),

need not necessarily be a payment in money. No authority is needed for that, but one must look at the particular transaction which was carried out. If a somewhat different transaction had been carried out, it may be that the trustees would have been in the position of purchasers. If, for instance, the £750 which was provided by the bankrupt had been held by the trustees on trust to reimburse themselves for any claim for breach of trust or to reimburse the beneficiaries

for any loss on the investment in the purchase of this particular house, it may be that the trustees would then have been in the position of purchasers, but what the parties chose to do was for the bankrupt to make a settlement of £750 on similar trusts to those which were declared by the settlement of 1944. The effect of that was that those moneys could be invested in the purchase of land, but only in a proper purchase of a house on proper conditions, at a proper price

and not at an over-value. It seems to me that the rights of the beneficiaries as regards the £750 were exactly the same as the right which they possessed in regard to the original funds. They may, therefore, equally well, if a loss should happen, have a right of action against the trustees as regards the £750 as well as regards the original funds. For that right the beneficiaries have given nothing whatever. Therefore, they are volunteers, and it was a voluntary settlement, and

it must be set aside under the provisions of the section. Accordingly, I also am in favour of dismissing the appeal.

*Appeal dismissed with costs.*

Solicitors: *Guillaume & Sons* (for the trustees of the settlement); *Gibson & Weldon*, agents for *Farrington & Whiting*, Brighton, Sussex (for the trustee in bankruptcy).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

*Re A DEBTOR (No. 564 of 1949). Ex parte COMMISSIONERS OF CUSTOMS AND EXCISE v. THE DEBTOR.*

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell, L.J., and Hodson, J.), January 23, 1950.]

*Bankruptcy—Receiving order—Infant—Infant trading with adult—Jurisdiction to make receiving order against infant—Bankruptcy Act, 1914 (c. 59), s. 3.* A

The debtor, an infant, carried on with her mother a business of wholesale trader in cosmetics, a class of articles subject to purchase tax. The debtor and her mother failed to account for the purchase tax which they collected, and the tax became a debt due to the Crown by virtue of s. 31 (2) of the Finance (No. 2) Act, 1940. The Crown obtained judgment for the amount of tax owing and presented a bankruptcy petition against the infant and her mother. The registrar made a receiving order against the mother, but he refused to make an order against the infant on the ground that, in view of her infancy, he had no jurisdiction to do so. B

**HELD:** the Bankruptcy Act, 1914, s. 3, applied to an infant if the debt invoked in support of the bankruptcy petition was a debt which was enforceable at law; the purchase tax for which the infant debtor in the present case was accountable constituted such a debt; and, therefore, the court had jurisdiction to make a receiving order against her. C

*R. v. Newmarket Income Tax Commissioners, Ex parte Huxley* ([1916] 1 K.B. 788), applied.

[FOR THE POSITION OF INFANTS UNDER THE BANKRUPTCY LAW, see HALSBURY, Hailsham Edn., Vol. 2, pp. 13, 14, para. 15; and FOR CASES, see DIGEST, Vol. 4, pp. 28-30, Nos. 218-237.] D

Cases referred to:

- (1) *R. v. Newmarket Income Tax Commissioners, Ex parte Huxley*, [1916] 1 K.B. 788; 85 L.J.K.B. 925; 114 L.T. 963; 7 Tax Cas. 49; 28 Digest 96, 575.
- (2) *Re A. and M.*, [1926] Ch.D. 274; *sub nom., Re L.A. and B.F.M., Ex parte, Official Receiver v. The Debtors*, 95 L.J.Ch. 258; 134 L.T. 539; Digest Supp.
- (3) *Re Smedley*, (1864), 10 L.T. 432; 4 Digest 29, 224.
- (4) *Ex parte Stevenson, Re Purser*, (1868), 19 L.T. 23; 4 Digest 29, 225.
- (5) *Ex parte Hands, Re Hands*, (1867), 15 W.R. 1089; 4 Digest 29, 226.
- (6) *Ex parte Jones, Re Jones*, (1881), 18 Ch.D. 109; 50 L.J.Ch. 673; 45 L.T. 193; 4 Digest 29, 235.
- (7) *Ex parte Lynch, Re Lynch*, (1876), 2 Ch.D. 227; 45 L.J. Bey. 48; 34 L.T. 34; 4 Digest 28, 223.
- (8) *Lovell and Christmas v. Beauchamp*, [1894] A.C. 607; 63 L.J.Q.B. 802; 71 L.T. 587; *varying, Re Beauchamp Brothers, Ex parte Beauchamp*, [1894] 1 Q.B. 1; 63 L.J.Q.B. 101; 69 L.T. 646; 4 Digest 29, 230. F G

**APPEAL** by the Commissioners of Customs and Excise, the petitioning creditors, from a decision of Mr. Registrar PARTON, dated Dec. 2, 1949, refusing to make a receiving order against the infant debtor on the ground of want of jurisdiction. The Court of Appeal now allowed the appeal, holding that the Bankruptcy Act, 1914, applied to the case of infants. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R. H

*Denys Buckley* for the creditors.

*Wingate-Saull* for the debtor.

**SIR RAYMOND EVERSLED, M.R.:** This is an appeal from a decision of Mr. Registrar PARTON whereby he declined to make a receiving order against Miss Esther Posner on the ground that she was an infant. In the view of the

registrar, however desirable it might be to make her a bankrupt, and however slender might be her merits in the case, on the authorities which had been cited to him there was no jurisdiction in the court to apply to an infant the law of bankruptcy.

Miss Posener carried on with her mother a business of wholesale trader or merchant in cosmetics, a class of article which is subject to the provisions as to purchase tax imposed by the Finance (No. 2) Act, 1940. According to that Act a wholesale seller of articles of the kind referred to as "chargeable goods" must be registered and is liable on the sale of such goods, save in certain immaterial exceptions, to account to the Crown for purchase tax in respect of the goods. The important section of the Act of 1940 for present purposes is s. 31 (2) which provides:

"Tax [*i.e.*, purchase tax] shall be recoverable as a debt due to His Majesty from the person accountable therefor."

The facts show that both Mrs. Posener and her daughter were duly registered as wholesale dealers in this kind of goods and they were accountable to the Crown for purchase tax on their sales. They failed to account for the tax which they had collected from purchasers of the goods from them, and, accordingly, the amount of tax became, within the language of the sub-section, recoverable as a debt due to His Majesty from Mrs. Posener and from Miss Posener.

In *R. v. Newmarket Income Tax Commissioners* (1) an analogous question arose, namely, whether infancy was a defence to a claim to proceed on an assessment to income tax under the Income Tax Act, 1842. Huxley, the person there concerned, was carrying on business (apparently with considerable profit to himself) as a jockey, but was an infant at the material date. It was said on his behalf that the provisions of the Income Tax Acts (including the section which provides that the amount of the tax is a debt due to the Crown) did not apply to Huxley by reason of his infancy. That contention was rejected by this court. LORD COZENS-HARDY, M.R., opened his judgment in this way ([1916] 1 K.B. 797):

"The question in this appeal is whether a jockey under the age of twenty-one, who has made large profits or gains from his business or employment, can be assessed to the income tax. The answer to this question depends upon the construction of a few clauses in the Income Tax Acts which undoubtedly admit of considerable argument. The charging section is s. 100 of the Act of 1842. It makes all 'persons' receiving profits chargeable with income tax under sched. D, and the contention on the part of the Crown is that the infant is a 'person' receiving the profits, and that there is nothing in the Act to exempt him from liability . . ."

At the end of the judgment of WARRINGTON, L.J. (*ibid.*, 803), occurs this passage, which will be relevant also at a later stage in connection with another argument with which I shall duly deal ([1916] 1 K.B. 803):

"But it is said that the general scope and purport of the [Income Tax Acts] is such that it is a necessary inference that an infant is personally exempt from its requirements. Huxley contends that the Act requires the exercise of skill and intelligence in preparing returns, and of discretion and judgment in deciding whether to appeal, and so forth; that the law treats all infants, whether babies in arms or men of twenty years of age, as equally incapable, and that accordingly it cannot be supposed that the legislature intended to require from any infant what the smallest baby in arms would be incapable of doing. But I think the legal doctrine of equality of incapacity has reference to the question of status before the law, and for the purpose of construing such an Act as the present it has no applicability. I think it is a sufficient answer to the rest of the argument that an infant who controls and manages



his own concern, as Huxley does, may well be treated as capable of doing what is required under the Act."

The court came to the conclusion that Huxley was liable to be assessed.

It seems to follow from the decision in that case that in this matter of purchase tax the sums for which the infant, as a partner with her mother in the firm, is accountable constitute debts in the strict sense—that is, debts duly recoverable at law. The question, therefore, is, assuming the existence of such a debt: Does the fact that the debtor is an infant nevertheless produce the result that the provisions of the Bankruptcy Act, by express language or necessary inference, do not apply to her? So far as express language is concerned, I confess the matter seems to me to be tolerably plain. Section 3 of the Bankruptcy Act, 1914, provides as follows:

"Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate."

In my judgment, all the conditions indicated in that section are satisfied. There is here a debtor, the infant, who became indebted to His Majesty, in the strict sense of that phrase, for purchase tax. There has also been committed an act of bankruptcy in that the Crown obtained judgment for the amount due and owing. In accordance with the Act, notice was served on the debtor to pay the sum due, and the debtor failed to pay. Beyond question, if there is here a debt, there is a creditor, and the sum in question is not below the limit set in the section nor otherwise disqualified by any of the terms of s. 4. Therefore, *prima facie*, on the plain language of this section and of the Act generally, there seems to me to be jurisdiction in the court to make a receiving order.

It is, however, said that there is authority, consisting of statements in text books and, possibly, some observations in cases, which indicates that, where the debtor is an infant, bankruptcy jurisdiction is inapplicable. So far as the text books are concerned, it is true to say that there appears to be unanimity, at any rate, in doubting whether the bankruptcy jurisdiction applies to infants. In CHALMERS AND HOUGH, 9th ed., p. 22, the matter is stated quite categorically:

"A petition does not lie against a corporation, nor against an infant."

Certain cases are cited in support of that proposition, but they are the same cases which are cited in support of the statements in other books to which I shall refer. There is nothing contained in the notes or authorities cited in CHALMERS AND HOUGH which seems to justify any stronger view than that expressed in WILLIAMS ON BANKRUPTCY and in HALSBURY'S LAWS OF ENGLAND. In WILLIAMS ON BANKRUPTCY, 16th ed., p. 41, the matter is expressed with less assurance:

"It is doubtful whether an infant under any circumstances can be made a bankrupt. In *Re A. and M.* (2) a Divisional Court annulled an adjudication of two infants consequent on their own petition, none of the debts being legally enforceable against them. The court will always inquire into the consideration of the judgment, which must be a claim which, having regard to the provisions of the Infants Relief Act, 1874, and to the general law of infancy, is enforceable against the infant. Infancy has never been a defence in tort, and a judgment in tort constitutes a debt. An infant, too, in equity, has always been held liable for fraud."

It will be observed that what follows after the first sentence seems to be limited to showing that, where there are no debts which are enforceable against an infant, there can be no basis for the exercise of the bankruptcy jurisdiction, and I think that undoubtedly must be so. The question here is: If this condition is fulfilled which is absent in the instances given, if there are legally enforceable debts,

does the same result follow? The editors of the title *BANKRUPTCY* in *HALSBURY'S LAWS OF ENGLAND*, Hailsham ed., who are deserving of the greatest respect, namely, the late *LUXMOORE, L.J.*, and the late Mr. *GEORGE KINGHAM*, suggest a negative answer to that question. In vol. 2, p. 13, para. 15, it is stated:

"It appears that an infant cannot be made bankrupt, nor can he alter his legal status as an infant by himself presenting a bankruptcy petition. Though he can make a valid contract in respect of necessities supplied to him, it has not been decided whether a debt incurred in respect of such a contract renders him liable to bankruptcy, but it is submitted that it does not, on the ground that this is a matter of status."

Is that correct, and on what authority is the submission founded? Treating it historically, it seems clear that, before the passing of the *Infants Relief Act, 1874*, infants could, in certain circumstances, be made bankrupt. At least, they have been made bankrupt in fact. I say that because three instances were cited to us in which an infant was made bankrupt on his own petition. They were all cases in which, I think I am right in saying, an infant was suffering a term of imprisonment for non-payment of a debt. To disembarass himself of that debt, and I dare say other debts, he presented his own petition. The first case of the three is *Re Smedley* (3) and the others are *Ex parte Stevenson, Re Purser* (4) and *Ex parte Hands, Re Hands* (5). The basis of *Re Smedley* (3) appears to be this. By the *Bankruptcy Act, 1869*, the bankruptcy jurisdiction no longer was exclusively applicable to traders. It was conceded that an infant, properly speaking, could not incur a trading debt, but, it was said, if an infant incurred a debt of some other kind (in this case on a judgment for a tort) there was nothing which prevented the court saying that the bankruptcy legislation applied to him. It is important to bear in mind that all three cases which I have mentioned were before the courts at a time when the *Infants Relief Act, 1874*, had not been passed. At that time—I am referring to *ANSON'S LAW OF CONTRACT*, 19th ed., p. 121—broadly speaking, contracts made by infants were voidable. As the learned author points out, those voidable contracts were of two kinds—contracts which were valid and binding until disaffirmed as could be done "either during infancy or within a reasonable time after majority," or contracts which were not binding "until he ratified them within a reasonable time after majority." The point to emphasise for present purposes is that the obligations were, not wholly void, but voidable. Without pursuing the matter further, as the infant in the two cases which followed *Re Smedley* (3) was in gaol for the non-payment of debt, there appears ground for supposing that the debt had not been effectively disaffirmed. Therefore, there was a debt existing, and, there being a debt existing, the bankruptcy jurisdiction was applied.

Then came the *Infants Relief Act, 1874*, which made debts contracted in the course of trade and debts contracted otherwise than for necessities not voidable but void. It, therefore, followed that, unless the obligations related to the supply of necessities, there could be no debt of any kind arising out of contract, and, there being no debt, on general principles it would seem to follow that the bankruptcy jurisdiction could not be made to apply. It was on that principle, I think, that *Ex parte Jones, Re Jones* (6), which came before the Court of Appeal in 1881, was decided. A young man, William Jones, an infant, was carrying on a business of trading in coal, coke, and breeze. Having incurred obligations in respect of those business transactions, he had been made a bankrupt. His adjudication having been affirmed by the Chief Judge in Bankruptcy (*BACON, C.J.*), he appealed to the Court of Appeal and that court concluded that there was no justification for such a decree. *SIR GEORGE JESSEL, M.R.*, said (18 Ch.D. 120):

"Only debts could then be proved. But there is no decision which says that this kind of liability is a legal debt. I use the words 'legal debt' "

advisedly; of course there can be no other debt than a legal debt, but the inaccurate phrase 'equitable debt' has crept into the books. But this liability is not really a debt at all, it is only a liability in equity to pay a sum of money, and whenever a debt is required by law in order to found any proceedings, this equitable liability will not be enough."

Then he says (*ibid.*, 121):

"There is therefore no pretence for saying in the present case that the infant is a debtor, or that any action could be maintained against him by the respondents."

To make those passages clear, it should be stated that there was a decision of *Ex parte Lynch, Re Lynch* (7) which the Chief Judge in Bankruptcy had followed. The substance of that decision was that if an infant in the course of trading represented that he was of age, and (I think the matter went this far) since he by his conduct in trading led it to be supposed that he was of age, there arose what SIR GEORGE JESSEL, M.R., referred to in the passage I have read as an equitable debt for which the infant became liable, notwithstanding his infancy. The Court of Appeal came to the conclusion that the decision in *Ex parte Lynch, Re Lynch* (7) was wrong and disapproved of the ruling of the Chief Judge. I will refer to one more passage in his judgment where SIR GEORGE JESSEL, M.R., says (18 Ch.D. 122):

"... the court can only be put in motion under [the Bankruptcy Act, 1869] by a person who is a creditor and who has a right to intervene in the proceedings."

As was pointed out in the circumstances of that case, there was no creditor. BAGGALLAY, L.J., in the last sentence of his judgment, says (18 Ch.D. 124):

"We come back therefore to this, that no debt has been proved to have been due to the petitioning creditors at the time when the application for the adjudication was made, and therefore the adjudication cannot be supported."

I have referred at a little length to that case because the first sentence in the passage from HALSBURY'S LAWS OF ENGLAND, vol. 2, p. 13, para. 15, which I read, namely, "It appears that an infant cannot be made bankrupt," is supported by a reference to *Ex parte Jones, Re Jones* (6). The note (t), after referring to that case goes on to say:

"Under the old law infants have been held liable to bankruptcy and had been made bankrupt,"

referring to *Re Smedley* (3). In *Re Smedley* (3) the "debt" arose out of a tort. I think it very probable that, had the Infants Relief Act, 1874, been passed when the two later cases following *Re Smedley* (3) (namely *Ex parte Stevenson, Re Purser* (4) and *Ex parte Hands, Re Hands* (5)) came up for decision, the results would have been different. The editors, therefore, may well be justified in supposing that, as a result of the Act of 1874 which made the obligations which Jones had contracted void altogether, a difference had been made in the position as it had been previously, but there is nothing in *Ex parte Jones, Re Jones* (6) which says that where, in the case of an infant, there is a legally enforceable debt the bankruptcy law cannot apply to him. Indeed, the few passages which I have read from the judgment of SIR GEORGE JESSEL, M.R., and the judgment of BAGGALLAY, L.J., show (I should have thought) that the converse would have been the case. In other words, it was the absence of a legally enforceable debt that was the basis of the decision.

To revert again to the statement in HALSBURY'S LAWS OF ENGLAND, it will be recollected that it is first said that there is no decision in the books showing that a debt incurred in respect of a contract for necessaries renders an infant



liable to bankruptcy proceedings. I think that is accurate. So far as the industry of counsel has enabled them to make researches, no such case has been found. The text goes on (HALSBURY'S LAWS OF ENGLAND, vol. 2, p. 14):

"... it is submitted that it does not, on the ground that this is a matter of status."

A The authority for that proposition, according to the note, is *Lovell and Christmas v. Beauchamp* (8) in which it had been sought to make a firm bankrupt. The firm consisted of more than one partner, but one partner was an infant. In the Court of Appeal it was decided that the whole proceedings and the receiving order made were invalid. There could not be, it was said, bankruptcy proceedings against an infant partner in respect of trade debts which had been incurred by the firm, because, as in *Ex parte Jones, Re Jones* (6), B they were not enforceable debts at all, and, therefore, the receiving order made against the firm was regarded as of no validity. The House of Lords varied that by ordering that the receiving order should not be against the firm simply, but against the firm other than the infant partner. We have examined closely the opinions of the noble Lords in that case, and reference has also been made to the decision of the Court of Appeal. In my judgment, there is no warrant in C any of the opinions of the noble Lords or in the judgments of the Court of Appeal for the view that the bankruptcy legislation is inapplicable to infants by reason of the status of infancy as such. In my judgment, the bankruptcy legislation does not apply to an infant if, and only if, the debts which are invoked in support of it are not enforceable debts at all, but are "debts" or obligations which are, in truth, wholly unenforceable and void. LORD HERSCHELL, L.C., in the course of D his opinion, seems to indicate the possibility that an infant might be adjudicated bankrupt because he says ([1894] A.C. 611):

"It is also clear that, even if there are circumstances under which an infant may be adjudicated bankrupt, or a receiving order may lawfully be obtained as a step towards such adjudication, he cannot be made subject to the bankruptcy laws in respect of any debt contracted by the firm of which E he is a partner."

I think it may be true to say, as counsel for the debtor urged, that the language of LORD HERSCHELL shows that in his mind at that time the possibility of an infant being made bankrupt was very remote, but it was quite unnecessary for the decision in that case to determine whether in any circumstances an infant F could be made bankrupt. The possibility of a petition founded on legally recoverable debts (for example, income tax or debts for goods supplied as necessities—purchase tax could not then have been considered because it did not exist) was not mentioned and formed no part of the debate before the House of Lords. Therefore, in my judgment, the case cited does not support the view for which the authors contend in HALSBURY'S LAWS OF ENGLAND G that bankruptcy legislation is inapplicable to infants because of the so-called status of infants. Indeed, the status of infancy as such appears, when one examines the provisions, and the purpose, of the Bankruptcy Act, 1914, to be quite irrelevant. If a person—and, *prima facie*, an infant is a person—has incurred debts which are enforceable it may be not only to the advantage of the creditors but also of the person himself that there should be a proper H administration of the estate. It is not to be forgotten that a receiving order is described in s. 3 of the Bankruptcy Act, 1914, as an order "for the protection of the estate."

That leads me to deal with the next point made by counsel for the debtor. He admits that there is here an enforceable debt and that in the terms of the Bankruptcy Act, 1914, there is no apparent reason why a receiving order should not be made, but he argues that it is against public policy that infants should be made bankrupt. He says with truth, that there is no certain line which can

be drawn when an infant attains a particular age above which it is reasonable to suppose that he may be made bankrupt, but below which it would have to be said that it was unreasonable. It cannot be supposed, he says, that the legislature intended that a boy or girl of seven or eight years of age should be brought under the bankruptcy legislation. For my part, I see no difficulty in that. Although bankruptcy legislation is not confined to the results of trading operations the common case, no doubt, is where a person has incurred debts by way of trade and has been unable to pay them. A boy or girl of seven or eight will not engage in trade. If a person is of age to engage in trade, there seems to me to be no ground of public policy why the obligations which fall on the rest of humanity who engage in trade should not also fall on him. There is, after all, a discretion in the court. It is not bound to make a receiving order. If in respect of income tax, for example, it was suggested that a very young child should be made bankrupt—if one can imagine such a case, though I find it difficult to do so—the discretion of the court would amply protect the infant and prevent any use of the Bankruptcy Acts in circumstances which everybody would agree to be inappropriate.

Counsel for the debtor also drew attention to the circumstance that there is in the Bankruptcy Rules themselves nothing to cover the case where the infant would have to be represented, for example, by its next friend or its guardian *ad litem*. It is true that in that regard there may be a *lacuna* in the Bankruptcy Rules. If there is, it can easily be filled. Reference, however, to the Practice Direction of 1931 seems to show that those who are responsible for the administration of bankruptcy procedure had not been unmindful of the need to make provision where an infant is interested in bankruptcy proceedings, as clearly he may be, whether or not an infant is liable to be made bankrupt. I, therefore, reject the arguments based on public policy, or inconvenience, or on the absence of any precedent.

It seems to me that s. 3 of the Bankruptcy Act, 1914, is in terms apt to cover every case where the conditions required by the section and the other provisions of the Act as to the existence of an enforceable debt, a creditor, and so on are satisfied. There is nothing, to my mind, in the Bankruptcy Act, 1914, which requires or permits the inference that the Act is not intended to apply to infants. I have dealt a little fully with the matter because of the statements in the text books, but it seems to me, for the reasons I have stated, that the assertion in CHALMERS AND HOUGH is illfounded and that the same may be said of the opening statement in HALSBURY'S LAWS OF ENGLAND. I think the doubts in WILLIAMS may now be taken to be resolved, though in a way contrary to that intimated in the text. Where such views have been expressed by persons of experience it is necessary to consider the matter very carefully before making any pronouncement which may be thought to disturb long established practice. It must not be forgotten that, at any rate prior to 1874, there were instances of infants being made bankrupt. One can well understand that the circumstances in which the application of bankruptcy legislation to infants would be possible at all are relatively rare, and one would not expect to find a great number of instances. I am quite clear, having examined the authorities and having looked at the Act, that there is nothing which makes the Act inapplicable to the case of an infant, provided always that the conditions stated in the Act are fulfilled. For these reasons, I have formed a different view from that entertained by the registrar. I think this is a case where, there being every reason why a receiving order should be made, one ought to be made against the daughter as it has been made already against the mother.

**SOMERVELL, L.J.:** I agree that the words of the Bankruptcy Act, 1914, given their ordinary meaning, confer on the registrar a jurisdiction to make the order sought for in this case against the debtor. I also agree, for the reasons which have been given, that there is nothing in any decided case, nor is there

any general principle of law, which would lead one to give them any other than their ordinary meaning. I only want to add one or two observations on a matter which may now really be academic, and that is on the principle which seems to me to have been applied in *Re Smedley* (3). That decision, though the argument is not set out, seems to me quite unaffected by the passage of the Infants Relief Act, 1874. It is to be noted that in that case the petitioner was in prison under execution for damages and costs arising in an action of tort. Under the common law an infant over seven years of age, broadly speaking, was, and is, liable for torts, and the Act of 1874 deals solely with liability for contracts. It is to be noted that the county court judge in *Re Smedley* (3), when dealing with the position of an infant as a trader, used these words (10 L.T. 433):

“Moreover, why was it that the courts held that an infant could not be made bankrupt?—because he could not be a trader. Trading, however, is no longer necessary.”

That refers to the time when bankruptcy procedure only applied to insolvency which arose from the result of trading. It is plain that when the judge says that infants could not trade, he means that any trading contracts to which the infant was a party were unenforceable against him. Therefore, as it seems to me, the decision in that case must have depended on the fact that the obligations in respect of which the petitioner was in prison, and presumably the basis of his petition for adjudication, was a liability, not void or voidable, but a liability in tort for which, at any rate, *prima facie*, the infant would be liable. If that is right, then the judgment in *Re Smedley* (3) is exactly in accordance with the principles which have been laid down today by SIR RAYMOND EVERSHED, M.R. As to the two cases which followed *Re Smedley* (3) the reports are so short that it is difficult to discover exactly the facts on which the court proceeded. It may be that there was something in them which would have been affected by the passage of the Infants Relief Act, 1874. I agree that the appeal should be allowed.

**HODSON, J.:** It is not surprising that the registrar should have been impressed by the statement in HALSBURY'S LAWS OF ENGLAND which has been referred to and which is against the contention for the creditors here. I think that statement is not supported by authority. I would add, if I may, a few words to what SOMERVELL, L.J., has just said about the old authorities. The three cases, *Re Smedley* (3), *Ex parte Stevenson*, *Re Purser* (4) and *Ex parte Hands*, *Re Hands* (5) are all precedents for invocation by infants in connection with the law of bankruptcy. It is true that they were all decided before the passing of the Infants Relief Act, 1874, but that Act had only to do with infants' contracts other than contracts for necessities. Nothing which has appeared in any of the judgments since the passing of the Infants Relief Act, which have been read to us, seems to throw any doubt on the soundness of the reasoning of *Re Smedley* (3) which was followed in the other two cases. *Re Smedley* (3) was a case concerning an infant's liability in respect of a judgment in an action of tort. *Ex parte Stevenson*, *Re Purser* (4) was a case relating to an infant's liability in respect of trading, where his contract would be voidable, and *Ex parte Hands*, *Re Hands* (5) was a case in which it is not clear whether the liability was for necessities or not.

It might be convenient to refer to one case which was referred to in argument, namely, *Re A. and M.* (2), a decision of ASTBURY, J., and P. O. LAWRENCE, J. ASTBURY, J., stated the position very clearly, although the judgment is a very short one. I think it is accurately summarised in the headnote as follows ([1926] Ch. 274):

“In the absence of debts actually enforceable against them infants cannot be made bankrupt, even on their own petition.”



In his judgment he used this language, which justified that statement (*ibid.* 275):

"There is no question as to any necessities having been supplied to [the infants] or that there were any other enforceable debts."

It seems to me quite clear that the learned judge had in view cases where there might be, as in the case now before the court, enforceable debts payable by infants. Therefore, not only, in my judgment, is the law quite clear upon the subject, but it is supported by ancient precedents the validity of which is not affected by decisions given since the passing of the Infants Relief Act, 1874. I agree that this appeal should be allowed.

*Appeal allowed. Receiving order made to date from Dec. 2, 1949. Costs of the appeal added to the costs of the receiving order.*

Solicitors: *Sir Nazeby Harrington, Solicitor for Customs and Excise* (for the creditors); *Franks, Charlesly and Leighton* (for the debtor).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## *Re BIRKETT (deceased). HOLLAND v. DUNCAN AND OTHERS.*

[CHANCERY DIVISION (Danckwerts, J.), January 27, 1950.]

*Will—Division of fund—Per stirpes or per capita—Prima facie rule—Rejection—*

"Equally between the children of my deceased sister T. and the said F.H."—*Children of different generation from that of testatrix, T., and F.H.*

By her will, dated June 5, 1945, a testatrix, who died on May 28, 1949, appointed F.H. (a stranger in blood) her sole executrix and trustee and gave, devised and bequeathed all her estate "unto and equally between the children of my deceased sister T. and the said F.H. absolutely Provided always that if any child or children of my said deceased sister shall die in my lifetime leaving issue who shall survive me then such issue shall take and if more than one in equal shares the share or shares which his her or their parent or parents would have taken had he she or they survived me." It appeared that F.H. was a friend both of the testatrix and another sister of the testatrix, and that the testatrix lived with F.H. as a "paying guest" for some years up to the date of her death.

**HELD:** (i) on the true construction of the will, there was a gift to F.H. herself and not to the children of F.H.

*Re Dale* ([1931] Ch. 357) and *Re Cossentine* ([1933] Ch. 119), applied.

(ii) having regard to the facts that the testatrix, T. and F.H. were of the same generation, and that the testatrix would have wished to reward her friend F.H. to whom she was under some obligation, the *prima facie* rule that the gift should be regarded as one *per capita* was displaced, and it was to be inferred that the testatrix intended that the estate should be divided as to one moiety equally to the children of T. and as to the other moiety to F.H. absolutely.

[AS TO DISTRIBUTION PER CAPITA AND PER STIRPES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 356-359, paras. 402-405; and FOR CASES, see DIGEST, Vol. 44, pp. 991-1003, Nos. 8490-8605.]

Cases referred to:

- (1) *Re Dale*, [1931] 1 Ch. 357; 100 L.J.Ch. 237; 145 L.T. 632; Digest Supp.
- (2) *Re Cossentine*, [1933] Ch. 119; 102 L.J.Ch. 78; 148 L.T. 261; Digest Supp.
- (3) *Re Alcock*, [1945] 1 All E.R. 613; [1945] Ch. 264; 114 L.J.Ch. 161; 173 L.T. 4; 2nd Digest Supp.

- (4) *Re Hall*, [1948] Ch. 437; [1948] L.J.R. 1430; 2nd Digest Supp.  
 (5) *Re Jeeves*, [1948] 2 All E.R. 961; [1949] Ch. 49; [1949] L.J.R. 317; 2nd Digest Supp.  
 (6) *Re Jeffrey*, [1948] 2 All E.R. 131; 2nd Digest Supp.  
 (7) *Re Harper*, [1914] 1 Ch. 70; 83 L.J.Ch. 157; 109 L.T. 925; 44 Digest 991, 8495.

A ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix and in the events which had happened, the executrix of the will ought to hold the residuary estate of the testatrix (a) as to one moiety in trust for the children of the testatrix's sister in equal shares and as to the other moiety in trust for herself, or (b) in trust for the said children and herself in equal third shares, or (c) as to one moiety in trust for the said children in equal shares and as to the other moiety in trust for the only child of the executrix, or (d) in trust for the said children of the testatrix's sister and the said child of the executrix in equal third shares. DANCKWERTS, J., held that the residuary estate ought to be held as set out under heading (a) above. The facts appear in the judgment.

C H. A. Rose for the plaintiff, F.H., the executrix of the testatrix's will.  
 Michael Browne for the first and second defendants, the children of the deceased sister of the testatrix, T.

C. A. Settle for the third defendant, the only child of the executrix.

D DANCKWERTS, J.: The will, dated June 5, 1945, of Adeline Birkett, who died on May 28, 1949, was drawn by a solicitor, but it raises a difficulty of construction with which these courts are not unfamiliar. After appointing the plaintiff, Frances Holland, to be the sole executrix and trustee, the testatrix gave, devised, and bequeathed all her estate, both real and personal, and of whatsoever kind or nature,

E "unto and equally between the children of my deceased sister Mrs. Toyne and the said Frances Holland absolutely Provided always that if any child or children of my said deceased sister shall die in my lifetime leaving issue who shall survive me then such issue shall take and if more than one in equal shares the share or shares which his her or their parent or parents would have taken had he she or they survived me."

F The first two defendants are the two surviving children of the testatrix's sister, Henriette Cecilia Toyne, who died in 1944. The remaining defendant, Roland Holland, is the only child of Mrs. Frances Holland.

G The first question is whether the reference to "Frances Holland" in her individual capacity was linked up with the earlier reference to "children" so that the bequest is of a share, not to Frances Holland herself, but to her child. On the authorities to which counsel for Mrs. Holland called my attention (*Re Dale* (1) and *Re Cossentine* (2)) it is plain that the *prima facie* rule with regard to a gift of this kind is that it is the parent who is referred to rather than the child. A gift to the children of A. and B. in equal shares or to be equally divided between the children of A. and B., should be construed as a gift in equal shares to the individual B. and the children of A. In this case it seems to me, the context and circumstances also support the application of the *prima facie* rule. Mrs. Holland was a stranger in blood to the testatrix as opposed to the sister, Mrs. Toyne whose children are referred to, and the substitutional clause plainly points to the fact that it is not the children of Mrs. Holland who are referred to because it would be difficult to apply the clause to her children in the circumstances. She has only one child. The testatrix must have known that she had only that one child as he was born some forty or fifty years before the death of the testatrix, and also she must have known that Mrs. Holland was unlikely to have another child. Therefore, I have no difficulty

in reaching the conclusion that the last defendant, the child of Mrs. Holland, cannot take any interest under this bequest.

The next question, which is whether distribution is to be *per capita* between the three persons, Mrs. Toyne's two children and Mrs. Holland, or stirpittally so that Mrs. Holland takes one half and Mrs. Toyne's children take the other half equally between them, is not so clear and there are a good number of authorities which, if reconcilable, must, I think, have proceeded on some rather fine distinctions. I have been referred to *Re Alcock* (3), *Re Hall* (4), *Re Jeeves* (5), *Re Jeffrey* (6), *Re Harper* (7) and *Re Cossentine* (2). It is quite plain from those cases that there is some *prima facie* rule in favour of a *per capita* construction, but HARMAN, J., in *Re Hall* (4) said that the context might easily displace that. On the other hand, VAISEY, J., in *Re Jeeves* (5) found great difficulty in reconciling the authorities and suggested that it was, perhaps, a matter of guesswork what was the proper conclusion to reach in any particular case.

Counsel for Mrs. Holland has argued that the context and circumstances in this case displace the *prima facie* rule. He points out that Mrs. Holland and the children of the sister, Mrs. Toyne, belong to different generations. That was questioned by counsel for the children of Mrs. Toyne, but I think it was a correct argument. Surely the testatrix, her friend, Mrs. Holland, and Mrs. Toyne, her sister, must be regarded as being of one generation in popular language, and the children of Mrs. Toyne must be regarded as belonging to another generation. That does seem to me to be an argument in favour of applying a stirpital construction in a case of this kind. In *Re Hall* (4) HARMAN, J., said that cases of stirpital distribution were cases of what he called family distribution, and counsel for Mrs. Holland argued that the present case was of that kind because Mrs. Toyne's children represented the family. I do not think very much help can be drawn by counsel from that argument, because it appears from *Re Harper* (7) and *Re Cossentine* (2), which were cited by counsel for the children of Mrs. Toyne, that, where there was, so to speak, a family only on one side, that rule, as enunciated by HARMAN, J.—if he meant to enunciate a rule at all—does not apply. The third argument put forward by counsel for Mrs. Holland appears to me, however, to have some force. Counsel points out that after 1939 Mrs. Holland looked after the testatrix and another sister until the sister's death in April, 1945, when the testatrix went to live with Mrs. Holland as a paying guest, and the testatrix would have wished to reward Mrs. Holland. I agree that the testatrix would have wished to reward such a friend, to whom she was under some obligation, not on an equal footing merely with the two children of her sister, Mrs. Toyne, but on a better footing, so as to give her a half share. Therefore, in spite of the *prima facie* rule, I think there are sufficient circumstances in the present case to lead me to hold, not merely by guesswork but as a matter of inference, that the testatrix intended a stirpital distribution under which Mrs. Frances Holland takes one half and the children of the deceased sister, Mrs. Toyne, take the remaining half equally between them.

*Declaration accordingly. Costs as between solicitor and client to be paid out of the estate.*

Solicitors: Tarry, Sherlock & King, agents for A. V. Clappen & Weaver, Winton, Bournemouth (for the plaintiff and the third defendant); Gibson & Weldon, agents for R. J. Fletcher, Sheffield (for the first and second defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]



## TAYLOR v. CIECIERSKI.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Morris, JJ.), January 25, 1950.]

*Motor Spirit—Commercial petrol in tank of private car—Prima facie evidence—Analysis—Result possibly produced by derivatives of diphenylamine—Motor Spirit (Regulation) Act, 1948 (c. 34), s. 2 (1).*

A When examined by a public analyst a sample of petrol taken from the tank of a private car yielded a positive reaction for diphenylamine, the prescribed ingredient of commercial petrol as defined in the Motor Spirit Regulations, 1948 (S.I. 1948, No. 1127), art. 3. The owner of the car having been charged before justices with an offence under the Motor Spirit (Regulation) Act, 1948, s. 2 (1), there being commercial petrol present in the tank of his car, the analyst stated in cross-examination that  
B “theoretically the same result could be produced by derivatives of diphenylamine, being substances of the same group and of very similar composition to diphenylamine; that there would be no purpose in putting such substances into petrol; and that, while it was not unlawful for such substances to be supplied to the public, they were uncommon and not  
C easily obtained.”

HELD: these facts constituted *prima facie* evidence that commercial petrol was present in the tank, contrary to s. 2 (1), and, therefore, there was a case for the owner of the car to answer.

[FOR THE MOTOR SPIRIT (REGULATION) ACT, 1948, s. 2 (1), see HALSBURY'S  
D STATUTES, Second Edn., 1948, p. 804.]

CASE STATED by Kent justices.

At a court of summary jurisdiction sitting at Bromley on Oct. 21, 1949, an information was preferred by the prosecutor, a metropolitan police officer, charging the respondent, the owner of a private motor car, with having had present in the tank of his car a quantity of commercial petrol contrary to the  
E Motor Spirit (Regulation) Act, 1948, s. 2 (1). For the respondent it was contended that the presence of the prescribed ingredient of commercial petrol, diphenylamine, in the petrol taken from the tank of the car had not been proved beyond any doubt. The justices dismissed the information. The prosecutor  
F appealed by way of Case Stated and the Divisional Court now held that a *prima facie* case had been established which the respondent ought to answer, and they remitted the case to the justices with an intimation to that effect. The facts appear in the judgment.

The Solicitor-General (Sir Frank Soskice, K.C.), and H. L. Parker for the appellant.

Hector Hughes, K.C., and I. F. Reuben for the respondent.

G LORD GODDARD, C.J.: This is a Case stated by the justices of Kent sitting at Bromley, before whom the respondent was charged with having commercial petrol in the tank of his motor car, contrary to the Motor Spirit (Regulation) Act, 1948, s. 2 (1). The facts given in evidence before the justices were that a police officer stopped the car and tested the petrol in the tank with a reagent paper. Having tested it twice, it appeared to him that the tank  
H contained commercial petrol and he did what the Act prescribes, *viz.*, took a sample, divided it into three parts, and sent one part to the public analyst. The analyst certified that:

“I have analysed this sample and find that it consists of motor spirit within the meaning of the Motor Spirit Regulations, 1948, and that, when examined by the test laid down in memorandum R.P. 1/8/7/3 of the Ministry of Fuel and Power, it yields a positive reaction for diphenylamine, the prescribed ingredient of commercial petrol as defined in the Motor

Spirit Regulations, 1948, art. 3. I am, therefore, of the opinion that this sample consists of, or contains, commercial petrol."

In evidence before the justices the analyst said that the test he had applied yielded a positive result for diphenylamine, and that he was of opinion that the sample consisted of or contained commercial petrol. Obviously that was *prima facie* evidence that the offence had been committed. In cross-examination he said

"that theoretically the same result could be produced by derivatives of diphenylamine, being substances of the same group and of very similar composition to diphenylamine; that there would be no purpose in putting such substances into petrol; that while it was not unlawful for such substances to be supplied to the public, they are uncommon and not easily obtained."

In the opinion of the court, there was *prima facie* evidence which called for an answer. If this was not commercial petrol, the respondent was given an opportunity of proving it was not. He still has that opportunity, because, when the case was before the justices, they did not call on him for an answer. The case, therefore, will go back to the justices with the opinion of this court that there was a *prima facie* case calling for an answer.

BYRNE, J: I agree.

MORRIS, J.: I agree.

*Appeal allowed with costs.*

Solicitors: *The Treasury Solicitor* (for the appellant); *Bryan O'Connor & Co.* (for the respondent).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

## PACEY v. ATKINSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Sellers, JJ.), January 16, 17, 23, 1950.]

*Solicitor—Unqualified person drawing instruments—"Expectation of . . . gain or reward"—Rent collector—Particulars of claim in county court actions for arrears of rent—Commission received in respect of all moneys recovered—No specific fee for drawing instrument—Solicitors Act, 1932 (c. 37), s. 47 (1) (as amended by Solicitors Act, 1941 (c. 46), s. 23 (1)).*

By the Solicitors Act, 1932, s. 47 (1), as amended by the Solicitors Act, 1941, s. 23 (1): "Any person, not being a barrister, or a duly certificated solicitor" or other qualified person, as specified in the section, "who, unless he proves that the act was not done for or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument relating to . . . any legal proceeding, shall be liable on summary conviction to a fine not exceeding £50."

A rent collector was authorised by his principals to take legal proceedings on their behalf in the county court for recovery of possession of premises and arrears of rent. He received no special fee or remuneration for taking the proceedings, but he received a fixed commission on all sums recovered by him, whether as a result of legal proceedings or otherwise. He was charged with preparing an instrument relating to legal proceedings, *viz.*, particulars of claim in proceedings in the county court, contrary to the Solicitors Act, 1932, s. 47 (1), as amended by the Solicitors Act, 1941, s. 23 (1). It was contended on his behalf that no offence against the section had been

committed, as he received no specific fee for preparing the particulars, nor did he expect to receive any such fee.

**HELD:** as the rent collector was entitled to a commission on any moneys recovered as a result of the legal proceedings, he had drawn the instrument in question "in expectation of . . . gain or reward," within the meaning of s. 47 (1) of the Act of 1932; the fact that he had no contractual right to recover a fee for drawing the instrument was immaterial; and, therefore, he was guilty of an offence against the section.

[AS TO UNQUALIFIED PERSONS PREPARING LEGAL INSTRUMENTS, see HALSBURY, Hailsham Edn., Vol. 31, p. 316, para. 349, and 1949 Supplement.

FOR THE SOLICITORS ACT, 1932, s. 47 (1), AND THE SOLICITORS ACT, 1941, s. 23, see HALSBURY'S STATUTES, Vol. 25, p. 816, and Vol. 34, p. 333.]

**CASE STATED** by Darlington justices.

At a court of summary jurisdiction sitting at Darlington on July 15, 1949, informations were preferred by the appellant, on behalf of the Incorporated Law Society, under the Solicitors Act, 1932, s. 47 (1), as amended by the Solicitors Act, 1941, s. 23 (1), charging the respondent, a collector of rents and debts, not being a barrister, duly certificated solicitor, or other person specified in the section, with having drawn, or, alternatively, with having prepared, instruments relating to legal proceedings, *viz.*, particulars of claim in county court actions. The respondent, who was authorised by his principals to bring the actions on their behalf for recovery of possession of premises and arrears of rent due, was entitled to a commission on any sums recovered, but he obtained no specific fee for taking the proceedings or preparing the particulars. The appellant contended, *inter alia*, that the respondent, in preparing the particulars of claim, was acting "in expectation of . . . gain or reward," within the meaning of s. 47 (1), as he was acting in expectation of receiving the commission payable on any sums recovered. The respondent contended that the commission was payable, not for preparing the particulars of claim, but for collecting the sums of money due to his principals, and, therefore, no offence had been committed. The justices dismissed the informations. The appellant appealed and the Divisional Court now allowed his appeal.

*Cumming-Bruce* for the appellant.

*Quintin Hogg* for the respondent.

*Cur. adv. vult.*

Jan. 23. **LORD GODDARD, C.J.**, read the following judgment of the court. The respondent was charged before the justices for the county borough of Darlington on six informations, preferred at the instance of the Incorporated Law Society, charging him with drawing instruments relating to legal proceedings, *viz.*, particulars of claim in certain actions in the Darlington County Court which were specified in the informations. Alternative informations were also laid in respect of the same instruments charging that the respondent had prepared them. The respondent at all material times carried on business as a debt and rent collector, and the particulars of claim, which he was alleged to have drawn and prepared, all claimed possession of premises and arrears of rent due to the principals for whom he was acting, and in one case there was a claim for a debt also due to his principal.

The Solicitors Act, 1932, s. 47 (1), as amended by the Solicitors Act, 1941, s. 23 (1), provides:

"Any person, not being a barrister, or a duly certificated solicitor . . . writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity, who, unless he proves that the act was not done for or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument relating to real or personal estate, or any legal proceeding, shall be liable on summary conviction to a fine not exceeding £50."



The respondent carries on business in Darlington as a rent and debt collector, and was remunerated, as is usual in such cases, by a commission on the money which he recovered, whether such sums were paid as a result of legal proceedings or not. The amount of his commission was  $2\frac{1}{2}$  per cent. of the amount recovered if he was acting directly for a landlord or creditor, but, if he acted on the instructions of an estate agent, he shared the commission with the latter. He had authority from his principals to take proceedings in their name in the county court when it was necessary so to do. He received no special fee or remuneration for taking those proceedings, but, if any sum of money was recovered in consequence of any action, he would receive commission on it. A

The justices appear to have received evidence that for many years past it had been a common practice for debt collectors to take proceedings on behalf of their principals in the county court and prepare the necessary documents, which would, of course, include particulars of claim, and that this had been done without any objection by the county court judge or registrars. This evidence was quite irrelevant and ought not to have been admitted. Whatever practice may have existed, the only question is whether this action on the part of the respondent is prohibited by the statute, as it is hardly necessary to say that he holds none of the qualifications mentioned in the section. At the same time, it is well known that this practice has existed in all parts of the country and the question, therefore, is one of considerable importance, not only to rent and debt collectors, but also to the owners of property who employ them and who, if the statute prohibits collectors from taking these proceedings in the county court on behalf of their principals, will have either to do the work themselves or employ solicitors, with the result that costs in many cases will be incurred which the debtors will have to pay. We are not, however, concerned either with the policy or the result of the Act. All we have to say is whether, on the true construction of the section, this action on the part of the respondent is prohibited. B C D

I may say in passing that the only change which was effected in s. 47 (1) of the Act of 1932 by the Act of 1941 was to cast the *onus* of proving that he did not act for or in expectation of any fee, gain or reward on the respondent, and in this case no point as to *onus* of proof arose. The respondent gave evidence, and all the facts were, therefore, before the court. In our opinion, it is clear that the respondent must be held to have prepared these county court documents in expectation of reward because, if judgment was recovered and money paid thereunder, he would receive remuneration in the shape of commission on the sum recovered. True, he received no fee, nor did he expect to receive a fee, but that he expected to gain thereby and obtain a reward seems to us to be beyond question. Counsel for the respondent argued—and this was really the whole point of the argument he submitted to us—that there must be some contractual right to receive a fee or other remuneration, and that, unless there was some such contractual right, no offence was committed. We think the short answer to that point is that the section provides that the act must not be “done for or in expectation of any fee, gain or reward,” and the word “expectation” clearly indicates that there need be no legal right to recover, but a mere expectation or hope that some reward will be forthcoming as a result of the action taken. On these short grounds we are of opinion that the offences were proved, and the case must be sent back to the justices with an intimation that convictions must be recorded in all the cases. The appeal, therefore, is allowed with costs. E F G H

*Appeal allowed with costs. Case remitted to the justices with an intimation that convictions must be recorded.*

Solicitors: *Hempsons* (for the appellant); *Butt & Bowyer*, agents for *J. F. Latimer & Hinks*, Darlington (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

## JONES v. HERXHEIMER.

[COURT OF APPEAL (Somervell and Jenkins, L.JJ., and Romer, J.), January 13, 26, 1950.]

*Landlord and Tenant—Covenant to repair—Breach—Measure of damages—Diminution to value of reversion—Cost of re-decoration—Repairs necessary to make premises fit for re-letting—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1).*

The premises comprised in a tenancy agreement, dated Mar. 25, 1943, consisted of four rooms on the first floor and one room on the ground floor of a dwelling-house, and by the agreement the tenant covenanted to deliver up the premises in good and tenantable repair at the termination of the tenancy. When the tenant gave up possession on May 19, 1949, the landlord found the premises in a bad state of repair and had to have them re-decorated to put them in a fit state for re-letting. In an action by the landlord claiming damages for breach of covenant the evidence for the landlord did not deal with the actual question of damage to the value of the reversion, but the county court judge held that there was damage of that character by reason of the want of repair and gave judgment for the landlord for £36, the costs of the repairs necessary to make the premises fit for occupation. On an appeal by the tenant to the Court of Appeal it was contended by him that there was no evidence that the value of the reversion had been diminished by the breach of covenant, that the fact that repairs were necessary was not *prima facie* evidence of damage to the value of the reversion, and that, therefore, under the Landlord and Tenant Act, 1927, s. 18 (1), the landlord was not entitled to recover damages.

**HELD:** as the repairs done by the landlord were repairs within the covenant and were no more than were reasonably necessary to make the five rooms fit, according to ordinary standards, for occupation for residential purposes, there was evidence on which the county court judge could hold that the proper cost of the repairs represented a diminution in the value of the reversion due to the tenant's breach of covenant, and, therefore, the cost of the repairs was recoverable by the landlord under the Landlord and Tenant Act, 1927, s. 18 (1).

*Hanson v. Newman* ([1934] Ch. 298), *Salisbury (Marquis) v. Gilmore* ([1942] 1 All E.R. 457), and *Portman v. Latta* ([1942] W.N. 97), *distinguished*.

*Per curiam:* We find nothing in the earlier authorities to justify the conclusion as a matter of law that in no case and in no circumstances can the fact that repairs are necessary, and the cost of those repairs, be taken as at least *prima facie* evidence of damage to the value of the reversion and of the extent of such damage. There must be many cases in which it is, in fact, quite obvious that the value of the reversion has, by reason of a tenant's failure to do some necessary repair, been damaged precisely to the extent of the proper cost of effecting the repair in question.

*Dictum of LYNSKEY, J., in Landeau v. Marchbank* ([1949] 2 All E.R. 175), *disapproved*.

[AS TO DAMAGES FOR BREACH OF COVENANT TO LEAVE PREMISES IN REPAIR, see *HALSBURY*, Hailsham Edn., Vol. 20, pp. 220, 221, para. 241.

FOR THE LANDLORD AND TENANT ACT, 1927, s. 18 (1), see *HALSBURY'S STATUTES*, Second Edn., p. 902.]

Cases referred to:

(1) *Landeau v. Marchbank*, [1949] 2 All E.R. 172.

(2) *Joyner v. Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 31 Digest 341, 4841.

(3) *Hanson v. Newman*, [1934] Ch. 298; 103 L.J.Ch. 124; 150 L.T. 345; Digest Supp.

(4) *Salisbury (Marquis) v. Gilmore*, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 2nd Digest Supp.

(5) *Portman v. Latta*, [1942] W.N. 97; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE GRANVILLE-SMITH, made at Barnet County Court, and dated Sept. 27, 1949, awarding damages to the landlord for breach of a covenant by the tenant to deliver up premises in good repair. On the determination of the tenancy by the tenant, the five rooms comprised in the tenancy were in a bad state of repair and had to be re-decorated by the landlord to make them fit for re-letting, and the sum awarded by the learned county court judge was the amount found by him to have been the cost of the necessary repairs. On appeal, it was contended by the tenant that there was no evidence that the value of the reversion had been damaged by the want of repair and, therefore, under the Landlord and Tenant Act, 1927, s. 18 (1), the landlord was entitled to no damages or to merely nominal damages. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of the court delivered by JENKINS, L.J.

*John Lawrence* for the tenant.

*Bibby-Trevor* for the landlord.

*Cur. adv. vult.*

Jan. 26. JENKINS, L.J., read the following judgment of the court. This is an appeal by the defendant from a judgment of His Honour JUDGE GRANVILLE-SMITH, in the Barnet County Court, dated Sept. 27, 1949, for the recovery by the plaintiff from the defendant of the sum of £36 damages for breach of a covenant by the defendant contained in a tenancy agreement dated Mar. 25, 1943, and made between a Miss Roman (the predecessor in title of the plaintiff) as landlord of the one part and the defendant as tenant of the other part, to deliver up in good and tenantable repair the premises comprised in that agreement at the termination of the tenancy. The question in the appeal is in substance whether, having regard to s. 18 (1) of the Landlord and Tenant Act, 1927, there was any evidence on which the learned county court judge could properly hold the landlord entitled to more than merely nominal damages.

The Landlord and Tenant Act, 1927, s. 18 (1), is in these terms:

"Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

It is contended for the tenant that in the present case there was no evidence of any damage to the reversion and consequently that the learned county court judge ought as a matter of law either to have dismissed the action or at most to have awarded the landlord a merely nominal sum.

The premises comprised in the tenancy agreement of Mar. 25, 1943, consisted of four rooms on the first floor and one room on the ground floor of No. 9 Elgin Road, Alexandra Park, Wood Green, Middlesex, with certain ancillary rights to which it is unnecessary to refer, and they were thereby let to the tenant for one year from Mar. 25, 1943, at the yearly rent of £109 4s. The relevant



covenants on the part of the tenant are those contained in cl. 2 (4) and cl. 2 (10) of the tenancy agreement which are in these terms:

"(4) To keep the interior of the premises and the doors windows and the fittings and fixtures (including those specified in the schedule hereto) in good and tenantable repair and the stairs and staircase leading from the ground floor and the landing and the carpets thereon clean and dusted."

A    "(10) At the determination of the tenancy to deliver up the premises together with the stoves and grates and all landlord's fixtures and the fittings and fixtures specified in the schedule hereto in good and tenantable repair in accordance with the tenant's covenants herein contained and with all locks keys and fastenings complete."

B    The tenant remained in possession of the five rooms in question on the terms of the tenancy agreement after the expiration of the one year's tenancy thereby granted, but ultimately on May 19, 1949, gave up possession to the landlord (i.e., the plaintiff who had in the meantime become the owner of the freehold of No. 9 Elgin Road, subject to the tenant's tenancy of these five rooms). The tenancy having thus determined, the landlord sued the tenant in the Barnet County Court for damages for breach of his covenants to keep and deliver C    up the premises in repair, the terms of which are set out above. The damages claimed by the landlord amounted to £71 15s. 6d., this figure being supported by a schedule of dilapidations prepared by the landlord's brother-in-law, a builder and decorator, named W. J. Reid. The repairs specified in such schedule were all decorative repairs of a usual character such as painting and re-papering. It was held by the learned county court judge and agreed before us that the D    landlord could rely only on the covenant to deliver up in repair, as no notice under the Law of Property Act, 1925, s. 146 (1), had been given with respect to any breach of the covenant to keep in repair. It was, however, not in dispute that the tenant had broken both covenants, and the extent of the landlord's claim was, so far as we can see, precisely the same, whether it was founded on both covenants or only on the covenant to deliver up in repair.

E    At the trial evidence was given for the landlord by the landlord himself and by Mr. Reid. The landlord gave evidence substantially to the effect that, on the tenant vacating, he inspected the rooms, found them in a bad state of repair, decided to have the whole place re-decorated, and instructed Mr. Reid to prepare a specification and do the work. In cross-examination he said that he had let the top floor (by which, we were told, he meant the first floor referred to in the F    tenancy agreement) furnished at £3 per week, having had it decorated from top to bottom. He also said that he understood that the tenant had to leave the premises "in habitable condition so that anyone could move in." Mr. Reid gave evidence substantially to the effect that, when the tenant vacated, the place was dirty; that the rooms, apparently, had not been re-decorated for at least ten to twelve years; that all the work in his schedule had been carried G    out; and that he had been paid £50 generally on account—as had already been mentioned by the landlord. It was put to him in cross-examination that £42 would be a fair price for all the work in his schedule, but he denied this. Neither of these witnesses dealt with the question of damage to the reversion, nor was the point put to either of them in cross-examination. It was conceded by counsel for the landlord that the top landing and stair well, repairs to which H    amounting to £21 had been included in Mr. Reid's schedule, were not within the covenant, and this had the effect of reducing the landlord's claim to £50 15s. 6d.

In opening his case counsel for the tenant submitted that, as there was no damage to the reversion, the landlord could only recover nominal damages in view of the Landlord and Tenant Act, 1927, s. 18 (1). The only witness called for the tenant was Mr. Harcourt Batty, a surveyor. He put the cost of the repairs required to comply with the covenant at £42, or £32 without the top

landing and stairway. He placed the following values on the premises: "Value of whole premises with a sitting tenant in one part" (meaning, presumably, the part which had been comprised in the tenancy) "—£2,250. Value of part occupied by tenant—£1,500. Value with complete vacant possession—£3,000." He expressed the view that the repairs in question, which were purely decorative, would not affect the value of the premises. In cross-examination he admitted that "the price would be affected by structural and, if very bad, decorative condition." In re-examination he expressed the view that the "letting value" was not "affected by the state of decorative repair in this case."

In his judgment the learned county court judge, after stating the nature of the claim, continued as follows:

"There was no question but that when the premises were handed over the covenants had not been complied with. There is evidence that apparently nothing was done to them for a period of from ten to twelve years. The only covenant in question is that to deliver up the premises in repair. The landlord cannot pray in aid the covenant to keep in repair. He gave no notice under s. 146 of the Law of Property Act, 1925. The defendant relied on *Landeau v. Marchbank* (1). No evidence was given by the landlord of any damage to the reversion. The case referred to is an authority for the proposition put forward by the tenant that the measure of damages must not exceed damage to the reversion, if any. Neither the landlord nor the witness Reid had addressed their minds to it and no expert was called (except by the tenant who called in Batty, who said that in this particular case there was no damage to the reversion, but only small, purely decorative, repair) and to that extent I am in agreement with counsel for the tenant that there was no evidence of damage to the reversion. But I do feel that, though the evidence by the landlord was not given with that in mind, in this particular case there must be some damage to the reversion. If the landlord had taken possession of the premises himself, there would clearly be some damage. He would have to do the work himself or keep the premises in a bad state. If he did not do anything to the premises, they would deteriorate. There is abundant evidence that the reversion was damaged. In *Landeau v. Marchbank* (1) LYNSEY, J., said ([1949] 2 All E.R. 175: 'It must depend on the circumstances.' I am satisfied there is damage to the reversion and the damage will be the proper cost of repair. In HILL'S COMPLETE LAW OF LANDLORD AND TENANT, 9th ed., p. 681, (damages for breach of repairing covenants),\* *Joyner v. Weeks* (2) is still relied on. The measure of damages is still as it was in *Joyner v. Weeks* (2). Mr. Batty is qualified to assess the amount of the cost of repairs. He was under a disadvantage in that he did not see the premises before the work was done. I accept his approach to the assessment . . . His figure for the whole is £42. As to Mr. Reid's evidence, I feel that the whole house was being done up from top to bottom. I give judgment for the landlord for £36, costs on Scale B, and the £10 in court to be paid out."

The statement in the earlier part of the judgment that "no evidence was given by the landlord of any damage to the reversion," read literally and out of its context, seems at first sight inconsistent with a decision in the landlord's favour. But it is plain from what follows that the learned county court judge meant by this, not that there was no evidence on which damage to the reversion could be held to have been proved, but only that the evidence for the landlord did not deal in so many words with the question of damage to the reversion. It was forcibly contended before us by counsel for the tenant that there was no evidence that the reversion had been damaged to the extent of

\* See now HILL AND REDMAN'S LAW OF LANDLORD AND TENANT, 10th ed., p. 739.

£36 or at all by the want of repair; that the evidence on which the learned county court judge held that the proper cost of putting the premises in repair was £36 was not even *prima facie* evidence of damage to the reversion to that or any amount; and that the only evidence before him directed to the question of damage to the reversion was the evidence of Mr. Batty to the effect that there was no such damage. Counsel for the tenant, accordingly, submitted that in view of s. 18 (1) of the Landlord and Tenant Act, 1927, the learned county court judge's decision was wrong in law as the landlord had wholly failed to prove his right to any recoverable damages.

In support of his contention counsel for the tenant cited a number of authorities to which we should next briefly refer. In *Hanson v. Newman* (3), an action had been brought in 1932 for possession of the premises comprised in a lease for a term expiring in 1938, for breach of the repairing covenants therein contained. The plaintiff had recovered judgment in default of defence for possession and damages to be assessed by a master. The proceeding before the court was an appeal by the defendant from the master's assessment of the damages and the question in issue was whether the master, who had assessed the damages in accordance with the terms of s. 18 (1) of the Landlord and Tenant Act, 1927, at the sum found by him to represent the amount by which the reversion in possession at the date of the forfeiture of the lease (*i.e.*, the date of the writ) had been diminished by the defendant's breaches of covenant, ought to have allowed a claim by the defendant to set off against the amount so assessed the difference between the value of the reversion in possession at the date of the forfeiture and its value at the same date as a reversion expectant on the expiration of the term in 1938. LUXMOORE, J., and the Court of Appeal held that there could be no such set-off. LUXMOORE, J., in the course of his judgment, said ([1934] Ch. 300):

"Under the law before the Landlord and Tenant Act, 1927, was passed, a landlord could recover by way of damage at the termination of his term the actual cost of executing the repairs required to fulfil the covenant. The Landlord and Tenant Act, 1927, has not changed the law in that respect; all that it has done is to impose a limit on the amount of those damages. The material section to be considered is s. 18 of the Landlord and Tenant Act, 1927."

His Lordship read s. 18 (1) and went on to discuss what was meant in the section by the phrase "reversion (whether immediate or not)," concluding (*ibid.*, 302) that the word "reversion" was used "as referring, in the case where the lease has terminated, to the land which has reverted." He then said this (*ibid.*) about the effect of the section on the amount of damages recoverable:

"What the section provides for is that the damages for breach of covenant on the termination of a lease are not to exceed the amount by which the value of the reversion, whether immediate or not, in the premises is diminished owing to the breach of such covenant or agreement; that is, you take the value of the reversion as it is with the breach—the value of the property which has reverted as it is subject to the breach—and you take it as it would be if there were no breach, and you provide that the amount of damage shall not exceed the amount by which the value of the property repaired exceeds the value of the property unrepaired."

In the Court of Appeal LAWRENCE, L.J., and ROMER, L.J., both expressed full approval of the judgment of LUXMOORE, J., and LAWRENCE, L.J., in particular, adopted the passage to which we have just referred, quoting it at length and saying ([1934] Ch. 305) that he could not "express it better."

In *Salisbury (Marquis) v. Gilmore* (4), premises in New Bond Street had been let to the defendant for a term of fourteen years from Sept. 29, 1925. The tenant



had asked for a new lease in 1937, but was then informed that the plaintiff landlords intended to pull the premises down (which intention would have been an answer to any claim by the tenant for a new lease under s. 5 of the Landlord and Tenant Act, 1927, and *prima facie* a defence under s. 18 (1) to any claim against the tenant for damages for non-repair at the termination of the lease). In 1939 the tenant vacated the premises and left them out of repair, being still under the impression that they were to be pulled down. Thereafter, the plaintiffs, having, as they said, abandoned their intention to pull down the premises, claimed damages for breach of the covenants to repair. The evidence showed that the plaintiffs had not abandoned their intention to pull down the premises until a date after the termination of the tenancy. The actual question in the case was not concerned with the *quantum* of damages recoverable under s. 18 (1), but was simply whether, in the circumstances which we have stated, the defendants were not precluded by the latter part of the sub-section from recovering any damages at all, and the Court of Appeal (reversing the decision of HILBERY, J.), held that they were so precluded. But MACKINNON, L.J., in the course of his judgment, did, in fact, deal with the necessity of proof of damage to the reversion under s. 18 (1), and expressed the view that there was no evidence at the trial of any diminution in the value of the reversion by reason of any breach of covenant to repair or yield up in repair. Counsel for the tenant in the case before us relied on the following passage in the judgment of MACKINNON, L.J. ([1942] 1 All E.R. 462):

"The only evidence as to breach was under (b), the covenant to deliver up in repair, upon a survey and schedule of dilapidations made after such delivery up. As to the effect of this breach on the value of the reversion, the first surveyor could only say that the depreciation was 'the cost of doing the repairs,' but on cross-examination, said: 'I am not in a position to answer' (as to the depreciation) 'because it is a question of the value of the premises, and as a surveyor assessing dilapidations, I was only concerned with the cost of making the repairs.' The other surveyor, on being asked what was the depreciation, answered, 'I think the cost of the work is the only possible criterion.' He also said, in cross-examination, that the only real value of the premises was the site value, and 'you would get as much for the site as for the site with the building on it.' On this I am clear that the judge was wrong in that passage of his judgment in which he says ([1941] 2 All E.R. 821): 'I accept the evidence of the plaintiffs' witnesses . . . I am satisfied that the cost of making good the want of repair is, as nearly as it can be assessed, the same as the diminution in the value of the reversion resulting from the breaches of covenant to yield up in repair . . . ' There was no evidence of any diminution of value in the reversion, and the judgment, if given for the plaintiff, should have been for nominal damages only."

*Portman v. Latta* (5) concerned premises let as a residence in 1921 under a lease which was terminated in 1940, and CROOM-JOHNSON, J., found on the facts that at the latter date they were unlettable as a private residence, but that it would not be in accordance with good estate management to pull them down and that they might be used as premises for institutions, etc. In dealing with the amount of damages recoverable under s. 18 (1) in these circumstances, the learned judge rejected the evidence of certain expert witnesses to the effect that the cost of the repairs was necessarily the amount by which the value of the reversion had been diminished, and assessed the damages by reference to the difference between the value of the property repaired and its value unrepaired.

Lastly, in *Landeau v. Marchbank* (1), a case in which on the determination of a lease the premises had been sold at an admittedly good price for conversion into two flats and two maisonettes, LYNSKEY, J., rejected a calculation of damages based on the cost of effecting repairs in accordance with the covenants

less the cost of those rendered valueless by the contemplated conversion, and held that there was no evidence of any diminution in the value of the reversion, and that the plaintiff was entitled to nominal damages only. Counsel for the tenant in the case before us relied, in particular, on a passage ([1949] 2 All E.R. 175) in which the learned judge expressed the view that "the fact that repairs are necessary is not in itself even *prima facie* evidence of damage to the value of the reversion." With the passage just quoted, as a general proposition, we are unable to agree. We find nothing in the earlier authorities to justify the conclusion as a matter of law that in no case and in no circumstances can the fact that repairs are necessary, and the cost of those repairs, be taken as at least *prima facie* evidence of damage to the value of the reversion and of the extent of such damage. There must be many cases in which it is, in fact, quite obvious that the value of the reversion has, by reason of a tenant's failure to do some necessary repair, been damaged precisely to the extent of the proper cost of effecting the repair in question. Nor do we understand the learned lords justices in *Hanson v. Newman* (3) as purporting to lay down an invariable rule of law to the effect that in all cases and in all circumstances the procedure of placing values on the reversion repaired and the reversion unrepaired, and ascertaining the difference, must necessarily be gone through in order to ascertain the diminution in the value of the reversion attributable to the want of repair. Nor do we regard *MACKINNON, L.J.*, in *Salisbury (Marquis) v. Gilmore* (4) as intending to do anything more than to hold that, on the evidence tendered by the plaintiffs in that particular case, the cost of effecting the repairs could not be regarded as any index of the diminution (if any) in the value of the reversion which the want of repair had occasioned.

In the present case the "reversion" for the purposes of s. 18 (1) consists simply of the four first floor rooms and one ground floor room formerly comprised in the tenancy, *i.e.*, not a whole house but merely a set of rooms in a house: see *Hanson v. Newman* (3). The matter is thus uncomplicated by any question of site value, such as materially affected the evidence regarding the New Bond Street premises in *Salisbury (Marquis) v. Gilmore* (4). Nor is there here any question of change of user (as in *Portman v. Latta* (5)), or of sale and physical alteration (as in *Landeau v. Marchbank* (1)). In the present case the landlord, having resumed possession of five rooms in his house which had been let for residential purposes, and intending to use or re-let them for residential purposes, found that through the tenant's breach of covenant it was necessary for him to do certain repairs to the rooms, in order to put them in what he considered a fit state for occupation or re-letting for residential purposes, and, accordingly, he spent money on effecting those repairs, which he would not have had to spend if the covenant had been duly performed. In such a case, if there is evidence that the repairs done, being repairs within the covenant, were no more than were reasonably necessary to make the rooms fit for occupation or re-letting for residential purposes, we fail to see why the proper cost of those repairs should not be regarded, *prima facie*, as representing a diminution in the value of the reversion due to the tenant's breach of covenant, being money which the landlord, acting as an ordinary prudent owner, had to spend on the property owing to the breach, and would not have had to spend but for the breach.

That the repairs here in question were within the covenant is not in dispute. There was clearly evidence on which the learned county court judge could find, and we think it is plain from his judgment that he intended to find, that the £36 at which he assessed the damages represented the proper cost of repairs, within the covenant, which were reasonably necessary to make the five rooms fit for occupation or re-letting according to ordinary standards. The sum of £36 is certainly on the face of it a moderate estimate of the cost to be expected in these days of reasonably necessary decorative repairs to five rooms which have had nothing done to them for ten to twelve years. Mr. Batty's evidence

as to the capital values of the whole house and of the part let to the tenant seems to us to be beside the point. There could be no question as a practical matter of a sale of the five rooms let to the tenant (which, as we have said above, constitute the reversion) separately from the rest of the house. Mr. Batty's intention presumably was to show that there was no diminution in the value of the reversion according to the calculation prescribed in *Hanson v. Newman* (3). That calculation is, no doubt, the right criterion to apply in many, if not most, cases, and we do not for a moment intend to cast any doubt on its validity as a measure of the damages recoverable under s. 18 (1) in cases to which it is appropriate. But we certainly deprecate its introduction as a *sine qua non* into all cases, including a small and simple case like the present, concerned with a letting of some of the rooms in a house, where it becomes a purely hypothetical calculation wholly removed from the practical realities of the matter. Nor do we think that the learned county court judge was necessarily bound to accept Mr. Batty's assertion in re-examination to the effect that the want of repair did not affect the letting value of the premises, if he was satisfied on the evidence as a whole, as we think he clearly was, that the repairs of which he assessed the proper cost at £36 were reasonably necessary to make the five rooms fit, according to ordinary standards, for occupation or re-letting for residential purposes.

We think that the judgment is open to criticism where it states that: "... in HILL'S COMPLETE LAW OF LANDLORD AND TENANT, p. 681 ... *Joyner v. Weeks* (2) is still relied on," and that: "The measure of damages is still as it was in *Joyner v. Weeks* (2)." This is only true in the sense that up to the limit imposed by s. 18 (1) of the Landlord and Tenant Act, 1927 (*i.e.*, the amount (if any) by which the value of the reversion has been diminished) the measure of damages for breach of a repairing covenant is still the cost of executing the repairs required to fulfil the covenant: see *Hanson v. Newman* (3); and in HILL'S COMPLETE LAW OF LANDLORD AND TENANT, 9th ed., p. 681, *Joyner v. Weeks* (2) is actually only cited in treating of the law as it stood before the Act of 1927. This criticism does not, however, affect the result, as it is clear from the rest of the judgment that the learned county court judge did, in fact, apply the test of damage to the value of the reversion, and held that such damage amounted to £36. For the reasons above stated we are of opinion that in the circumstances of the present case there was evidence on which the learned county court judge could so hold, and that he committed no error of law in doing so. We would, accordingly, dismiss the appeal.

*Appeal dismissed with costs.*

Solicitors: *E. E. Pugh* (for the tenant); *Hardman, Phillips & Mann* (for the landlord).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

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## MORLEYS (BIRMINGHAM) LTD. v. SLATER.

[COURT OF APPEAL (SIR Raymond Evershed, M.R., Somervell, L.J., and Hodson, J.), January 24, 1950.]

*Rent Restriction—Possession—House rendered uninhabitable by bomb—No loss of identity—Use by tenant for business purposes—Notice to quit served before repair.*

A The landlords let premises to a tenant on a monthly tenancy partly for use as a dwelling-house and partly for business purposes. In November, 1940, the premises were damaged by enemy action and became uninhabitable, but the tenant was able, and continued, to use them for the purposes of his business. The landlords gave the tenant a notice in writing to quit the premises expiring on July 1, 1949, and now claimed possession.

B  
C HELD: the premises were originally let as a dwelling-house within the Rent Acts; they remained the same identifiable premises; the fact that owing to the damage the tenant was prevented from living in the premises did not change the character of the letting; and, therefore, at the date of the expiration of the notice to quit the premises were still let as a dwelling-house and the tenant was entitled to the protection of the Rent Acts.

*Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* ([1948] 1 All E.R. 44), applied and dictum therein of TUCKER, L.J., (*ibid.*, 47), explained.

D [AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-335, paras. 392-401; and FOR CASES, see DIGEST, Vol. 31, pp. 576-584, Nos. 7256-7330.]

Case referred to:

(1) *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman*, [1948] 1 All E.R. 44; [1948] 1 K.B. 653; [1948] L.J.R. 929; 2nd Digest Supp.

E APPEAL by the landlords from an order of His Honour JUDGE FORBES, sitting at Birmingham County Court, dated Sept. 22, 1949, dismissing their action for possession. The county court judge held that the tenant of premises originally let as a dwelling-house within the Rent Acts remained a protected tenant, although, at the date of the expiration of the notice to quit delivered by the landlords, he was able, by reason of war damage to the premises, to use them only for business purposes. The Court of Appeal now affirmed the decision of the county court judge. The relevant facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

*Lincoln, K.C.*, and *Grove* for the landlords.

*G. Green* for the tenant.

G SIR RAYMOND EVERSLED, M.R.: This case has raised a point of some novelty and of no little difficulty. I think I have felt more doubt about it during the argument than have my brethren, but on the whole I have come to the conclusion that we ought not to disturb the finding of the county court judge.

H By the particulars of claim the landlords alleged that they were entitled to premises described as 202 and 203 Darwin Street, Birmingham, which were let to the defendant on a monthly tenancy at the monthly rent of £3 9s. 4d., "which said tenancy was duly determined by notice in writing to quit" expiring on July 1, 1949. In his defence the tenant said:

"I dispute the plaintiff's claim because the premises were, until damaged by enemy action in 1941, partly dwelling-house and partly business premises and the tenancies thereof were controlled by the Rent Restrictions Acts. I, therefore, claim protection of the said Acts."

No one reading the particulars of claim would guess that the argument which underlay the landlords' claim was that, as the result of bomb damage, the premises had ceased for the purposes of the Acts to be let as a dwelling-house on July 1, 1949. It appears from the particulars of claim that at one time the defendant was the tenant of the two houses, Nos. 202 and 203, but on this appeal we are only concerned with No. 203. The tenant appears to have granted a sub-tenancy of No. 202, the county court judge made an order for possession of that house, and there is no appeal about it. A

Before I refer to the evidence and the judgment, it will be appropriate to state the point which now emerges. The premises were damaged by enemy action in November, 1940, and, as the result of that damage, now over nine years old, they became and are still uninhabitable. That is, of course, a word of somewhat elastic import, but I think it should be understood here as meaning that they are not capable of being occupied and used in the ordinary sense of the term for living quarters. As a result, says counsel for the landlords (and he founds himself in large measure on the decision of this court in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1)) the necessary condition to enable a tenant to invoke the Act has not been fulfilled because the premises have ceased to be let as a dwelling-house. The tenant, however, is still in occupation of the premises, and the evidence is that he uses them now for his business as a rag and bone merchant whereas formerly he used the premises in part as his home and residence and partly for his business. He now occupies a room in the premises for office work and uses the yard and other land for his business. There was indicated by counsel for the landlords as a subsidiary argument that the nature of the user had so changed that at the relevant date, namely, at the date of the expiry of the notice to quit, the premises were let, not as a dwelling-house, but as business premises and as such were excluded from the Rent Acts. B C D

The general question, which is of some interest and as I said of some novelty, may be stated thus. Where premises have been damaged by bombs and rendered uninhabitable in the sense in which I have defined the word, is the result that the tenant, who has had to go and live somewhere else, on the termination of his contractual tenancy deprived of his right to claim the benefit of the Rent Acts by reason only of those facts? The evidence, to which I will now turn, consisted, first, of the testimony of the managing director of the landlords who stated, so far as is relevant, simply: "Want possession for business. Yard, building not habitable. May have been old house. Tenant uses as store." The tenant stated that he lived at these premises until November, 1940: E F

"Bombed. I moved out. After bombing, arranged reduced rent. Wish to go back and live there . . . I repaired inside. No agreement. Landlords did outside [which counsel for the tenant said referred to the original demise of the premises made in 1936]. I made no claim on War Damage Commission. I had asked to go back in 1940. Roof on. I had agreed with builder to repair last July . . . Always wished to go back." G

The note of the judgment is:

"I found that No. 203 Darwin Street was let to the tenant as a dwelling-house, that he lived there with his family until November, 1940, when the building was damaged by bombs, that the tenant then moved out of the house, and that he was waiting to return at such time as the premises should be repaired and to occupy them with his family. I, therefore, held that his tenancy of No. 203 was protected by the Rent Restrictions Acts." H

In my judgment, the proper test in cases of this kind is whether the house as such can be said substantially to have ceased to exist. There was here a contract whereby the premises were let to the tenant. Undoubtedly, on the

evidence, when the letting was effected, they were let to him as a dwelling-house within the meaning of the Act. It was argued by counsel for the landlords that because the premises were uninhabitable and in fact were uninhabited when the notice to quit expired it followed that they were not then let as a dwelling-house to the tenant. He founds himself to some extent for that proposition on the *Ellis* case (1), but, if counsel's proposition be true, then what is the answer to the question posed by SOMERVELL, L.J., during the argument, *viz.*: For what purpose were they let at that date? One can imagine, if habitability be the test, a case in which a house is rendered temporarily uninhabitable by the flooding of the ground floor by inundation from a river. Until the water has been pumped out and the house dried, it would, in fact, be uninhabitable. Could it be said, if the landlord in such circumstances gave notice to terminate the tenancy, that the tenant was deprived of his right to claim protection because at the date of the termination of the notice the premises were not in fact "let to him as a dwelling-house"? It would seem a very surprising thing if an affirmative answer had to be given to that question, and it would, I think, be very surprising if a tenant, who had to be evacuated because his house was damaged by enemy action and to whom notice to quit was given before repairs were done, was deprived of his right to claim protection under the Acts. As I have already said, for my part I think the test should be (and this I believe to be borne out by the authorities) whether at the relevant date it can be said that the dwelling-house which is the subject-matter of the original contract has as such ceased to exist either because it has been wholly demolished and has disappeared or because it has been converted into something else, for example, into business premises. In this case I think the learned judge's judgment must be taken to have amounted to a finding that the premises had not ceased to exist, and I think there is ample evidence to support that view. The roof was still on, and the tenant was using it for some purpose.

Without going through the cases, I think their effect is correctly summarised in Mr. R. E. Megarry's book on the RENT ACTS, 4th ed., p. 83. He there says:

"... the restrictions of the Acts do not inhere in the land after the demolition of the dwelling-house but remain only so long as it is there."

He also says in his note referring to the *Ellis* case (*ibid.*):

"It seems pretty clear that the statutory tenancy perishes with the dwelling-house ..."

That is a matter which we are not called on to decide, but the argument founded on the cases appears to me to be that the test is whether the house which was the subject of the original tenancy has ceased to exist as such.

At this stage I will refer more fully to *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1), because at first reading it would appear that certain observations of TUCKER, L.J., on which counsel for the landlords relied, lend support to the view for which he was contending, namely, that the question of habitability or habitation was in fact the test. The facts of that case were that the house in question was damaged, though by no means destroyed, by enemy action in 1941. At a later stage the landlord, in collaboration with the war damage authorities, pulled down completely the remains of the original structure, cleared the site, and erected on the site a new house with new material though in all respects similar to the house which had been originally damaged. Throughout all this period the contractual tenancy continued to subsist, but before the new house was completed ready for habitation, by proper notice to quit the landlord terminated the contractual tenancy. The tenant then claimed to be entitled to the protection of the Rent Acts in respect of the new edifice. As I think is made quite plain from an earlier part of the judgment of TUCKER, L.J. ([1948] 1 All E.R. 46), it is vital to his conclusion that the old



dwelling-house had passed completely away, not by the explosion of the bomb but as a result of the subsequent demolition, and had been replaced by an entirely new house, and, further, that during his contractual tenancy the tenant had never occupied as his dwelling that new house and so could not say that that new house had ever been let to him as a separate dwelling. It was not, in fact, used by him or let to him as such at the material date. In the light of those facts must be read the following passages in TUCKER, L.J.'s judgment (*ibid.*, 47):

"It is true that in several cases it has been pointed out that a tenant does not lose the benefit of the Acts merely because in the course of his business or occupation he may be absent from the premises for long periods, but the house must be one which is being used by the tenant as a dwelling-house. In the present case it seems to me impossible to say, on the uncontradicted evidence and on the judge's finding, that on June 21, 1947, [the date of the expiration of the notice to quit] this was a house which was let as a separate dwelling. It was not completed or fit for habitation, the windows were not in, and it was, in my view, not only not being used as a dwelling-house, but it was not fit for or capable of user as a dwelling-house at the material date."

At first sight, as I stated earlier, those phrases may appear to support the proposition that habitability at the relevant date was the test, but when they are examined in relation to the earlier reasoning and the facts it is clear that that is not so and that the basis of the decision was the total disappearance of the original subject-matter of the contract and the fact that the new house had never at any material date reached the condition when the tenant could declare: "This house was occupied as my home by me." The phrase which most points in the direction of the argument of counsel for the landlords is, of course, "but the house must be one which is being used by the tenant as a dwelling-house." But, again, I do not think that the learned lord justice meant that, at the date when the Acts applied, it must be shown that there was user or even the possibility of user of the house as a dwelling-house by the tenant. If the language had that meaning, it was obviously, I think, unnecessary for the purposes of the decision, and I venture, with all respect, to think that it was stating the matter somewhat too broadly.

For the reasons which I have given I think it would be wrong to hold that, where there has arisen, whether by enemy action, flood or fire, a state of things in which a house cannot be inhabited in the ordinary sense of the word at the point of time when the contractual tenancy ended and it is not so occupied, that is conclusive against the tenant's invocation of the Rent Acts. COHEN, L.J., in the *Ellis* case (1) says (*ibid.*, 48):

"I entirely agree with my Lord that in the present case the evidence clearly establishes that at the material date, when the notice to determine the tenancy expired, there was no house fit for occupation on the premises. That being so, I do not think that it was possible for the tenant to establish a claim to remain on as statutory tenant."

But COHEN, L.J., says also (*ibid.*):

"I think the only possible inference from the evidence is that the house comprised in the original tenancy . . . ceased to exist as a house . . ."

I, therefore, think that *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1) is not an authority for the view which counsel for the landlords contended for in his argument.

There remains the question put somewhat tentatively by him: Can it be said on the facts as found that there was here a change from the original user as a dwelling-house to user for business purposes? I think, again, it would be dangerous to suggest that some temporary arrangement for the use of what remained for purposes such as storing belongings would have so far-reaching

an effect. On the other hand, equally it may be possible that a new bargain is made which does not contemplate the restoration of the dwelling-house or its use as a dwelling-house. Those, however, are matters of fact and the only evidence on the matter is the one sentence: "Tenant uses as store." The learned judge has not found the facts in the landlords' favour, and, therefore, I think that there is no sufficient basis for that suggestion. As I said earlier, the case is not wholly satisfactory. A long period has elapsed since the bomb struck these premises, and there is no evidence which indicates what is likely, or, indeed, possible, to be done about them. The landlord may or may not be under an obligation to restore them. The tenant may or may not be entitled to do so if he so desires or is able to do so. There may or may not be some restrictions which may be material on the matter. On none of those questions is there any material before us, but in deciding that the county court judge's judgment be undisturbed I am not pre-judging any subsequent application that the landlord may be entitled to make according as events turn out in the future, and according as these premises become or do not become available for occupation for any particular purpose. Suffice it for the moment to say that I think the learned judge was entitled to find on the evidence that this house remained substantially the same identifiable edifice. It was originally let as a dwelling-house, and I am not prepared to hold that at the material date it ceased to be so let within the meaning of the Acts. That being so, and the tenant being, in fact, in possession of it, I see no ground for disturbing the learned judge's conclusion that he is entitled to claim the aid of the Rent Acts. For these reasons I would dismiss the appeal.

**SOMERVELL, L.J.:** I agree.

**HODSON, J:** I agree.

*Appeal dismissed with costs.*

Solicitors: *Beckingsales*, agents for *Joseph Cohen & Cowen*, Birmingham (for the landlords); *Sweepstones*, agents for *Parkhouse & Allee*, Birmingham (for the tenant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

## R v. REYNOLDS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Morris, JJ.), January 23, 1950.]

*Criminal Law—Evidence—Child—Ability to understand nature of oath—Evidence of school attendance officer—Evidence given in absence of jury—Children and Young Persons Act, 1933 (c. 12), s. 38 (1).*

On the trial of the appellant for an indecent assault on a child aged eleven years who was attending a school for mentally retarded children the question arose under the Children and Young Persons Act, 1933, s. 38 (1), whether the child understood the nature of an oath or whether she was possessed of sufficient intelligence to justify the reception of her unsworn evidence. The chairman of quarter sessions ordered the jury to retire and evidence about the child was then given by a school attendance officer.

**HELD:** the evidence should have been given in the presence of the jury, and, as this was not done, the conviction must be quashed.

*R. v. Dunne* (1929) (143 L.T. 120), *applied*.

[AS TO THE EVIDENCE OF CHILDREN IN CRIMINAL TRIALS, see HALSBURY, *Hailsham Edn.*, Vol. 9, pp. 220-222, paras. 307 and 308; and FOR CASES, see DIGEST, Vol. 14, pp. 453-456, Nos. 4806-4825, and Digest Supp.]

Case referred to:

- (1) *R. v. Dunne*, (1929), 99 L.J.K.B. 117; 143 L.T. 120; 21 Cr. App. Rep. 176; Digest Supp.

APPEAL against conviction.

The appellant was convicted at Hertfordshire Quarter Sessions of indecent assault on a child. Evidence was given, in the absence of the jury, as to the child's fitness to give evidence on oath. The court held this to be such an irregularity that the conviction could not stand. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

*Rees-Davies* for the appellant.

*Pensotti* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted at the Hertfordshire Quarter Sessions of indecent assault on a child, and he appeals against conviction.

During the trial the question arose whether the child should be sworn as a witness or whether her unsworn evidence should be received in accordance with the Children and Young Persons Act, 1933, s. 38 (1). The further question was then raised by the clerk of the peace whether or not the investigation of this matter should be conducted in the presence of the jury. After some discussion the chairman said:

"The question whether the child is capable of taking the oath or not is entirely a question for me. If counsel says he wishes to make submissions to me, I am pleased to hear what they are. What I shall do about them is another matter. The only question at the moment is whether these submissions should be made in the absence of the jury. I think perhaps that would be the better course. Members of the jury, I do not know what is coming. It may be that it is something you should not hear until after the case. Therefore, I must ask you to retire."

Evidently the clerk of the peace, in putting the question: "Do wish the jury to be here?", was thinking of the practice which always obtains in the courts where there is a discussion whether a confession is admissible or whether it has been obtained by methods which would render it inadmissible. In such circumstances the jury are always told to retire because in the course of adducing evidence to prove the circumstances in which the confession has been obtained, it is almost impossible to prevent the terms of the confession being disclosed, and the whole question at that stage is whether or not the confession can go before the jury. Therefore, the jury is out of court while that is argued so that they cannot hear the terms of the confession which may afterwards be held not to be admissible. In the present case the state of affairs was entirely different. After the jury had retired the school attendance officer, who knew the school to which the child had been sent, was called. It is a school, not for mentally deficient children, but for mentally retarded children. This child came from a somewhat squalid home and her degree of education was below the average for a child of her age, which was twelve at the time of the trial. She was eleven at the time of the assault. The school officer was called, and he gave evidence and was cross-examined. The evidence takes some three or four pages of the shorthand note. All that was done in the absence of the jury, and, in our view, that was such an irregularity that this conviction cannot be allowed to stand.

What did the chairman have to decide? By the Children and Young Persons Act, 1933, s. 38 (1):

"Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not



given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth . . . ”

So, when a child is put into the witness-box, the chairman or presiding judge has to decide, first, whether, in his opinion, the child understands the nature of the oath, and, then, if that question is decided in the negative, whether he is possessed of sufficient intelligence to justify his unsworn evidence being received on the ground that he understands the duty of speaking the truth.

In *R. v. Dunne* (1), a child of seven was put into the box to be examined on a charge of incest, and the judge had her taken to his room so that he could talk to her and examine her to see whether she understood the nature of an oath. She afterwards gave evidence, but this court quashed the conviction and LORD HEWART, C.J., said (143 L.T. 121):

“ It goes without saying that what the judge did in that matter was suggested purely by feelings of kindness and consideration for the youthful witness. The question for this court is, can a conviction stand after an incident of that kind has occurred? It is admittedly an incident without parallel. Admittedly, nobody in this court, either from his own experience or from researches into the authorities, can adduce any parallel case. In the result, something was said to or by this witness which was not in the hearing or presence of the jury or of the accused. The court is clearly of opinion that, in these circumstances, the appeal must be allowed and the conviction quashed.”

No member of this court has ever known of a case in which a witness has been called to inform the court whether or not a child is fit to give evidence. I am not saying that there may not be cases—perhaps this is one—in which the judge or chairman may want some such assistance, especially if he hears that the child is at a particular sort of school. It is not on that ground that the court thinks that there has been a fatal mistake here. The reason why the court decided in *R. v. Dunne* (1) that the evidence of the child must be given in the presence of the jury was because, although the duty of deciding whether the child may be sworn or not lies on the judge and is not a matter for the jury, it is most important that the jury should hear the answers which the child gives and see her demeanour when she is questioned by the court, for that enables them to come to a conclusion as to what weight they should attach to her evidence. If that be the reason why the court in *R. v. Dunne* (1) held that it was essential that the evidence should be given in the presence of the jury, it is *a fortiori* so, it seems to me, when some witness is called to assist the court by relating his experience of the child and the impression he may have formed of her. The jury then would have all the facts before them with regard to the child's truthfulness or reputation for truthfulness and all the information showing whether the child was a witness on whose evidence they could rely. It should be regarded as most exceptional that any evidence should be given in a criminal trial not in the presence of the jury. As I have said, there is one well known exception, an exception which has been laid down in mercy and fairness to prisoners, *viz.*, that evidence on the question whether a confession was properly made ought to be given in the absence of the jury. The class of evidence referred to in this case ought to be given in the presence of the jury in open court. For these reasons we have come to the conclusion that this conviction must be quashed.

*Appeal allowed.*

Solicitors: *Cartwright, Cunningham & Co.* (for the appellant); *Hartley & Hine, Hitchin, Herts* (for the Crown).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

*Re* PRICE (*deceased*). WASLEY *v.* PRICE AND OTHERS.

[CHANCERY DIVISION (Romer, J.), January 26, 1950.]

*Will—Gift of “all my belongings”—Exclusion of real property.*

By a home-made will, dated Aug. 9, 1946, a testator who died on Oct. 21, 1948, provided: “I . . . leave all my belongings to my daughter I.M.P. to my wife furniture to do as she like all my belongings to bee [*sic*] sold within eight weeks of my death and the money to bee [*sic*] invested and to draw the interested [*sic*] up to my daughter I.M.P. is twenty-five years of age then to do as she please. If she die before that age twenty-five years I leave to my too [*sic*] sisters . . . all my belongings.” The testator was survived by his wife and I.M.P., who was an infant at the date of the testator's death, and his estate consisted of cash at a bank, a funeral benefit, live and dead farming stock, income tax post war credits, and a freehold cottage.

**HELD:** the word “belongings” was not, in common usage, an apt expression in relation to real property, and, as there was nothing in the will or in the circumstances to indicate the contrary, in this case it did not include the freehold cottage.

[AS TO DESCRIPTIONS OF PROPERTY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 261-265, paras. 312, 313; and FOR CASES, see DIGEST, Vol. 44, pp. 742-746, Nos. 5990-6036.]

Cases referred to:

- (1) *Re Bradfield*, [1914] W.N. 423; 44 Digest 722, 5722.
- (2) *Re Mills' Will Trusts*, [1937] 1 All E.R. 142; 106 L.J.Ch. 159; 156 L.T. 190; Digest Supp.
- (3) *Re Edwards*, [1906] 1 Ch. 570; 75 L.J.Ch. 321; 94 L.T. 593; 44 Digest 578, 3979.

ADJOURNED SUMMONS to determine whether, on the true construction of the testator's will, the expression “all my belongings” therein included the testator's freehold cottage. ROMER, J., held that the cottage was not included. The facts appear in the judgment.

*R. S. Lazarus* for the plaintiff, one of the administrators of the testator's estate, and for defendants other than the testator's widow.

*Beswick* for the widow.

**ROMER, J.:** This case raises a question of some little difficulty under the home-made will of Henry William Price, who died on Oct. 21, 1948, having made his will on Aug. 9, 1946. The will is written on a printed form, but the testator took no notice of the printed parts. The printed matter is as follows:

“This is the last will and testament of me———of———in the county of———made this———day of———one thousand nine hundred and———and I hereby revoke all former wills and testamentary dispositions of any kind at any time heretofore made by me and I appoint——— of——— and——— of——— (hereinafter called ‘my trustees’) to be the executors and trustees of this my will I give and bequeath.”

At that point the testator launches out into making his own testamentary disposition which, being a man apparently of small education, he did in very ill-written and ill-chosen language. He provides:

“I Henry William Price of Church View Bishop's Cleeve near Cheltenham in the county of Gloustershire [*sic*] leave all my belongings to my daughter Iris May Price to my wife furniture to do as she like all my belongings to bee [*sic*] sold within eight weeks of my death and the money to bee [*sic*]

invested and to draw the interested [*sic*] up to my daughter Iris May Price is twenty-five years of age then to do as she please. If she die before that age twenty-five years I leave to my too [*sic*] sisters Annie Marie Dobbins and Margaret Price all my belongings."

A The testator left the following estate at his death:—cash at Lloyds Bank Ltd., Cheltenham, £550 odd; funeral benefit, £17 odd; live and dead farming stock, £238 odd; income tax post war credits, £32 odd; and the freehold cottage known as "Church View" and valued at £1,500 in which he himself lived. These details appear in the affidavit of the plaintiff who goes on to say that the furniture in the cottage at the testator's death all belonged to the widow. I should, perhaps, add that, according to the affidavit, the will was proved on May 3, 1949, but I gather that a grant of administration was made on that date to the plaintiff and the widow.

B The question at issue is whether the freehold cottage passes under the gift of "all my belongings" or as on an intestacy? Counsel for the widow contends that the effect of the bequest is to pass the personal estate but nothing else. He puts the matter partly as one of construction to be determined in the light of surrounding circumstances, and partly as a matter of dictionary definition and judicial interpretation. C He says that the word "belongings" is not a word usually applied to real estate, and he has referred me to the definition of "belongings" in the SHORTER OXFORD ENGLISH DICTIONARY. The definition there, for the present purposes, is "goods, effects." Counsel says that, if that be the proper meaning, then, as "effects" is confined to personalty, and "goods" also is confined to personalty, "belongings" should be similarly D so confined.

E Counsel for the plaintiff drew my attention to two cases which, he said, show that a wider interpretation has been given to the word "belongings" than the definition of "goods, effects" to which I have referred. The first case he cited was *Re Bradfield* (1), where gifts of specific chattels were followed by gifts of other chattels and "all other belongings," and that gift, in its turn, was followed by other specific bequests. The judgment of EVE, J., is very shortly reported as follows ([1914] W.N. 423):

"EVE, J., held that 'belongings' must be given its primary meaning of 'property' and 'all other belongings' covered all that the testatrix did not specifically dispose of."

F At first sight that would seem to show that EVE, J., gave a fully extended meaning to the word "belongings," but the report does not show what property the testatrix died possessed of. In particular, it does not show whether she died possessed of any real estate, but, inasmuch as the phrase which had to be construed, "all other belongings," followed a gift of personal chattels, it seems to me reasonably clear that there was not any real estate included among the G testatrix's assets because it would have been difficult to hold, having regard to the *ejusdem generis* rule, that "belongings" in that context should pass real estate. What, in my judgment, EVE, J., there held was that "belongings" must be given its primary meaning of "property" in the sense that "all other belongings" would cover all the testatrix's personal property that she did not H specifically dispose of. I do not, therefore, think that I can get any real assistance from that case.

In *Re Mills' Will Trusts* (2) the testatrix, by her will, gave to her daughter

"all my home and personal belongings except the piano and that is for my grandson . . . All insurances to go to my daughter . . ."

It was held that the words "all my home and personal belongings" were sufficient to pass the whole of the residuary estate of the testatrix. In his judgment BENNETT, J., said ([1937] 1 All E.R. 144):



"Now the word 'belongings' is wide enough to cover a testatrix's personal estate, and has been held by EVE, J., in *Re Bradfield* (1) to have the primary meaning of property. So, unless there is sufficient in this will to afford a context restricting the meaning of the term 'belongings,' it should be interpreted as meaning property."

That, again, is not authority for the proposition that a gift of "belongings" would pass real estate. On the other hand, counsel for the plaintiff points out that both those cases are authorities for the proposition that "belongings" means property in a wide sense, and that, therefore, in the courts the word "belongings" has received a less narrow interpretation than that which is to be found in the SHORTER OXFORD ENGLISH DICTIONARY. Counsel from there argues that, once you go beyond the narrow meaning in the dictionary, why not go the whole way and say that it covers and includes all the property of which a person died possessed?

So much for the arguments relating to the dictionary and legal meanings of the word "belongings" in general, and the cases which have some bearing on it. We come to the contentions of counsel for the widow on the construction of the will, which, he says, shows that there is no reason to suppose that the testator was intending to deal with his house. There are, indeed, he argues, reasons to suppose the contrary. His wife survived him as also did his daughter, who was at the date of the testator's death, and is, an infant. She was thirteen or fourteen years old at the time that the will was made. Counsel for the widow says that it is apparent that the main idea in the testator's mind was to benefit his daughter, and it would be an odd way of benefiting her to deprive her of her home. I do not myself think there is a great deal of force in that contention—although it certainly has some force—because she would, instead of the house, have the proceeds of sale, and, as everybody knows, the present time or, at all events, last year, was a very favourable time for selling property. Apart from that aspect of the matter, counsel relies very much on the emphatic direction that the testator's belongings, whatever he intended those to have been, were to be sold within eight weeks of his death. He says that, although that direction might be perfectly sensible and capable of being carried out in relation to the farming stock, it would have been quite impossible to carry it out in relation to real property, more especially as the testator did not appoint anybody to be an executor of his will.

Counsel for the plaintiff says, and rightly, that EVE, J., and BENNETT, J., went further in interpreting the word "belongings" than the meaning which is to be found in the SHORTER OXFORD ENGLISH DICTIONARY, and he says, as I have already indicated, that, that being so, we should go the whole way? He says: "Take the word 'belongings' and see what it means. All that it means is something that belongs to a person, and in common conversation it is certainly apt to say: 'Who does that house belong to?'" It is true that it is accurate to say: "Who does that house belong to?", but my view of the matter is that "belongings" has a secondary or special meaning of its own now which has removed it from the meaning which it originally had, and that, while in ordinary parlance it means property, it cannot be applied to property other than personal property. In that view I am supported by the dictionary definition, and it is a view which, I think, is not in the least at variance with the decisions of EVE, J., or BENNETT, J., to which I have referred, because in neither of those cases was the mind of the learned judge applied to real estate at all. When they said that "belongings" meant or included property, they meant—having regard to the particular matters which were falling for decision—personal property.

I, therefore, approach this will on the footing that "belongings" in its natural sense and according to the ordinary, common usage of the word, is not an apt expression to relate to real estate. Certainly there is nothing on the face of this will to lead to a contrary conclusion, because it seems to me that the

direction to sell within eight weeks shows that the testator had not in mind his house at all, which was the home, not only of his daughter, but also of his wife, who was living with him at the time of his death. Apart altogether from the administration difficulties, of getting a legal personal representative appointed and selling the house within eight weeks, this direction, if carried out, would mean that his wife and daughter would have hurriedly to leave the family home and find somewhere else to live, which was at the date of the testator's death, and still is, by no means an easy thing to do. That direction for sale, however, is perfectly apt and intelligible in regard to the rest of the testator's assets, but it seems to me to be wholly inappropriate to this cottage—the family home—and it is a strong pointer, in my view, in the direction that the testator was not contemplating the inclusion of his house in the expression “all my belongings.”

I arrive at the conclusion, partly on the ordinary meaning of the word “belongings” in the English language and partly on the construction of this particular will in the light of the surrounding circumstances, that “belongings” is to be given the same meaning as it received in *Re Mills' Will Trusts* (2), that is to say, the residuary personal estate, but that its meaning does not extend further. The argument was advanced that the court leans against an intestacy, but, if the court finds language which it can fairly interpret and which, taking it as it stands, has only one effect, the court is not entitled, and has never been entitled, to depart from that meaning simply to avoid intestacy, which, as ROMER, L.J., once pointed out in *Re Edwards* (3), is something which testators may deliberately have in contemplation. For these reasons I hold that, on the true construction of the testator's will, the gift therein contained of “all my belongings” did not comprise the freehold property known as Church View, Bishops Cleeve, but that the testator died intestate so far as that freehold property was concerned. The costs as between solicitor and client of all parties will come out of the estate in due course of administration.

*Order accordingly.*

Solicitors: *Waterhouse & Co.*, agents for *Winterbotham, Gurney & Co.*, Cheltenham (for all parties).

[*Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.*]

## JAMES LAMONT & CO., LTD. v. HYLAND, LTD.

[COURT OF APPEAL (Tucker and Asquith, L.JJ., and Roxburgh, J.), January 30, 1950.]

*Court of Appeal—Appeal—Consent to dismissal—Consent initialled by president of court—No order drawn up or entered—Discretion of court to allow or refuse appeal to be proceeded with.*

On Nov. 11, 1949, LYNSEY, J., made an order giving the plaintiffs leave to sign final judgment for the sum claimed by them from the defendants in an action on a bill of exchange. On Nov. 14 the defendants gave notice of appeal against that order. On the same day the defendants paid to the plaintiffs the sum claimed and signed a form of consent to the dismissal of their appeal. This consent was initialled by the president of the Court of Appeal, but no order dismissing the appeal was drawn up or entered. On Nov. 23 the defendants gave a fresh notice of appeal.

HELD: until an order had been drawn up and entered the appeal was not dismissed; the Court of Appeal had a discretion to allow or to refuse the appeal to be proceeded with on either a fresh or the original notice of

appeal; and in the circumstances of the present case the court, in the exercise of its discretion, would allow the appeal to proceed.

Cases referred to:

- (1) *Re Samuel, Trustee v. Kerman* (No. 2), [1945] 2 All E.R. 319; [1945] Ch. 364; 114 L.J.Ch. 337; 173 L.T. 278; 2nd Digest Supp.
- (2) *Watson v. Cave* (No. 2), (1881), 17 Ch.D. 23; 50 L.J.Ch. 561; 44 L.T. 117; Digest Practice 796, 3589.

APPEAL by the defendants from an order of LYNSEY, J., in chambers, made on Nov. 11, 1949, giving the plaintiffs leave under R.S.C., Ord. 14, r. 1, to sign final judgment.

Counsel for the plaintiffs took the preliminary point that, a form of consent to the dismissal of the appeal having been signed by the defendants and initialled by the president of the Court of Appeal, as required by the practice direction in the notes in the ANNUAL PRACTICE, 1948, to R.S.C., Ord. 58, r. 8, the defendants were precluded from proceeding on a fresh notice of appeal, although no order dismissing the original appeal had been made. The Court of Appeal allowed the appeal to proceed.

*MacKenna* for the plaintiffs.

*Ashe Lincoln, K.C.*, and *Peter Bristow* for the defendants.

**TUCKER, L.J.:** This is an appeal by the defendants from an order of LYNSEY, J., in chambers, dated Nov. 11, 1949, giving the plaintiffs leave under R.S.C., Ord. 14, r. 1, to sign final judgment for £20,575 6s. 10d. Counsel for the plaintiffs takes a preliminary point and submits that this appeal will not lie.

This was an action on a bill of exchange. The defence was that the bill was given in respect of certain shipbuilding work and that the work had been badly done. Notice of appeal from the order of Nov. 11 was given, but on Nov. 14 the defendants' solicitors wrote stating that a bankers' draft for payment of the amount of the judgment would be sent to the plaintiffs shortly, and, by letter of the same day, the defendants' solicitors sent the plaintiffs a cheque for £20,575 6s. 10d. Thereupon, the defendants consented to the dismissal of their appeal, and they signed by their solicitors the following consent: "We consent to the dismissal of the appeal herein, all parties being *sui juris*." That was initialled by the president of the Court of Appeal, but no order was drawn up or entered. Thereafter, the defendants changed their solicitors and on Nov. 23 they gave a fresh notice of appeal which now comes on.

The practice is stated in the ANNUAL PRACTICE, 1948, p. 1330, as follows:

"Where an appellant is *sui juris* and does not desire to prosecute an appeal, he may present a request signed by his solicitor stating that he is *sui juris* and asking to have the appeal dismissed, in which case (subject to the request being initialled by the president of the court) the appeal will be dismissed and struck out of the list, and an order will, if necessary, be drawn up directing payment of the costs by the appellant, such costs to be taxed in case the parties differ."

The position under this practice was considered by this court in *Re Samuel, Trustee v. Kerman* (No. 2) (1), the headnote to which is as follows ([1945] Ch. 364):

"Under the practice laid down in 1938 (see note to Ord. 58, r. 8, in ANNUAL PRACTICE, 1944, p. 1301) an appellant who is *sui juris* may submit an application to have the appeal dismissed and on this application being initialled by the president of the court the appeal will be dismissed with costs. It follows that, notwithstanding the signing by both parties of a form of consent to an appeal being abandoned, the notice of appeal remains on foot; and the court will allow the appeal to be proceeded with on



this notice of appeal, unless it considers that by reason of what has happened the respondent has changed his position disadvantageously :—*Quære*, whether in such a case the court would allow a new notice of appeal to be given. As under the existing practice an appellant can obtain the dismissal of an appeal without securing the respondent's consent, a consent signed by both parties cannot set up any contractual relationship. *Watson v. Cave* (2) discussed and not followed having regard to the change in the practice."

In *Samuel's* case (1) a trustee in bankruptcy sought to abandon his appeal, and he obtained the respondent's consent. Subsequently, he desired to proceed with his appeal, and the matter came before the court. The document of consent never came before the president of the court to be initialled, and so the appeal was never dismissed. LORD GREENE, M.R., in his judgment, said ([1945] 2 All E.R. 321, 322):

"No order has been made dismissing the appeal: the notice is still a live notice unless there be some reason which would induce the court to say that in the circumstances the appellant should not be allowed to proceed with that notice . . . I cannot myself see how such an order could have been made. Similarly, under the present practice, once an order has been drawn up and entered, pursuant to an application by the appellant duly initialled by the president of the court to dismiss the appeal, there is an end of the appeal; and I see no means by which the court would have jurisdiction to grant leave to serve a fresh notice of appeal in respect of an appeal which *ex hypothesi* is dead and buried by the order dismissing it."

It is clear that the appeal is not dismissed until an order has been drawn up and entered. The signing of the consent and the initialling by the president of the court is all preliminary machinery leading up to the drawing up and entry of the order. Frequently no order is drawn up unless the taxation of costs is required, but, if an order is not drawn up and entered, a respondent may find himself in a difficulty. In the present case, the consent having been initialled by the president of this court, the matter is on the same footing as if an application had been made in open court and dealt with. The procedure of initialling these consents is merely to save time and expense, and it affords exactly the same authority to the officials who draw up the formal order as an order made in court. Accordingly, where this court has, under that procedure, in effect made an order which has not been drawn up, the court has power to refuse to allow the matter to be proceeded with by a fresh notice of appeal or by the party seeking to rely on the original notice of appeal. In some cases it would be an abuse of the practice and procedure of the court to allow a party to blow hot and cold in that way, but the matter is one which is within our discretion and unless and until an order has been drawn up and entered we can give leave to allow the matter to proceed.

The present case is an exceptional one in that the plaintiffs are in possession of the money claimed and a very short time elapsed between the consent and the defendants' change of mind. There is no suggestion that the plaintiffs have altered their position in consequence of the consent or would in any way be embarrassed by allowing this appeal to proceed. In all the circumstances and subject to questions of costs I think that we should exercise our discretion in this case by allowing the appeal to proceed.

ASQUITH, L.J.: I agree.

ROXBURGH, J. : I also agree.

*Order accordingly.*

Solicitors: *Sydney Morse & Co.* (for the plaintiffs); *Torr & Co.*, agents for *Morton, Morton & Shaw*, Sunderland (for the defendants).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

## DEAN v. SECRETARY OF STATE FOR WAR.

[COURT OF APPEAL (Tucker and Asquith, L.JJ., and Roxburgh, J.), January 23, 1950.]

*Agriculture—Agricultural holding—Tenancy agreement Compensation for disturbance—Amount of compensation—Covenant by landlord to pay “for any loss or damage through disturbance”—Amount of compensation not confined to statutory limits—Agricultural Holdings Act, 1923 (c. 9), s. 12 (6).*

Under a written agreement the tenant held an agricultural holding for the term from Mar. 25 to Sept. 29, 1942, and “thereafter from year to year determinable by either party by one year’s previous notice in writing to expire at the end of the second or any subsequent year of tenancy or by the landlord as hereinafter mentioned.” Clause 6 of the agreement provided: “The landlord may at any time determine the tenancy [of the holding] if required for naval, military or Air Force purposes or for the purpose for which the farm was acquired for the landlord or for other purposes by virtue of s. 25 (2) of the Agricultural Holdings Act, 1923, by a demand for possession ... and thereupon the said tenancy ... shall forthwith cease and determine ... and thereupon the landlord shall pay or allow to the tenant by way of compensation (in addition to such compensation if any as he may be otherwise entitled to under the Agricultural Holdings Act, 1923) the fair value of the crops growing in the farm ... and the tenant right thereon and any loss or damage he may sustain through such disturbance ...” The tenant gave up possession of the farm on Dec. 17, 1943, in consequence of a notice to quit served on Nov. 13, 1943, by the landlord who required the land for War Department purposes. On a claim for compensation by the tenant the landlord contended that the effect of cl. 6 was merely to entitle the tenant to the amount of compensation payable under the Agricultural Holdings Act, 1923, s. 12 (6).

**HELD:** the words in the agreement, “any loss or damage [the tenant] may sustain through such disturbance,” must be construed as intended to give a greater measure of relief to the tenant than that provided by s. 12 (6) of the Act.

[AS TO COMPENSATION FOR DISTURBANCE OF THE TENANCY OF AN AGRICULTURAL HOLDING, see HALSBURY, Hailsham Edn., Vol. 1, pp. 361-368, paras. 594-601; and FOR CASES, see DIGEST Supp.

FOR THE AGRICULTURAL HOLDINGS ACT, 1923, see HALSBURY’S STATUTES, Vol. 1, pp. 86-91 (s. 12) and pp. 99, 100 (s. 25).]

**APPEAL** from a decision of MORRIS, J., on an award stated in the form of a Special Case by an arbitrator.

The tenant, Mr. Sydney George Dean, entered into a written agreement with the landlord, the Secretary of State for War, for an agricultural holding consisting of a farm and 182 acres of land at Inber, Wiltshire. By cl. 6 of the agreement the landlord could determine the tenancy in whole or in part at any time if the land were required for naval, military or Air Force purposes, subject to the payment of compensation to the tenant for disturbance under the Agricultural Holdings Act, 1923, and under the terms of the agreement (the relevant clause of which is set out in the judgment of TUCKER, L.J.). On Nov. 13, 1943, the landlord served notice to quit the whole of the land and after the tenant had quitted the holding pursuant to such notice he claimed compensation. The matter was referred to an arbitrator and no dispute arose over the terms of the award except on the finding that the tenant was not entitled to compensation for loss of profit. On appeal, MORRIS, J., reversed that finding and awarded the sum of £600 under this head, and the Court of Appeal now affirmed that decision and dismissed the appeal of the landlord,

*Diplock, K.C.*, and *Quintin Hogg* for the landlord.

*Scott Henderson, K.C.*, and *L. A. Blundell* for the tenant.

**TUCKER, L.J.:** This is an appeal from a judgment of *MORRIS, J.*, on an award stated in the form of a Special Case by an arbitrator. We are only concerned with one part of the case which was before the arbitrator and the learned judge. On this part of the case the arbitrator found that there was no compensation payable to the tenant. On the matter being referred back to him by the judge, he found that, if he was wrong in his first view, the amount of compensation should be £600. *MORRIS, J.*, held that the arbitrator was wrong in awarding no compensation, and awarded £600 to the tenant.

The tenant was tenant of an agricultural holding on Salisbury Plain, Wiltshire, consisting of a farm-house, buildings, and 182 acres of land under an agreement dated January 27, 1943, for a term from Mar. 25 to Sept. 29, 1942, and

"thereafter from year to year determinable by either party by one year's previous notice in writing to expire at the end of the second or any subsequent year of the tenancy, or by the landlord as hereinafter mentioned . . ."

Clause 6, on which this case depends, is as follows:

"The landlord may at any time determine the tenancy of the whole or any part of the farm if required for naval, military or Air Force purposes or for the purpose for which the farm was acquired by the landlord or for other purposes by virtue of s. 25 (2) of the Agricultural Holdings Act, 1923, by a demand for possession of the same and thereupon the said tenancy of the premises whereof the possession is so demanded as aforesaid shall forthwith cease and determine by virtue of such demand and thereupon the landlord shall pay or allow to the tenant by way of compensation (in addition to such compensation if any as he may be otherwise entitled to under the Agricultural Holdings Act, 1923) the fair value of the crops growing in the farm or on the part whereof the tenancy shall be so determined and the tenant right thereon and any loss or damage he may sustain through such disturbance."

The result is that the earliest date at which this agreement could be determined under the first part of cl. 1 would be by notice expiring at Michaelmas, 1944, but under cl. 6 the landlord could determine it at any moment by demanding possession provided it was required for naval, military, or Air Force purposes or for the purpose for which the farm was acquired by the landlord. We are not concerned with the other purposes under s. 25 (2) of the Agricultural Holdings Act, 1923.

In those circumstances it is not quite accurate, I think, to say, as *MORRIS, J.*, said, that the tenant had security of tenure until Michaelmas, 1944. His security of tenure depended entirely on the circumstances and the will of the landlord and it might be determined in a very short space of time. The tenancy was, in fact, determined by a notice given on Nov. 13, 1943, to give up possession on Dec. 17, 1943, and possession was given up on that date. Furthermore, the possession was required for the purposes of the War Department, and the land was acquired by the War Department for such purposes. The tenant, having left the holding as a result of that notice, claimed compensation under the Agricultural Holdings Act, 1923, and under cl. 6, and he has been awarded compensation with regard to parts of his case. He has been given £86 10s. for out-of-pocket expenses for sundry items, such as removal of household goods etc., and a sum of £113 odd under a claim for sale commission and expenses, the claim being part of the loss or damage sustained by him within the meaning of cl. 6. There was a dispute only as to amount with regard to that item. Then he has been awarded the sum of £82 for capital loss on the sale of a cross-bred flock of sheep. Those items add up to the sum of £281. In addition he claimed



loss of profit, and that is the matter now in dispute. In respect of it MORRIS, J., awarded him £600. The tenant put his claim in this way :

"The claim of the tenant for this item is based on the fact that in November, 1943, when the demand for possession was, in fact, made by the landlord under the special powers in the tenancy agreement, the earliest date at which the tenancy could have been terminated by a notice to quit, apart from such special powers, would have been Sept. 29, 1945. Therefore, apart from the said special powers, the tenant would normally have had nearly two years' further possession of the said farm—from November, 1943, to the end of September, 1945—which period would have covered two complete periods of growth and harvesting of crops, so that in the result the tenant lost two years' beneficial occupation of the farm, which normally he would have had apart from the termination under the special powers of the landlord."

The Agricultural Holdings Act, 1923, s. 12, provides, so far as material:

"(1) Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then . . . compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section . . ."

Then follow certain sub-sections. Sub-section (6), which deals with the compensation which is to be payable for the disturbance, is as follows:

"The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of the compensation), but for the avoidance of disputes, such sum shall, for the purposes of this Act, be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed an amount equal to one year's rent of the holding, in which case the sum recoverable shall be such as represents the whole loss and expenses so incurred up to a maximum amount equal to two years' rent of the holding."

Sub-section (7) provides:

"Compensation shall not be payable under this section . . . (e) Where the holding was let to the tenant by a corporation carrying on a railway, dock, canal, water, or other undertaking, or by a government department or a local authority, and possession of the holding is required by the corporation, department, or authority for the purpose (not being the use of the land for agriculture) for which it was acquired by the corporation, department, or authority, or appropriated under any statutory provision."

Stopping there, but for any provisions in the agreement compensation as defined by sub-s. (6) would not have been payable in this case by the War Department having regard to sub-s. (7) (e). It is also relevant to consider s. 25 which provides:

"(1) Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy; but nothing in this section shall extend to a case where a receiving order in bankruptcy is made against the tenant. (2) This section shall not apply to (a) any notice given by or on behalf of the Admiralty, War Department, or Air Council under the provisions of any

agreement of tenancy where possession of the land is required for naval, military, or Air Force purposes."

So the War Department is not bound to give twelve months' notice where possession of the land is required for military purposes although an ordinary landlord cannot terminate such a tenancy by less than twelve months' notice. That is the justification for the inclusion of cl. 6 in this agreement which could not have been included in an agreement between two ordinary citizens.

In those circumstances, the tenant contends that cl. 6 could quite well have been phrased in such a way as in terms to give him the compensation laid down in s. 12 of the Agricultural Holdings Act, 1923, and limited as defined in sub-s. (6) of that section. He says that this clause, in a document proffered by the landlord, instead of so saying, has used language which is much wider than that contained in the Act, that is to say, instead of saying "compensation as defined in s. 12 (6)," it says, "any loss or damage he may sustain through such disturbance." Furthermore, he says the words "such disturbance" refer to something that has been mentioned earlier in the agreement or earlier in that clause. On looking back it is found that the word "disturbance" has not previously been used, but what is clearly referred to is the termination of the agreement at any time by a demand for possession. I think it also pre-supposes the tenant having quitted the holding pursuant to such a demand. The tenant says that that is the meaning of "such disturbance." He does not dispute that the word "disturbance" has the same meaning in the agreement as it has in the Agricultural Holdings Act, 1923—that is to say, the termination of a holding by a notice to quit and the quitting of the holding by the tenant consequent thereon, but it is said that the compensation which is receivable in consequence of disturbance is another matter and that the agreement has provided that the scope of the compensation payable for any loss or damage which the tenant may sustain is much wider than that of the compensation prescribed by sub-s. (6) which limits the compensation to "a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur." The tenant, therefore, claims that he is entitled to any loss that he has suffered as a result of the premature determination of the tenancy and his quitting as a consequence of the exercise by the landlord of his right in certain circumstances to determine the tenancy on demand rather than by giving twelve months' notice expiring at Michaelmas, 1945.

On the other hand, counsel for the landlord laid much stress on the use of the word "disturbance" in cl. 6 and I agree that "disturbance" in this context must have the meaning which it bears in the Agricultural Holdings Act, 1923, but, as I have already said, disturbance and the compensation payable in respect of disturbance are two separate things. Counsel for the landlord argues that this clause merely has the effect of giving the tenant that compensation of which he would otherwise be deprived by virtue of para. (e) of sub-s. (7). If so, of course, it would have been quite easy to say so in terms.

I do not think that the problem before us is an altogether easy one, but in the end I have come to the same decision as MORRIS, J. In giving his judgment, he said:

"Very attractively as the argument of counsel for the landlord was developed it seems to me that it does not pay sufficient heed to the actual words used by the parties in this particular contract. The words are: 'any loss or damage he may sustain through such disturbance.' Counsel for the tenant submits that those words ought to be taken as they are and construed in their ordinary and natural way. It seems to me that, if the parties had intended to limit the loss or damage that was recoverable, it would have been quite easy for them to do so. There is, in my judgment, a difference between the conception of disturbance and any provision as to what is payable in respect of the disturbance. When Parliament enacted in the Act of 1923 that there was to be compensation for disturbance, it

laid down the basis on which that compensation was payable. The parties here might have chosen to say that there would be payable for disturbance any loss or damage not above the amount that would be payable pursuant to the statutory provisions. They have not chosen to do anything of the kind. The words do not seem to me to be limited. The words, in my judgment, are plain words, and they are 'any loss or damage he may sustain through such disturbance.' I see no reason to limit those words in the way suggested by counsel for the landlord."

Although he argues that compensation is to be limited to the amount of compensation envisaged by sub-s. (6), none the less counsel for the landlord says that all the limits in the amount of compensation prescribed by sub-s. (6) do not apply. The maximum of two years' rent and the minimum of one year's rent, he says, are not applicable. I find it difficult to see why part of sub-s. (6) should apply and not the whole. If he has to pray in aid sub-s. (6) as indicating the compensation payable under this agreement, why should not the maximum and minimum limits also be included. I do not see why we should construe this clause as meaning nothing more nor less than the compensation provided by sub-s. (6) excluding the maximum and minimum limits. I think that tends to support the view that the parties have used, and must be taken purposely to have used, very wide and general language which goes beyond the words of sub-s. (6) and must be construed as intended to give a greater measure of relief to the tenant whose tenancy has been determined in this summary manner. I can see nothing unreasonable in a landlord contracting that in such circumstances the tenant shall be entitled to receive compensation to a greater extent than would otherwise be recoverable under the provisions of the Agricultural Holdings Act, 1923. For these reasons I think this appeal fails.

**ASQUITH, L.J.:** I agree. My mind has fluctuated much during the hearing, and I still think a powerful argument can be advanced—and, indeed, one has been advanced—in respect of either view. Section 12 (7) (e) of the Agricultural Holdings Act, 1923, standing by itself, would, on the facts of this case, entitle the landlord to eject the tenant without paying compensation. The landlord argues that the disputed words in cl. 6 can have no stronger operation than to restore the right to compensation taken away by that provision, minus, perhaps, the provisions for maximum and minimum amounts. I inclined to this view while counsel for the landlord was opening the appeal, but later I was converted. If it had been intended merely to restore the equivalent of the statutory right to compensation, nothing would have been easier than to say so plainly. What the landlord must actually pay under this contract has to be paid by way of compensation. Then follow a number of items ending with "any loss or damage he may sustain through such disturbance." This seems to me to mean that what is to be paid is not the statutory compensation, but a different measure, described under the very wide term, not derived from the statute, "any loss or damage." "Disturbance," no doubt, means the same thing in the contract and in the statute, namely, the involuntary dispossession of the tenant. No doubt, too, the words "such disturbance" mean an involuntary dispossession of the tenant such as occurred in this case, without the normal notice, but because "disturbance" means the same thing in the contract and in the statute, it does not follow that the words "any loss or damage he may sustain" in the contract mean the same as the somewhat narrower and differently phrased statutory measure of compensation. For these reasons and those given by my Lord I agree that the appeal should be dismissed.

**ROXBURGH, J.:** I agree.

*Appeal dismissed with costs.*

Solicitors: *Treasury Solicitor* (for the landlord); *Ellis and Fairbairn* (for the tenant).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]



Re LORY'S WILL TRUSTS. LAMBRICK *v.* PUBLIC TRUSTEE  
OF THE COLONY AND PROTECTORATE OF KENYA  
AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 27, 1950.]

Will—"Land"—Inclusion of incorporeal hereditaments—Tithe rentcharge.

A Tithe and Tithe Rentcharge—Extinguishment—Compensation—Right of devisee under will of testator dying in 1902—Tithe rentcharge included in bequest of life interest—Tithe Act, 1936 (c. 43), s. 7 (1), sched. I, pt. I, para. 5.

By his will, dated Oct. 16, 1899, a testator, who died on July 31, 1902, after bequeathing certain legacies and annuities and devising a freehold farm, provided: "And as to all the rest residue and remainder I give it to J.L.R. the son of my sister Alice on his attaining twenty-five years for his life . . . and after his decease I give Tredore to his eldest surviving boy in tail on his attaining twenty-one years. I give Trethewey to his second surviving boy in tail at twenty-one and my St. Keverne land to the third boy in tail on attaining twenty-one years but should either of my freehold farms revert or vest in anyone who can claim two estates under this my will after the death of J.L.R. then in such case I give my St. Keverne farms to the eldest surviving grandson of my brother . . ." Tredore and Trethewey were freehold farms owned by the testator. In the parish of St. Keverne the testator possessed two freehold farms called Polquest and Trevallach, and also, issuing out of land in that parish, he had certain tithe rentcharges and an undivided share in a perpetual rentcharge of £10.

D HELD: there was nothing in the will to cut down the meaning of the word "land" so as to exclude incorporeal hereditaments, and, therefore, the words "my St. Keverne land" extended to and included the tithe rentcharges and the share of the rentcharge of £10.

E By the Tithe Act, 1936, s. 7: "(1) Stock to be issued for compensation in respect of a tithe rentcharge shall be issued to the person specified in that behalf in Part I of sched. III to this Act, and shall be held and disposed of for the like purposes as if the stock had been an investment of consideration money paid for the redemption of the rentcharge under the Tithe Acts . . ." Part I of sched. III to the Act provides: "Stock to be issued for compensation in respect of the extinguishment of a tithe rentcharge shall be issued in the following cases to the following persons, that is to say: . . . 5. In the case of a rentcharge which was then so vested that the legal estate in fee simple therein could then have been sold and conveyed to the purchaser under the powers conferred by the Settled Land Act, 1925, . . . or by trustees for sale . . . or personal representative . . . in such manner as to overreach all equitable interests, and powers, and to extinguish any other legal estate subsisting therein, the stock shall be issued to the person to whom the purchase money arising on such a sale would have been payable."

G HELD: on the true construction of the provisions of s. 7 (1) and para. 5 of Part I of sched. III, the stock ought to be held by the trustee of the will on trust for the third son of J.L.R.

H [AS TO MEANING OF "LAND," see HALSBURY, Hailsham Edn., Vol. 34, pp. 250-252, para. 304; and FOR CASES, see DIGEST, Vol. 44, pp. 714-716, Nos. 5626-5649.]

Case referred to:

(1) *West v. Lawday*, (1865), 11 H.L. Cas. 375; 13 L.T. 171; 44 Digest 906, 7665.

ADJOURNED SUMMONS to determine *inter alia* whether, on the true construction of the will of the testator, the words "my St. Keverne land" included certain

tithe rentcharges and an undivided share of a perpetual rentcharge issuing out of land in the parish of St. Keverne, and also whether, if the tithe rentcharges were so included, the stock issued as compensation for the extinguishment of the tithe rentcharges under the Tithe Act, 1936, ought to be held by the trustee for the benefit of the person entitled to the "St. Keverne land." DANCKWERTS, J., answered both questions in the affirmative. The facts appear in the judgment.

*H. A. Rose* for the plaintiff, sole trustee of the will.

*Swingland* for the Public Trustee of Kenya, the administrator of the estate of the testator's heir at law.

*I. G. H. Campbell* for the second, third, fourth and fifth defendants, annuitants under the will and next of kin.

*G. B. Parker* for the sixth, seventh and eighth defendants, the executors of certain next of kin.

*Bagnall* for the tenth defendant, a specific devisee.

*R. L. Edwards* for the eleventh defendant, the third surviving son of J.L.R. The ninth defendant was not represented.

**DANCKWERTS, J.:** By his will the testator provided:

"... as to all the rest residue and remainder I give it to James Lory Rapson the son of my sister Alice on his attaining twenty-five years for his life provided that he adopt the surname of Lory and also reside at Tredore and after his decease I give Tredore to his eldest surviving boy in tail on his attaining twenty-one years. I give Trethewey to his second surviving boy in tail at twenty-one and my St. Keverne land to the third boy in tail on attaining twenty-one years but should either of my freehold farms revert or vest in anyone who can claim two estates under this my will after the death of James Lory Rapson then in such case I give my St. Keverne farms to the eldest surviving grandson of my brother James on his attaining twenty-one years who takes no interest out of the Colvennor Farm in Cury."

The difficulty arises in regard to the devise, after the death of James Lory Rapson, who became James Lory Lory, of "my St. Keverne land." It appears that the testator had, in addition to a farm called Trevallach in the parish of St. Keverne and another farm called Polquest in the same parish, the following tithe rentcharges: Halwin tithes, Bargwitha tithes, Lanheverne tithes and Arrowan tithes, all issuing out of land in St. Keverne and amounting in all to £25 15s. 0d. He also had three equal undivided fourth parts of £10 issuing out of a tenement known as Clenhall in the parish of St. Keverne. They were incorporeal hereditaments connected with the corporeal hereditament in St. Keverne. The question is whether those incorporeal hereditaments pass on the devise of "my St. Keverne land." It is said that they do not pass because they are incorporeal hereditaments, and, therefore, different and separate from the actual corporeal ownership of the land at St. Keverne.

Reliance was placed on a passage in JARMAN ON WILLS, 7th ed., vol. 2, p. 1254, which is in the following terms:

"Words descriptive of Land, Houses, etc. Mr. Jarman lays it down that 'The most comprehensive words of description applicable to real estate are *tenements* and *hereditaments*; as they include every species of realty, as well corporeal as incorporeal. The word "lands" is not equally extensive; for though, generally, it includes as well the surface of the ground as everything that is on and under it, as houses and other buildings, mines, etc., yet it seems that the term will not, *proprio vigore*, comprehend incorporeal hereditaments, as advowsons, tithes, etc., unless there is no other real estate to satisfy the words of the devise: a circumstance, however, which in regard to wills made or re-published since 1837, would

be immaterial. Thus it seems that if a man devise all his lands in A, and he has no other real estate there than tithes, they will pass. So, if he devise a certain manor, and has only a fee farm rent issuing out of it, such rent will pass '."

A In the note to that passage *West v. Lawday* (1) is referred to as supporting the statement by Mr. JARMAN. That case is subsequent in time to the edition in which these words originally appeared, and, therefore, is not necessarily anything to do with his observations, but, so far as it supports those observations, it seems very weak authority because the reference in the case to the meaning of "lands" as including incorporeal hereditaments is merely a passing reference and cannot be called even a *dictum*. The decision in that case proceeded on quite other grounds. However that may be and whether the statement by Mr. JARMAN be B justified as a statement of law or not, the word which he is construing is not "land" in the singular, but "lands." The expression which I have to construe today is "my St. Keverne land."

The testator, though he made his own will, also had some legal knowledge, because he uses the words "in tail" in quite an expert manner. On the other hand, he uses some expressions rather haphazardly, such as "my interest C in Colvennor Farm," "I give this estate," "my St. Keverne land," "either of my freehold farms," "two estates," and "I give my St. Keverne farms." So, perhaps, he is not as consistent as he might be when he is using expressions which refer to the subject-matter of his various dispositions, but, apart from those questions, as a matter of ordinary legal language, it is clear that corporeal hereditaments, such as farms, are land. D It is equally well established that incorporeal hereditaments, such as rentcharges, are also land and real property, and I see no reason why in this case I should cut down the meaning of "land"—"my St. Keverne land"—so as to exclude any land of any nature which the testator had in that particular parish. It seems to me very improbable that the testator would have wanted to make a present of his farm to the third son of James Lory Rapson and to render him E liable to the heir at law—because otherwise there is no disposition of the incorporeal hereditaments—in respect of the rentcharges which issue out of the corporeal land in question. Therefore, I come to the conclusion that the devise of "my St. Keverne land" carries not only the corporeal hereditament represented by the farms but also the tithe rentcharges and the three-quarters' share of the other rentcharge which issue out of that corporeal hereditament. F

I now come to another rather odd question arising by reason of the change in the law which was made by the Tithe Act, 1936. The scheme of that Act was to abolish all tithes and to compensate the owners with stock which was to be issued to various persons under the provisions of the Act. Section 37 of that Act provides:

G " (2) In the case of a testamentary instrument executed before the commencement of this Act, a disposition referring to tithe rentcharge shall be construed and have effect in relation to a rentcharge extinguished by this Act as if the reference had included a reference to the stock issued in respect thereof."

H That sub-section has nothing to do with the present case because it was designed to deal with cases of people who had made their wills before the passing of the Act but died after the Act came into force, so that questions of ademption might possibly arise. This is not that case. This is a case where, as I have held, the tithe rentcharges were given to a particular beneficiary, and the question is whether he has lost what he was entitled to after the testator's death and has not become entitled to the stock which was given to former owners of tithe. Section 7 provides:



"(1) Stock to be issued for compensation in respect of a tithe rentcharge shall be issued to the person specified in that behalf in Part I of sched. III to this Act, and shall be held and disposed of for the like purposes as if the stock had been an investment of consideration money paid for the redemption of the rentcharge under the Tithe Acts, and, in the case of stock issued to the proper officer of the court, according to the orders of the court."

Under the Tithe Act, 1846, s. 9, there is a provision about consideration money paid for the redemption of a tithe rentcharge, but it is not expressed in language very apt to deal with the present case. I am not sure, however, that it is necessary to rely on that provision.

The material provision to which I think it is necessary to turn is Part I of sched. III to the Act of 1936:

"Persons to whom stock is to be issued. Stock to be issued for compensation in respect of the extinguishment of a tithe rentcharge shall be issued in the following cases to the following persons, that is to say . . ."

The first case is that of a person who is beneficially entitled to a tithe rent charge in his own right, and the present case, where the rentcharge was held by the trustees, is not that case. Cases 2, 3 and 4 are special cases, such as Queen Anne's Bounty, and have nothing to do with the present case. Case 5 is:

"In the case of a rentcharge which was then so vested that the legal estate in fee simple therein could then have been sold and conveyed to the purchaser under the powers conferred by the Settled Land Act, 1925, or any additional powers conferred by a settlement, or by trustees for sale, or by a mortgagee or personal representative in the exercise of his paramount powers, in such manner as to overreach all equitable interests, and powers, and to extinguish any other legal estate subsisting therein, the stock shall be issued to the person to whom the purchase money arising on such a sale would have been payable."

That does seem to be a case which might apply to the present circumstances. The rentcharge could have been sold, and the purchase money would have been payable to trustees. Therefore, it seems to me plain that the stock in the present case would be issuable to the trustees, and the trustee now in fact holds the stock. It is quite clear that he intended to hold that stock on trust for the beneficiary who would be entitled to the previously existing tithe rentcharges. Therefore, I have no difficulty, in spite of the possible doubts caused by a strict interpretation of the language of the statute, in coming to the conclusion that it was the duty of the trustee to hold the stock he had acquired on trust for the defendant, Paul Lory.

*Declaration accordingly. Costs of all parties as between solicitor and client to be paid rateably out of the residuary real and personal estate undisposed of by the will.*

Solicitors: *Adams & Adams* (for the sixth, seventh and eighth defendants); *Hyde, Mahon & Pascall*, agents for *Randle, Thomas & Thomas*, Helston, Cornwall (for all other parties except the ninth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

## WEINBAUM v. KLEIN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell, L.J., and Hodson, J.), January 24, 25, 1950.]

*County Court—Appeal—New trial—Further evidence—Power of Court of Appeal to order new trial—County Courts Act, 1934 (c. 53), s. 105—County Courts Rules, 1936, Ord. 37, r. 1 (1).*

A By Ord. 37, r. 1 (1), of the County Courts Rules, 1936: "The judge shall in every case have the power to order a new trial to be had upon such terms as he thinks reasonable . . ." Among the grounds on which such an order may be made is that fresh evidence is available. By s. 105 of the County Courts Act, 1934: "If any party to any proceedings in a county court is dissatisfied with the determination . . . of the judge in point of law or equity or upon the admission or rejection of any evidence, the party aggrieved . . . may appeal therefrom to the Court of Appeal . . ."

B The appellant against an order for possession made against him in the county court asked in his notice of appeal, *inter alia*, for a new trial on the ground that he desired to call further evidence. No application for a new trial had been made to the county court under Ord. 37, r. 1.

C HELD: the appeal was not brought within the terms of s. 105 of the Act of 1934, and, therefore, the Court of Appeal had no power to order a new trial; nor had the court jurisdiction to hear an application by an unsuccessful litigant in the county court for a new trial on the ground that further evidence should be admitted unless by way of an appeal from a decision of a county court judge under Ord. 37, r. 1 (1), refusing a new trial.

D [FOR THE COUNTY COURTS ACT, 1934, s. 105, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 82.]

APPEAL of the defendant from an order of His Honour JUDGE ENGELBACH, made at Shoreditch County Court, dated Oct. 18, 1949, granting possession of certain premises to the plaintiff. The defendant asked *inter alia* for a new trial on the ground that fresh evidence was available. The Court of Appeal dismissed the appeal. The facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R.

F. E. Sugden for the defendant.

Quintin Hogg for the plaintiff.

F SIR RAYMOND EVERSHERD, M.R.: When reference is made to the decision and the facts of this case it is plain that the first question which the learned judge had to decide was whether the premises in suit (the subject of a lease dated 1941 which came to an end in 1946) were at the date of the issue of the summons (the tenant being a statutory tenant) occupied by him otherwise than for business purposes thereby entitling him to the protection of the Rent Restrictions Acts. On that point a number of witnesses were called, and the learned judge, having formed an unfavourable view of all the tenant's witnesses save one, came to the conclusion that the premises were only used for business purposes at the material date and so were outside the protection and ambit of the Rent Acts. If he had decided differently on that point other matters, including the question of alternative accommodation, would have arisen, and, if the judge had accepted the suggested alternative accommodation, he would have had to decide whether it was reasonable to make an order. The bulk of the grounds of appeal were related to the second point. They cannot, therefore, be considered unless some ground can be suggested whereby the finding on the first point can be disturbed. Counsel for the defendant admits that unless he can adduce new evidence, he cannot successfully contend that on this matter, which was one of fact, he can challenge the finding, but he says that further evidence is available. He admits, however, that that evidence was available at the date of the trial, that it was not called by the then representative of the tenant,

although its availability was known, and although, indeed, the tenant himself requested that it should be called. It is plain that counsel cannot say that this is a case in which the new evidence sought to be called was not called because reasonable diligence had not disclosed its existence. On well-known principles it is obviously impossible for this court to give leave to re-open the matter by calling fresh evidence of that character. It is plain, therefore, to my mind, that this appeal cannot succeed.

There has arisen a further preliminary question on which it is, perhaps, desirable that something should be said. The notice of appeal is in the usual form and asks that the judgment be set aside, and, alternatively, that a new trial may be had. From what I have said it is clear that it is essential for the tenant that the question of user as business premises should first be disposed of, and that can only be done by means of a new hearing. Therefore, the substance of this appeal is really a request to this court direct to grant a new hearing on the ground that fresh evidence is now available which should be called. By the County Courts Rules, 1936, Ord. 37, r. 1 (1), provision is made for application to the county court judge for a new trial, and among the grounds on which such an application will be granted is that of the availability of fresh evidence. No application to the county court judge was made under Ord. 37 in the present case. It is now very much out of time, and it is impossible to suppose that, if application was made, any extension of time would be given.

So far as appeals to this court are concerned, the right so to appeal and the jurisdiction of this court to hear appeals from county courts is contained in s. 105 of the County Courts Act, 1934. The jurisdiction is statutory and is confined to what is said in that section, namely:

"If any party to any proceedings in a county court is dissatisfied with the determination . . . of the judge in point of law or equity or upon the admission or rejection of any evidence, the party aggrieved . . . may appeal therefrom to the Court of Appeal . . ."

It follows that the only cases in which an appeal lies to this court are where the party dissatisfied has a point of law, or equity, on the judgment, or complains in regard to the admission or rejection of evidence. If the appeal is, within the terms of that section, brought properly to this court, then by s. 109 this court can make orders of the kind there stated, which include directions for a new trial. Unless the appeal is properly brought in accordance with the terms of s. 105, it appears to me that this court would have no power to order a new trial. If an application for a new trial is made to the county court judge pursuant to Ord. 37, r. 1 (1), and the county court judge refuses so to order, an appeal can be brought to this court from that refusal, provided, of course, that the grounds of the appeal are within the language of s. 105. Where, however, the ground on which a new trial is sought is, as in this case, that further evidence should be admitted, that is not a matter within the language of s. 105, so that, as I construe the statute, there is no jurisdiction in this court to hear an application on those grounds direct to this court, there having been no application to the county court judge under Ord. 37, r. 1 (1). That, we are informed, is well established practice, and it seems to me to be completely in accordance with the terms of the statute. In my judgment, it is impossible to sustain this appeal, and it must be dismissed with the usual consequences.

**SOMERVELL, L.J.:** I agree.

**HODSON, J.:** I agree.

*Appeal dismissed with costs.*

Solicitors: *Pothecary & Barratt* (for the defendant); *Aukin, Courts & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]



# INTERNATIONAL CORPORATION, LTD. v. BESSER MANUFACTURING CO.

[COURT OF APPEAL (Tucker and Asquith, L.JJ., and Roxburgh, J.), January 27, 1950.]

A *Practice—Service—Service out of jurisdiction—Action for account and payment of commission—Breach of contract committed within the jurisdiction—English company acting as American company's agents in Europe—Commission payable in England—Duty to render account in England—Prima facie case—R.S.C., Ord. 11, r. 1 (e).*

B An English company applied under R.S.C., Ord. 11, r. 1 (e), to serve a writ of summons out of the jurisdiction on an American company in an action claiming *inter alia* (a) an account of all sales made by the American company to purchasers in Europe between November, 1941, and May, 1948, and (b) payment of commission on such sales. Affidavits, sworn on behalf of the English company by one of its directors, alleged that in November, 1941, a contract was made in the United States of America between the two companies, whereby the English company was to be the sole agent of the American company in England and the other countries of Europe and the American company agreed to pay to the English company a commission of fifteen per cent. on all products of the American company (with certain exceptions) sold in Europe; that the English company had from time to time claimed commission on the products sold by the American company in Europe; and that the American company had failed to make the payments and to submit any accounts. None of these allegations had been denied by the American company, who resisted the application for service out of the jurisdiction. It was contended by the English company that the commission was payable in England, and, therefore, there had been a breach of the contract within the jurisdiction of the court. In the statement of claim the contract to pay commission was limited to commission on products of the American company sold in Europe in consequence of introductions affected, or work done, by the English company on behalf of the American company.

F **Held:** (i) if the affidavits on behalf of the English company showed a *prima facie* case, it was immaterial and showed no lack of good faith that the contract alleged in the statement of claim was more restricted than the contract alleged in the affidavits and was limited to payment of commission on products sold in consequence of work done by the English company.

G (ii) the inference on the material before the court was that the alleged contract was one under which (a) it was the duty of the American company to account to the English company in England, and (b) commission became payable in England, as by English law—and for this purpose, it was to be assumed that American law was the same in such circumstances—it was the duty of the debtor to seek out his creditor and pay him at his place of business or where he would be found; and, therefore, the English company had made out a *prima facie* case, within R.S.C., Ord. 11, r. 1 (e).

H (iii) the fact that one of the remedies sought was an account did not preclude the English company from obtaining an order for service out of the jurisdiction.

*Hoerler v. Hanover Caoutchouc, Gutta Percha and Telegraph Works*, (1893) (10 T.L.R. 103), *applied*.

[As to SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-35, paras. 44-50; and FOR CASES, see DIGEST, Practice, pp. 344-351, Nos. 610-666.]

Cases referred to:

- (1) *Re Schintz*, [1926] Ch. 710; 95 L.J.Ch. 393; 135 L.T. 350; Digest, Practice, 358, 716.
- (2) *The Hagen*, [1908] P. 189; 77 L.J.P. 124; 98 L.T. 891; Digest, Practice, 340, 579.
- (3) *Société Générale de Paris v. Dreyfus Bros.*, (1887), 37 Ch.D. 215; 57 L.J.Ch. 276; 58 L.T. 573; Digest, Practice, 339, 574; *revsg.* (1885) 29 Ch.D. 239; 54 L.J.Ch. 893; 53 L.T. 463.
- (4) *Hoerler v. Hanover Caoutchouc, Gutta Percha and Telegraph Works*, (1893), 10 T.L.R. 103; Digest, Practice, 349, 647.

APPEAL by the plaintiffs from an order of LYNSEY, J., made in chambers, and dated Nov. 16, 1949, allowing an appeal from an order of the master dismissing an application by the defendants to set aside an order, made under R.S.C., Ord. 11, r. 1 (e), giving leave to serve a writ out of the jurisdiction. The plaintiffs, an English company, alleged that they were the exclusive agents of the defendants, an American company, in England and the other countries of Europe; that the defendants had committed a breach of a term of the contract between the parties by refusing to pay to the plaintiffs commission on all sales made by the defendants in Europe; and that under the terms of the contract the commission was payable in England. The writ claimed (*inter alia*) an account and payment of the commission. The Court of Appeal now held that a *prima facie* case had been shown by the plaintiffs and allowed the appeal. The facts appear in the judgment of TUCKER, L.J.

*Benev, K.C.*, and *Bernard Finlay* for the plaintiffs.

*Sandlands, K.C.*, and *Leonard Lewis* for the defendants.

**TUCKER, L.J.:** This is an appeal from a decision of LYNSEY, J., in chambers, whereby he set aside an order which had been made giving leave to serve a writ out of the jurisdiction. The action was one by International Corporation, Ltd., whose registered office is at 19, Ebury Street, London, and the proposed writ is against Besser Manufacturing Co. of Alpena, Michigan, U.S.A. The writ claims:

"(1) An account of all sales by the defendants of Besser concrete products plant sold by the defendants to purchasers in England and the continent of Europe between November, 1941 and May, 1948. (2) Further or alternatively an account of all sales by the defendants of the said Besser concrete products plant sold by the defendants during the like period to . . ."

There follows a certain number of named firms, one of which was in Johannesburg, another in Palestine, others in France, Holland, Switzerland and Sweden, and one in the United Kingdom. The writ further claims:

"(3) Payment of commission at the rate of fifteen per centum on the value of all sales under (1) or alternatively (2) or both (1) and (2). (4) Alternatively the sum of 40,000 dollars as commission on the sales under (2) or alternatively the like sum or such other sum as may be deemed just as a reasonable remuneration for services rendered by the plaintiffs to the defendants in and about the procuring of the said sales. (5) Alternatively damages for breach of contract. (6) Further or other relief."

In support of the application for leave to serve the writ out of the jurisdiction, on Feb. 9, 1949, the proposed plaintiffs swore an affidavit by Mr. Ryner, one of their directors. The material parts of the affidavit, omitting for the moment a statement in para. 3 with which I shall deal later, state:

"4. In or about 1941 I visited the United States of America for the purpose of investigating methods and processes in connection with the building industry and under the sponsorship of the Ministry of Works, and

A in the course of such investigation I visited the intended defendant company's premises and had a number of discussions with its president, Mr. Jesse H. Besser, its vice-president, Mr. P. M. Park, and other officers of the intended defendant company. 5. In or about November, 1941, it was agreed between the intended defendant company and myself, acting on behalf of the intended plaintiff company, that the intended plaintiff company should thereafter act as the sole agents and representatives of the intended defendants in England and the countries of the continent of Europe, and that the intended defendants would pay to the intended plaintiffs a commission of fifteen per cent. on all products of the intended defendants, other than motors, v-belt drives, pallets and racks, sold in England or in the countries of the continent of Europe. There is now produced and shown to me a letter, dated Nov. 26, 1941, and contained in a bundle of letters exhibited hereto ... which letter confirms the terms of the agreement hereinbefore referred to."

B That letter of Nov. 26, 1941, refers to a shipment of samples, and proceeds:

C "On receipt of your cash order for a Besser super vibrapac unitized concrete products plant, you will be the exclusive representative of Besser Manufacturing Co. in England. Likewise, on the sale of the same in other countries on the continent you will be the exclusive representative in those countries. In the meantime any inquiries we receive from England or on the continent we will be glad to forward them to you to help you in getting started. Reports on inquiries sent you and other prospects will be expected weekly. According to our conversation you will be placing the first vibrapac in England shortly and that will be your greatest advertisement. A notice of sixty days should be given by yourself or Besser Manufacturing Co. in the event either should want to dissolve this agreement. We will pay you a commission on the Marley Holding Tile Co. order in the event you acquire it after your first plant is installed. We offer you a fifteen per cent. commission on everything but motors and v-belt drives, pallets and racks, on which there will be none. Hoping the above meets with your approval and that this will be the start of a very interesting and profitable mutual business relation ..."

D Thereafter it became the practice of the plaintiffs, as I will call them for convenience, to deduct commission from any sums which they were remitting to the defendants. That practice is referred to in a letter from the defendants, dated July 30, 1945, in which they say:

E "Now with regard to your deducting a commission from the payments. We believe this is perfectly logical and is the best way for you to handle it. You may be certain that we will invoice the machine to you at the net amount so that duty will be held to a minimum."

F Mr. Ryner's affidavit proceeds to state:

G "6. The intended plaintiffs, in pursuance of the said agreement thereafter did much work in making known in England and in countries of the continent of Europe the products of the intended defendants and despite the difficulties, which for a number of years were due to the war, the intended plaintiffs succeeded in promoting the sales of the intended defendants' products in England and in France, Sweden, Switzerland, Eire, Belgium, Czechoslovakia and Holland, and in consequence the intended defendants obtained orders for and sold their products in all such countries down to May, 1948."

H In para. 14 Mr. Ryner went on to say:

"The intended plaintiffs have from time to time made claims for commission, and the intended defendants have allowed the intended



plaintiffs to retain commission as aforesaid, but the intended defendants have failed or refused to make any payment of commission in regard to the transactions hereinbefore referred to. The intended plaintiffs have requested the intended defendants to render an account of commission due in respect of orders relating to all the said matters and further to make payment of the amounts due under such accounts."

In para. 16, Mr. Ryner said:

"The intended plaintiffs have in their possession a very large number of letters passing between the intended plaintiffs and the intended defendants in relation to all the foregoing matters from 1941 until 1948, from which it is clear that a great amount of work and time were expended by the intended plaintiffs on the intended defendants' business and such letters are available for exhibition."

That affidavit did not in terms, or sufficiently, show a breach of contract within the jurisdiction, and, accordingly, a further affidavit was sworn on Apr. 4, 1949, in para. 4 of which Mr. Ryner again referred to the contract which was made at Alpena between the plaintiffs and the defendants, and said:

"... it was agreed that the plaintiff company should thereafter act as the exclusive agents and representatives of the defendant company in England and in other countries in Europe and that the defendants would pay to the plaintiffs a commission of fifteen per cent. on all products of the defendant company, other than motors and belt drives, pallets and racks, sold in England or in other countries of the continent of Europe. This contract was confirmed by letters passing between the parties in or about November, 1941, exhibited hereto ..."

By para. 5 Mr. Ryner said:

"It was a term of the said contract that the performance of the said contract should be in England and in other countries in Europe and that any commission due to the plaintiffs under the contract should be payable in England."

In para. 7 Mr. Ryner alleged a number of breaches which, he said, occurred within the jurisdiction, but the only breach relied on in this appeal, and the only one with which we are concerned, is the allegation that commission due to the plaintiffs under the contract was payable in England. According to the affidavit clearly, it had not been paid, and no accounts had been rendered in respect thereof. That is the breach which, it is said, occurred within the jurisdiction. I certainly do not read para. 5 of that affidavit as purporting to swear that it was expressly agreed between the parties that payment should be made in England. The actual terms of the contract have already been referred to. Perhaps it would have been better if para. 5 had said that by the law of England—and for this purpose we have to assume that the law of America is the same in circumstances such as this—it is the duty of the debtor to seek out his creditor and pay him at his place of business or where he would be found, but I do not think that any proper criticism can be directed to that paragraph by saying, as the defendants have done, that it does not sufficiently disclose the true position and is lacking in sincerity.

The first question is whether *prima facie*, on the facts sworn to in these affidavits, under a contract of this kind commission is payable in England. I think it clearly is. That is the *prima facie* inference to draw by the English law. It was contended on behalf of the defendants that the difficulties, or restrictions, which exist with regard to currency and the difficulty of trading between one country and another should compel us to infer from this contract that payment was to be made somewhere else, and counsel for the defendants submitted that the proper inference was that the payment of commission was to be made in

the various countries in Europe where the orders were obtained or executed, or, alternatively, that for some reason it should be paid in America. I can find nothing in the facts which would justify such an inference. It seems to me that the only inference on the material before us at present is that the contract—and for this purpose we must assume that there was a contract as alleged in the affidavit—was one under which, not only did commission become payable in England, but it was the duty of the defendants to account in England to the plaintiffs, who, as the defendants' agents, were entitled to an account showing what the position was with regard to commission. On the affidavits, there has been both a failure to render an account and a failure to pay commission which, it is sworn, was due, but the precise amount of which is not known or ascertainable until after an account has been rendered by the defendants or, if necessary, taken under the process of the court.

Counsel for the defendants argued that the affidavits have not sufficiently disclosed the full position to the court, that they are in some respects contradictory, and that there are discrepancies between the form of relief which is sought in the affidavits and that which appears in the statement of claim. For instance, the contract sworn to in the affidavits is a contract that the plaintiff company should act as the exclusive agents and representatives of the defendants in England and other countries in Europe, and that the defendants should pay to the plaintiffs a commission of fifteen per cent. on all products of the defendants, with certain exceptions, sold in England or in other countries of the continent of Europe, whereas under para. 3 of the statement of claim the contract is put as one whereby:

“... the defendants would pay to the plaintiffs a commission ... on all products of the defendants [with certain exceptions] sold in England and other countries in Europe by the plaintiffs or in consequence of introductions effected by the plaintiffs, on the defendants' behalf, or in consequence of work done by the plaintiffs on the defendants' behalf.”

I do not think that the statement by LORD HANWORTH, M.R., in *Re Schintz* (1), that there must be the fullest disclosure, was intended to cover an inconsistency or discrepancy of this kind. If the proposed plaintiff on his affidavit shows a *prima facie* case that there was a contract to pay commission, that the commission was payable in this country, and that it has not been paid, it is, in my view, immaterial and it does not show lack of good faith that, when he comes to formulate his claim, he restricts it in that way. In *Re Schintz* (1), referring to the three rules which were enunciated by FARWELL, L.J. ([1908] P. 201), in *The Hagen* (2), as binding on the court—the first of which was adopted from a statement of PEARSON, J. (29 Ch.D. 243) in *Société Générale de Paris v. Dreyfus Brothers* (3)—LORD HANWORTH, M.R., said ([1926] Ch. 717):

“... I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.’ That is the first rule. The second is that ‘if on the construction of any of the sub-heads of Ord. 11 there was any doubt, it ought to be resolved in favour of the foreigner’; and the third rule is that, ‘in as much as the application is made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications’.”

The rule with which we are concerned in the present case, and under which this application is made, is R.S.C., Ord. 11, r. 1, which is:

“Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever ... (e) the action ... is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which

rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction."

In that connection one should also bear in mind R.S.C., Ord. 11, r. 4, which, after dealing with how the application is to be made, says:

"... and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this Order."

It thus underlines the fact that this is a discretionary matter for the judge in chambers.

I have carefully considered all the criticisms of counsel for the defendants with regard to the affidavits and the conduct of the plaintiffs generally, and I cannot find anything which shows that they have not made the proper kind of disclosure which has to be made on an application under R.S.C., Ord. 11, r. 1. When an application of this kind is made, it is the duty of the plaintiffs to make out a *prima facie* case, but the court does not try out an issue, and it is not necessary to go into all the details of the case which will eventually have to be thrashed out. I think that on these affidavits the plaintiffs have made out a *prima facie* case, and that it cannot be said that they have not put the proper material before the court. It is to be borne in mind that the plaintiffs are not relieved from the obligations of disclosing everything which is proper and in support of their case by the fact that the defendants have sworn no affidavit. None the less, the defendants have had every opportunity of swearing an affidavit and have not attempted to deny a single allegation in either of the affidavits sworn on behalf of the plaintiffs, and, therefore, we must accept them for present purposes as being true.

That brings me to the part of the case which I think is the most difficult, *i.e.*, whether the fact that the plaintiffs are claiming an account precludes them from obtaining an order for service out of the jurisdiction because this would not be a convenient forum for the granting of such relief. It is said that the disclosure of books and documents which may be required could be more conveniently dealt with in America. There appears to be no authority for the proposition that, where one of the remedies sought is an account, or where an account is a necessary step in ascertaining the amount due to a plaintiff, this court will never grant leave to serve out of the jurisdiction. Service out of the jurisdiction in such a case was allowed in *Hoerler v. Hanover Caoutchouc, Gutta Percha and Telegraph Works* (4), in which the facts were as follows. The plaintiffs, who carried on business in London, brought the action for commission on a sale of goods, as agents for the defendants, who were a foreign company carrying on business at Linden, near Hanover, and for an account. The contract contained the provision that in case of disputes the plaintiffs' firm was to submit to the laws and jurisdiction in force in Hanover. One of the questions was whether that term in the contract prevented service out of the jurisdiction, and it was held that it did not and was not to be construed as excluding the jurisdiction of the courts of this country. In the course of his argument, counsel for the defendants in that case, who sought to set aside the service of the writ, contended as follows:

"The plaintiffs, in their affidavit, stated that the greater part of the goods were sold by them in England, but that they did not know the amount of the commission due until the accounts were taken. Therefore, this was an action for an account which would have to be taken in Germany, and no commission would be due under the contract until the account was taken in Germany. Accordingly, the plaintiffs were not suing for a breach of contract within the jurisdiction. Further, if there was a breach within the jurisdiction, the court in its discretion would not in this case, where



the account must be taken in Germany and where all the books and documents were, give leave to bring the action in this country."

That argument did not commend itself to the court, and in giving judgment LORD ESHER, M.R., does not seem to have thought it necessary to refer in terms to that part of the argument of counsel for the defendants. The matter was clearly brought to the notice of the court and the court, having rejected the contention that the jurisdiction was ousted, upheld the order made for service out of the jurisdiction.

The way in which the discretion must be exercised in one case is very little guidance as to how it is to be exercised in another. *Hoerler's* case (4) was a case of an account and one in which the amount due could not be ascertained until there had been an account taken or rendered, and the court do not seem to have thought that that was an insurmountable obstacle in the way of granting leave to serve out of the jurisdiction. I cannot say that it is any such obstacle in the present case. Nothing I am saying, of course, should be interpreted as meaning that a plaintiff can, as of right, obtain leave to serve out of the jurisdiction in all cases where an account is claimed. In some cases the defendants by their affidavit may be able to show that some hardship or difficulty would result from an action of this kind being tried in the courts of this country. In this case, however, it may be quite a simple matter for the defendants to write to the plaintiffs giving them the particulars that they require in regard to the orders placed in the various countries, and then the amount of commission payable thereon would be merely a matter of calculation. One does not know yet what issues there may be in this case, whether its result will turn on a denial of the contract or whether it will turn on some question of *quantum*. Having given the matter due consideration, I think, on the whole, that leave to serve out of the jurisdiction should be granted. The learned judge in chambers did not, I understand, give any reasons for setting aside the order for service out of the jurisdiction, but, as counsel for the plaintiffs told us, he appeared to be much influenced by the question of *forum conveniens* in regard to taking the account. I do not know whether that was the sole ground on which the learned judge acted.

There is one other matter to which I must refer and which is relied on by counsel for the defendants. In para. 3 of his affidavit of Feb. 9, 1949, on behalf of the plaintiffs, Mr. Ryner states:

"The intended defendant company carry on business as manufacturers of machinery at Alpena, county of Alpena, in the state of Michigan, in the United States of America, and in particular are manufacturers of machinery designed for equipment for concrete products plants and plain pallet tampers and vibrators, known generally as Besser Products. I verily believe that the intended defendant company is a corporation under the laws of the State of Michigan and is not authorised to do business in any country other than the United States of America."

The deponent does not state the source of his information or belief of what appears to be, on the face of it, a remarkable statement, but counsel for the defendants contends that it must be taken against the plaintiffs, who cannot be heard to rely on the fact that the deponent has not stated the source of his information and belief. Counsel for the defendants did not, as I understand him, suggest that the statement really seriously meant that all the transactions of the defendants which, according to the affidavits, were carried out throughout Europe and in other countries were *ultra vires* and void from first to last. I should hesitate for some time before I interpreted this somewhat curious sentence as having that result. But counsel for the defendants contended that it would be sufficient to negative the inference, which would otherwise follow, that payment had to be made in this country, and that, as the defendants, according

to this statement, were restricted to business in America, it would be sufficient for the court to draw the inference that payment must necessarily be made in America. I confess that that passage in the affidavit is very curious, and precisely what it means I do not know, but I cannot construe it as having the effect for which counsel for the defendants contends. By saying that there is something in this paragraph which indicates that it would be illegal for the defendants to make any payment outside America with respect to contracts which have not been made in America and which have been carried out elsewhere, and which include payment of commission to an agent who has brought about business, I am negating the well-known position that the debtor has to seek out his creditor and pay him. In my view, however, this statement in the affidavit is not sufficient to vitiate the whole of the rest of the affidavit, which is really what it would do if we were to give it the meaning for which counsel for the defendants contends. On the whole, I have come to the conclusion that this is a proper case for allowing the service of a writ out of the jurisdiction, and that this appeal should be allowed. A B

ASQUITH, L.J.: I agree.

ROXBURGH, J.: I also agree. C

*Appeal allowed. Costs to be plaintiffs' costs in the cause.*

Solicitors: *Mendes da Costa, Greenwood & Co.* (for the plaintiffs); *Hall Clark & Goldhawk* (for the defendants).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*] D

*Affirmed. C.A. post p. 798.*

## BORTHWICK-NORTON AND OTHERS *v.* ROMNEY WARWICK ESTATES, LTD. E

[KING'S BENCH DIVISION (Hilbery, J.), January 20, 23, 1950.]

*Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Suffering premises to be used as a brothel—User by sub-tenant—Knowledge of tenant—Imputation of knowledge—Relief—Exercise of discretion of court—Law of Property Act, 1925 (c. 20), s. 146 (2).* F

The lease of certain premises contained a covenant by the tenants not to do, or suffer to be done, on the premises any act which might be an annoyance, damage or disturbance to the landlords or their tenants, and to use them as a private dwelling-house only, and there was a proviso for re-entry in the event of a breach of covenant. The premises had been divided into a number of flats, and in 1947 the tenants sub-let the top flat to Mrs. Y. Complaints regarding Mrs. Y.'s conduct and the manner in which she was using her flat were made to the tenants by their sub-tenants in other flats on the premises, but the tenants took no steps to ascertain whether or not the allegations were true. On Aug. 30, 1948, Mrs. Y. was convicted of keeping the flat as a brothel. On Sept. 14 the tenants gave her notice to quit, and she thereupon vacated the flat. Pursuant to the Law of Property Act, 1925, s. 146 (1), the landlords served a notice on the tenants complaining that they had committed a breach of covenant by suffering the premises to be used as a brothel. In an action by the landlords for forfeiture and possession, the tenants contended that they had not suffered the premises to be used as a brothel because they had no knowledge that it was being used in that manner. G H

Held: (i) the tenants had received sufficient warning of what was going on on the premises; as they had taken no steps to verify or dispel the allegations made by their sub-tenants, they had wilfully shut their eyes to the true state of affairs; and, therefore, the law would impute knowledge to them and they were guilty of a breach of covenant.

Observations of LORD SUMNER in *The Zamora* (No. 2) ([1921] 1 A.C. 812), applied.

(ii) in view of the damage resulting to premises by reason of a breach of this kind, and having regard to the general conduct of the tenants, they were not entitled to relief under s. 146 (2) of the Act of 1925.

*Per curiam*: "I have had it pressed on me that the penalty is great if I refuse to exercise the discretion [under the Law of Property Act, 1925, s. 146 (2)] ... I think the penalty for allowing or suffering premises to be used in this way ought to be high, and it ought to be known that the courts will be strict and will enforce, by forfeiture of leases, breaches of covenant of this nature, where people are put to all the abominable unpleasantnesses that occur where one in a set of flats is suffered to be used day and night as a brothel. I think it is a very grave type of breach, and it is not the kind of breach for which it was intended that the court should grant relief."

[AS TO LESSEE'S RIGHT TO RELIEF FROM FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 260, 261, para. 293; and FOR CASES, see DIGEST, Vol. 31, pp. 487, 488, Nos. 6354-6356.]

Cases referred to:

(1) *The Zamora* (No. 2), [1921] 1 A.C. 801; 90 L.J.P. 259; 125 L.T. 204; 37 Digest 640, 926.

(2) *Egerton v. Esplanade Hotels, London, Ltd.*, [1947] 2 All E.R. 88; 2nd Digest Supp.

ACTION for possession of premises on the ground of breach of covenant by the tenants, the defendant company.

The plaintiffs were the present trustees of the Paddington Estate. In 1869 the premises, 81 Warwick Avenue, Paddington, were demised by the then trustees of the estate to John Kellond for a term of ninety-seven and a quarter years from June 24, 1869, and the lease contained a covenant by John Kellond for himself, his executors, administrators and assigns that he would not do, or suffer to be done, on the premises any act which might be, or grow to be, an annoyance, damage or disturbance to the Ecclesiastical Commissioners (who were parties to the deed) or the trustees for the time being or their tenants, and would keep and use the premises as and for a private dwelling-house only. The lease contained a proviso for re-entry by the trustees in the event of any breach of covenant. In 1938 the lease became vested in Mrs. Ada Purnell, and on June 21, 1947, the defendant company became the assignees of the residue of the term created by the lease. The defendant company was a family concern, and was managed by John Edward Purnell, the chief shareholder, and his mother, Mrs. Ada Purnell, and the rents of the properties owned by the defendant company were collected weekly by Mr. or Mrs. Purnell. The premises, 81 Warwick Avenue, had been divided up into a number of flats or tenements, and the top flat was let by Mrs. Purnell, on behalf of the company, to a Mrs. Young. The only inquiry Mrs. Purnell made in regard to Mrs. Young's suitability as a tenant, before letting the flat to her, was from a woman who seemed to be in charge of a restaurant in the neighbourhood and stated that Mrs. Young worked there. When collecting the rent from Mrs. Young, Mrs. Purnell used to go into the living room of the flat, but, according to her evidence, she "saw nothing to make her feel uncomfortable." On Aug. 30, 1948, as a result of observations kept on the premises by police officers on Aug. 18 and 19, Mrs. Young was



charged with keeping the top flat as a brothel. She admitted the offence and was convicted. On Sept. 14, the defendant company served on her a notice to quit the premises, and she quitted them on Sept. 25, 1948. On Oct. 19, 1948, the solicitors for the plaintiffs wrote to Mrs. Purnell stating that they had been instructed by the plaintiffs to take the necessary steps for the forfeiture of the lease, on account of Mrs. Young's conviction, and, pursuant to the Law of Property Act, 1925, s. 146 (1), they served a notice on the defendant company complaining that the defendants had "done or suffered to be done on the ... premises an act which is an annoyance, damage or disturbance to the ... trustees and that you have not used the said messuage or tenement as and for a private dwelling-house only, in that you have used or suffered to be used the same or part thereof during 1948 as a brothel contrary to the Criminal Law Amendment Act, 1885, s. 13 (2)." On Oct. 25, the defendant company's solicitors wrote stating that Mrs. Purnell had no knowledge of the use to which the top floor of the premises was being put until Sept. 13, 1948, when she learnt of Mrs. Young's conviction, and that she had thereupon served Mrs. Young with a notice to quit, and they suggested that, in the circumstances, the notice under the Law of Property Act, 1925, s. 146, should be withdrawn. The plaintiffs, however, refused to withdraw the notice, and brought the action for possession. HILBERY, J., now found that the defendant company had received ample warning of what was going on on the premises, and he held that it was guilty of a breach of covenant and was not entitled to relief under s. 146 (2) of the Act of 1925.

*Melford Stevenson, K.C.*, and *Sir Shirley Worthington-Evans* for the plaintiffs.  
*C. G. A. Cowan* for the defendant company.

HILBERY, J., stated the facts and continued: The first contention of the defendant company is that it has committed no breach of the covenant because it did not know of the breach or suffer it. It is submitted on its behalf that it cannot be held guilty of a breach unless it is shown that it knew of it. Alternatively, if it should be found that there was a breach because it is shown that the defendant company did know or suffer this conduct on the premises, the company applies to the court under the Law of Property Act, 1925, s. 146 (2), to grant it relief from the forfeiture. In my view, it is plain that two responsible tenants, occupying two of the other flats at No. 81, Warwick Avenue, had made complaints which indicated fairly and squarely to the defendant company's representatives, Mrs. Purnell and her son, John Edward Purnell, that these premises were being used for irregular and immoral purposes. [HIS LORDSHIP dealt with the evidence of Mr. Daltrey, the tenant of the basement flat, who had complained to Mr. Purnell, between Whitsun and August, 1947, about the conduct of Mrs. Young and the occurrences on the premises, and continued:] I do not overlook the fact that it is extremely dangerous for a landlord to make accusations which are only founded on something which he has heard from one of the tenants in the premises. I do not underrate the difficulties of a landlord in deciding whether what one tenant is saying about another is something which he ought to take seriously or not, but this was a serious complaint, obviously seriously made, by a respectable man who had a wife and child occupying the basement flat. Mr. Purnell admits that he interpreted Mr. Daltrey's complaint as indicating that the irregular behaviour in the top flat involved sexual immorality. He says that he did not remember such a word as "bawdy-house" being used to him, but he did remember that Mr. Daltrey told him that, in his opinion, there was "funny business" going on there, and he interpreted that expression as indicating that the flat was being used for sexual immorality. That could only mean that he understood that the charge was that it was being used as a brothel. He took no steps, however, to verify or to refute the charge. He chose, in my view, to do nothing about it. He could have made inquiries of the tenants occupying the other flats to see what they had to say, but he

did not do so. Mrs. Purnell then received a complaint from Miss Tucker, a respectable, well educated and reliable young woman, who had occupied the second floor flat of the premises since October, 1943. Miss Tucker said, in evidence, that she had seen men being taken into the flat, and:

“About the early part of 1948 ... I complained to Mrs. Purnell of drunkenness and noises on this woman’s part and in her flat.”

A Mrs. Purnell said she was very upset and displeased and would look into it, but she did nothing in the matter, apart from complaining to Mrs. Young about the noisy parties. Miss Tucker then made the complaint to the police which led to the watching of the premises and the discovery by police officers that the top flat was being used by Young as a brothel.

B The sub-divisional inspector of police told me that prostitutes use this area openly in the afternoons and at other times, walking the streets and plying their trade. Mr. Purnell tells me that, although he has been in those streets regularly, at different times, collecting the rents and so on, he has never observed these street-walking women, and, although he is a comparatively young man, he says that he has never even been accosted by one of them. I find that  
C extremely difficult to credit. It is hardly to be believed that any man could go frequently up and down the streets where that sort of thing is going on without observing it, even if he did not suffer the annoyance of being solicited. I have formed the view that, in all the circumstances, neither Mrs. Purnell nor her son wanted to know any more about what was going on. Each of them preferred not to face the facts, and turned away from the obvious facts in order that  
D they should not see them. I think some support for this view is to be found in a further fact which emerged in the course of this case. At 66 Warwick Avenue, which was also owned by the defendant company, and the rents of which were collected by Mr. or Mrs. Purnell, Mrs. Purnell retained one room, which she used as an office and in which she spent a good deal of time at all hours of the day. By September, 1948, a flat in that house was being used as a brothel, and, after the police had kept it under observation for four nights, they reported  
E that two women were seen to take twenty-six different men to the premises. In that case, also, Mrs. Purnell said that she had observed nothing irregular happening at the house.

It was admitted by counsel for the defendant company that, if it knew, or ought to have known, what was going on, then it was in breach of the covenant and suffering that to go on which was, in fact, going on. If I come to the  
F conclusion that sufficient warning had been given to Mrs. Purnell and to her son, both of whom were directors actively engaged for the defendant company in the management of the properties which were held by the defendant company, and they took no sufficient steps to verify or to dispel the allegations, but wilfully shut their eyes to the state of affairs that was existent, as I think they were doing, then I think that the law will impute knowledge to them, since the law  
G will not allow a person to escape his obligations by saying, “I did not know,” when he has wilfully blinded himself to facts and refused to know that which, if he had chosen, he might have known quite well. As LORD SUMNER said ([1921] 1 A.C. 812) in *The Zamora* (No. 2) (1):

H “... there are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where

ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise."

As I have said, I have come to the conclusion that the defendant company had been put on notice, but chose to take no steps, because to do so might have been to discover the unpleasantness which the police had no difficulty in discovering, and I have no doubt that the company preferred to avoid the troubles in which it might be involved if it made the discovery.

As I am satisfied that there was a breach, in that the defendant company suffered this misuser of the premises, the only question that remains is: Ought the court in these circumstances to exercise its discretion under the Law of Property Act, 1925, s. 146 (2), and grant relief against the forfeiture? This particular breach of covenant, *i.e.*, this type of misuse of the premises in breach of a covenant not to use them otherwise than as a private dwelling-house and not to use them in such a way as to become a nuisance or annoyance to the trustees or the Ecclesiastical Commissioners, is one which it is most difficult to remedy, and it certainly cannot be remedied by payment. It does, necessarily, a harm to the reputation and value of the premises, as it attaches to them the stigma of having been known as a house of ill fame. For those reasons it has been decided that the notice of the breach which is given in order to found the claim for forfeiture need not require the breach to be remedied: [see *Egerton v. Esplanade Hotels, London, Ltd.* (2)]. It has also been held that stopping a wrongful user of this kind is not a way of remedying the breach, and that a breach of this kind cannot be remedied: [see *Egerton v. Esplanade Hotels, London, Ltd.* (2)].

When I regard, as I must, all the circumstances of this case, the nature of this particular breach, and the damage which it does to premises, when I reflect also on the curious fact that in no less than two of the houses which were in the hands of the defendant company, the top flats were being misused in this way, when I think of the failure to take any steps—and the way in which the defendant company, through its directors, John Edward Purnell and Mrs. Purnell, seemed to have refused to take reasonable steps—to see whether such a misuse of the premises was going on, I come to the conclusion that, having regard to the nature of the misuse and to all these circumstances, it is not a case in which the court should exercise its discretion.

I have had it pressed on me that the penalty is great if I refuse to exercise the discretion. I am told that there are about nineteen years of the lease to run, and it is submitted that the fact that, if the lease is forfeited, there may occur an immediate and present claim for dilapidations, and so on, results in too high a penalty being imposed on the defendant company. I am unable to take that view. I think the penalty for allowing or suffering premises to be used in this way ought to be high, and it ought to be known that the courts will be strict and will enforce, by forfeiture of leases, breaches of covenant of this nature, where people are put to all the abominable unpleasantness that occur where one in a set of flats is suffered to be used day and night as a brothel. I think it is a very grave type of breach, and it is not the kind of breach for which it was intended that the court should grant relief. Where a breach can be remedied by doing repairs or restoring premises to their original layout, where it is a mere expenditure of money, it is another matter, but where there is a breach of the kind that I have been considering, and in the circumstances of this case, I think it would be wrong for me to exercise the discretion under s. 146 (2) of the Act of 1925 and to grant relief against the forfeiture, and, accordingly, there will be judgment for the plaintiffs.

*Judgment for the plaintiffs with costs.*

Solicitors: *Trower, Still & Keeling* (for the plaintiffs); *Ingledeu, Brown, Bennison & Garrett* (for the defendant company).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]



## PARKINSON v. LIVERPOOL CORPORATION.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.J.J.), January 12, 1950.]

*Negligence—Driving of motor vehicle—Sudden stopping of omnibus to avoid running over dog—Injury to passenger—Driver's duty to take reasonable care.*

A To avoid running over a dog an omnibus driver applied his brakes suddenly and brought the vehicle to an abrupt standstill. The plaintiff, a passenger, at that moment was walking down the gangway with the intention of alighting at the next stopping-place. He was thrown to the floor of the vehicle and sustained personal injuries for which he claimed damages on the ground that the driver had been negligent.

B HELD: that the driver, faced with a sudden emergency caused by the dog's appearance in front of the omnibus, acted as an ordinary and careful driver ought to act in such circumstances, and, therefore, he was not guilty of negligence or failure to take due care of his passengers, and the plaintiff was not entitled to recover.

*Sutherland v. Glasgow Corpn.* ([1949] Sc.L.T. 388), *distinguished*.

C [AS TO THE GENERAL DUTY OF DRIVERS OF VEHICLES ON HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-644, paras. 894-904; and FOR CASES, see DIGEST, Vol. 36, pp. 59-62, Nos. 366-400, and Digest Supp.]

Case referred to:

(1) *Sutherland v. Glasgow Corpn.*, [1949] Sc.L.T. 388.

D APPEAL by plaintiff from a decision of PRITCHARD, J., at Liverpool Assizes on June 10, 1949.

E The plaintiff, a passenger in an omnibus belonging to the defendants and driven by one of their servants, was thrown to the floor of the vehicle owing to the sudden application of the brakes by the driver and sustained injuries for which he claimed damages on the ground that the driver had driven negligently. At the time of the accident he had left his seat and was passing down the gangway to alight at a stopping place. The driver, in evidence, said that he stopped to avoid running over a dog which suddenly ran in front of the omnibus. PRITCHARD, J., found that the driver had acted as any reasonable person would have done in a like emergency, that he was not negligent, and, therefore, the action failed. The Court of Appeal now affirmed that decision and dismissed the plaintiff's appeal with costs.

F *Sir Noel Goldie, K.C.*, and *G. N. England* for the plaintiff.  
*Nelson, K.C.*, and *Baucher* for the defendants.

TUCKER, L.J.: The plaintiff, Mr. Parkinson, a man of some sixty-five years of age, who was a passenger on a Liverpool Corporation omnibus, suffered injuries as a result of a sudden stopping of the omnibus, whereby he was thrown to the floor and broke two of his ribs. He boarded the omnibus at about 6.40 p.m. on Nov. 2, 1948, and obtained a seat towards the front of the vehicle. Before the omnibus came to the place at which he usually alighted there were traffic lights, and, according to his custom, he rose from his seat near the lights. The omnibus stopped at the lights and then went forward, but, after it had proceeded some little distance up the road, there was an application of the brakes of some suddenness. I say "of some suddenness" because the suddenness of stoppages of this kind is always a matter of degree. The nature of this stopping was such as to throw the plaintiff off his balance while he was walking along the gangway. It also threw the conductor of the omnibus to the floor. The sudden stop was not sufficient seriously to inconvenience the seated passengers. It was not one of those stoppages where the seated passengers are thrown all over the omnibus. In that state of affairs, if there had been no explanation of what had caused the driver to pull up with that degree of suddenness, the court would certainly have been entitled to draw the inference

that *prima facie* there had been negligence on the part of the driver. The circumstances would be such as to call for an explanation.

The driver was called and he gave an explanation, of the truth of which PRITCHARD, J., was satisfied. He said that after he had gone over the traffic lights a dog appeared from his near side. He saw it some twenty yards away. It appeared to be minded to cross the front of him, and he, accordingly, took his foot off the accelerator and passed behind the dog. The dog, having cleared the vehicle, apparently, changed its mind and suddenly came back across the front of the omnibus. When the driver realised what the dog was going to do it was some five or six yards away from him, and he applied his brakes and brought the omnibus to a standstill. While he was doing that he lost sight of the dog, and it was not until afterwards that anyone could discover whether or not the dog had been injured. Apparently, it had not been. The dog escaped, and the plaintiff suffered the injuries described. On that PRITCHARD, J., said:

"This is not a case which can be argued, or, indeed, thought of, I think, on the lines which have been suggested, whether the driver owed a duty to the dog or a greater duty to his passenger. The simple test to be applied in the circumstances of this case which took place is: Did the driver act reasonably or unreasonably by doing something which a reasonable person would not do and leaving undone something a reasonable person would do? In this case I accept the driver's evidence, and I am satisfied the dog did what he says it did. In those circumstances, and accepting those circumstances as I do as the facts in this case, I have to ask myself: Has it been established that this driver did something which a reasonable person would not do, and I do not think he did. I think he acted as any reasonable person would in the emergency which took place, and I find there was no negligence on his part."

I do not think PRITCHARD, J., in any way misdirected himself with regard to any onus that there may have been. What his judgment amounted to was that the driver's evidence established that an emergency arose, and the learned judge was satisfied that the driver did that which an ordinary, reasonable, careful, driver would do in the circumstances of that particular emergency. Having come to that conclusion he decided in favour of the defendants. I think the decision of PRITCHARD, J., was clearly right on the facts which he found, and that he approached the problem from the proper angle.

Counsel for the plaintiff has drawn our attention to *Sutherland v. Glasgow Corpn.* (1) because it is a case which tends to support the view which he urged before us, namely, that a driver owes some paramount duty to his passengers, and, if he injures a passenger, he cannot discharge the onus that lies on him by saying: "I did what I did to avoid running over a dog." With regard to *Sutherland v. Glasgow Corpn.* (1), I would only observe that each of the learned judges who heard it said that each case of this kind must depend on its own facts. The Lord Justice-Clerk (LORD THOMSON) said ([1949] Sc.L.T. 391):

"In the course of an interesting debate we ranged over a number of topics connected with the difficulties the drivers of vehicles may be placed in by the presence of animals on roadways. As the problems which may arise are infinitely various, I am averse to attempting any general statement of the law. This is one of the occasions when one is well justified in saying that each case must depend on its own facts."

Similar statements were made by LORD MACKAY and LORD JAMIESON. In that case the driver of a Glasgow tramway car had pulled up suddenly to avoid running over a dog and there was evidence that passengers who had got on to the car shortly before the sudden stop could not reasonably have been expected to reach their seats by the time the driver pulled up. In addition, it was a case

A of the application of a magnetic brake on a tramway car, and I think we are entitled to know that the application of such a brake to such a vehicle has extremely sudden consequences. Those are two factors which differentiate the facts of the present case from those of *Sutherland v. Glasgow Corpn.* (1). In the present case the evidence was the other way. It all tended to show that the blind was down so that the driver of the omnibus would not know whether there was any passenger, not only standing, but moving along the gangway. Furthermore, the brake applied was the ordinary normal brake used in the course of driving an omnibus.

B In such circumstances I do not think it is necessary to deal in detail with the facts or reasoning in *Sutherland v. Glasgow Corpn.* (1). I am not prepared to accept as the law which we should apply in this country in the circumstances of a case of this kind all the statements with regard to the duties said to be owed by the driver of a tramcar to the passengers in the circumstances which occurred in that case. I am by no means prepared to accept that the duty can be put in quite the language used by the Lord Justice-Clerk or by LORD JAMIESON, and certainly there is nothing in that case which compels me to the view (which I should be very reluctant to reach) that PRITCHARD, J., arrived at an erroneous conclusion in the present case. The duty owed by the driver is a duty to take reasonable care, having regard to the passengers he is carrying and having regard to the other users of the road. I should add that the decision in *Sutherland v. Glasgow Corpn.* (1) proceeded on the basis that the sheriff substitute had not properly directed his mind to the degree of proof which was required to be adduced by the defendant to justify his conduct, and the court came to the conclusion, on the evidence given, that the driver really had not applied his mind to the question of the safety of his passengers or possible injury which they might suffer. Although I think that in such circumstances as these drivers act instinctively, they are required to go through some process of reasoning. In the present case the driver was asked this question: "What do you usually do when driving your omnibus when a dog is in imminent peril of being run over?", and the answer was: "I try to save the animal's life, if possible, without endangering anybody else, of course." So that it appears that he did apply, or that it was his custom to apply, his mind to the question of his conduct endangering anyone else when faced with an emergency of this kind. I think that this appeal fails.

F COHEN, L.J.: I agree.

ASQUITH, L.J.: I also agree.

*Appeal dismissed with costs.*

Solicitors: *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff); *Cree, Godfrey & Wood*, agents for *Thomas Akner*, town clerk, Liverpool (for the defendants).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

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## BORDER RURAL DISTRICT COUNCIL v. ROBERTS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell, L.J., and Hodson, J.), January 25, 26, 27, 1950.]

*Water Supply—Rates and charges—Special expense charged on ratepayers in contributory place—Cost of supply to that place thereafter small—Right of ratepayers in that place to have rate reduced to reflect cost—Public Health Act, 1936 (c. 49), s. 126 (1).*

The Public Health Act, 1936, s. 126, provides: “(1) . . . a local authority who supply water under this Act to any premises for domestic purposes may charge in respect thereof a water rate, which shall be assessed on the net annual value of the premises as appearing in the valuation list for the time being in force . . . Provided that the authority may fix a minimum charge applicable in all cases to premises supplied with water.” In 1898, under the Carlisle Corporation Act, 1898, s. 28, the Carlisle Corporation became bound to supply to the B. council a quantity of water daily for the use of the B. council in its seventeen parishes. Soon afterwards, the B. council took a lease of a plot of land for use as a reservoir and contracted with the lessor that the free supply under the Act of 1898 should be allocated to four of the parishes, including the B. parish. The Local Government Board made an Order (S.R. & O., 1908, No. 1202) charging the cost of leading the free supply to the four parishes on those parishes as a special expense pursuant to the Public Health Act, 1875, s. 229. The B.R.D. Council, the successors of the B. council, charged a water-rate on premises in the B. parish and the other three parishes receiving the free supply at 2s. in the pound and on premises in the remaining parishes in their area at 2s. 6d. in the pound. A ratepayer having premises in B. parish refused to pay the rate at 2s. in the pound on the ground that the cost of supplying water to B. parish was much less than 2s. in the pound and was merely that of maintaining the pipes and apparatus, and that the parishioners of B., having borne the special expense of leading the supply which they received, had now an enforceable equity to be charged only the actual cost of the present supply to their parish.

HELD: the circumstances did not give rise to any such enforceable equity; the B.R.D. Council had a discretionary power under s. 126 to charge uniformly throughout their area; and, therefore, they were not bound to differentiate according to the actual cost of the supply to any one parish or contributory place.

[AS TO WATER RATES AND CHARGES, see HALSBURY, Hailsham Edn., Vol. 33, pp. 400-403, paras. 662-667; and FOR CASES, see DIGEST, Vol. 43, pp. 1087-1091, Nos. 204-228.]

Cases referred to:

- (1) *Northampton Corpn. v. Ellen*, [1904] 1 K.B. 299; 73 L.J.K.B. 329; 90 L.T. 71; 68 J.P. 197; 43 Digest 1091, 227.
- (2) *Julius v. Oxford (Bp.)*, (1880), 5 App. Cas. 214; 49 L.J.Q.B. 577; 42 L.T. 546; 44 J.P. 600; 42 Digest 716, 1351.
- (3) *R. v. Barlow*, (1693), 2 Salk. 609; Carth. 293; 42 Digest 717, 1363.

APPEAL by the Border Rural District Council from a judgment of His Honour JUDGE ALLSEBROOK, sitting at Carlisle County Court, dated Oct. 26, 1949. JUDGE ALLSEBROOK held that the council could charge by way of water rate only the cost of supplying water to the contributory place. The Court of Appeal now reversed the county court judge's decision. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

*Blain* for the Border Rural District Council.  
*C. E. Scholefield* for the ratepayer.

**SIR RAYMOND EVERSLED, M.R.:** The plaintiffs in this action are the Border Rural District Council (hereinafter called "the council"), and they claim from the defendant, Charles Henry Roberts (hereinafter called "the ratepayer"), a total sum of £18 13s. 0d. in respect of water-rate for the period ending Mar. 31, 1949, alleged to be due in respect of five premises in the ratepayer's occupation. The five premises are all situated in the parish of Brampton, which is a "contributory place" within the meaning of the Public Health Acts within the area of the council. The council are the suppliers of water to this area, and, there being for this purpose no special Act, their obligations and powers are governed by the general Acts, particularly by the Public Health Act, 1936.

To make clear certain of the points which arise it is necessary to state that the council came into being in 1934 as the result of what is known as the Cumberland Review Order of that year (S.R. & O., 1934, No. 259). Previously the parish of Brampton had been within the area of what had been called the Brampton Rural District Council. That area comprehended seventeen parishes, all in the neighbourhood of Carlisle in the county of Cumberland. The effect of the Cumberland Review Order was to enlarge the area which had hitherto been the province of the Brampton Rural District Council. It added twenty parishes, so that the total number of contributory places or parishes subject to the jurisdiction of the council as regards water is now thirty-seven. It is conceded that *quoad* the original seventeen parishes of the Brampton Council area all the statutory and other powers, duties and obligations of the Brampton Council became vested in the council which, therefore, are the successors of the Brampton Council. For the purpose of supplying water there have at all times been, so far as is relevant, two available sources, to one of which I shall refer as the Glazier Spring source, and the other as the Geltsdale source. So far as the parish of Brampton is concerned, it, together with three other parishes, derives the bulk, but not the whole, of its supply from the Geltsdale source. For reasons which I shall hope to make clear, the supply of Geltsdale water is much less costly than the supply of the Glazier Spring water.

The real point in this appeal may, I think, fairly be stated thus. Having regard to all the circumstances, is the council bound so to exercise its powers to charge water rates as to reflect fairly in the rates charged to the Brampton parish (and the other three parishes which are in a like case) the fact that the supply of water, as it is mainly from Geltsdale, is far less costly than is the supply of water to the remaining thirty-three parishes which comes from the Glazier Spring and other sources? What the council have done is to charge a water-rate based, as it must be, on the net annual value of the relevant premises at a rate of 2s. 6d. in the pound in all parishes other than Brampton and its three colleagues, but in the latter case to charge only at the rate of 2s. 0d. in the pound, thus by a difference of only sixpence in the rate reflecting the difference in the cost. It is said by counsel for the ratepayer that that sixpence is an altogether negligible appreciation of the claim of the four parishes, when regard is had to all the facts.

The matter came before the learned county court judge at Carlisle, who heard argument and evidence in March. At some stage it appeared that of the five premises which I have mentioned as being in the occupation of the ratepayer the last two named in the particulars of claim—Craw Hall and Cotehill Terrace—although in the parish of Brampton, derived their water, not from the Geltsdale supply, but from Glazier Spring. He conceded that, having regard to that fact, he could not contend that his claim to a greatly reduced water rate could properly be entertained as regards the last two premises. We are not concerned with the logic or correctness of the admission, but as a result those two premises pass from the picture. The learned judge gave judgment for a sum of £9 10s. 10d. Of that sum, £5 8s. 0d. was the amount claimed in respect of Craw Hall and Cotehill Terrace. As to the balance, the learned judge concluded that, having

regard to the facts, the only proper amount which the council could charge by way of water rate was one which only brought into account the cost of maintaining the pipes and other apparatus requisite for carrying the Geltsdale water to the parish of Brampton. Arithmetically that worked out at  $7\frac{1}{2}d.$  in the pound. The balance, therefore, of £4 2s. 10d. was the result of scaling down the charge in respect of the three first mentioned premises from 2s. in the pound to  $7\frac{1}{2}d.$  in the pound. The amount involved is small, but a question of principle has been raised, and we have, indeed, been told that there are many other cases which depend on the result of this case. The claim of the council is that they have power under the Act to charge a water rate in the way they have done, and that they are not bound to limit their charge in respect of Brampton and the other three parishes so as only to reflect the cost of maintenance. That is the issue we have to try.

To complete the history of the matter, in the county court the learned judge gave an interim judgment in which he intimated his conclusion on the lines I have suggested. He did not give any specific reasons for his conclusion that the maintenance cost was all that could be taken into account, but we understand that he regarded that limitation as one which must be imposed on the council as a result of the various matters which I shall presently mention. As he has stated no reasons, there is no point in my taking up time by reading from his interim judgment. After a passage of time intended to enable the parties to agree their arithmetic (or, at any rate, a method of assessment) which did not have the result for which the learned judge hoped, in October of last year he gave a final judgment in which he worked out his arithmetic on the basis which he had suggested. In order that I may dispose of the matter, it is not in dispute that the council are properly entitled, by virtue of their statutory powers, to sue as they did in the county court for these water-rates, and the real question turns, and, as I think, turns only, on the proper effect, having regard to the circumstances of this case, of the Public Health Act, 1936, s. 126.

It appears that before 1898 the Brampton Council, the plaintiffs' predecessors in title, had cast their eyes on the Geltsdale Springs as a source from which they could get further water to supply the area. They were forestalled by the Carlisle City Corporation which promoted a Bill, the effect of which was to give to the Carlisle Corporation a prior right to the supply. We are told that the Bill was opposed by the Brampton Council, and in accordance with what, according to those more familiar with the procedure than I am, frequently is alleged to happen in such cases, some kind of a bargain was struck, so that there was included in the Bill when it became law a special section, s. 28, of the private Act known as the Carlisle Corporation (Water) Act, 1898, the effect of which was that the Carlisle Corporation became bound to supply to the Brampton Council a quantity of water from Geltsdale equivalent to 220,000 gallons as a maximum per day. It was provided in the Act that the Carlisle Corporation would in specified proportions comply with its obligation by delivering the water to two reservoirs, one known as the Garth Head, and the other as the Faugh. It was stated that the water so supplied should be for the use of the Brampton Council in respect of its seventeen parishes. There was nothing in the Act which stated that it was to be allocated to any one or other of the seventeen. Following that statute there was made a lease of a small plot of land some thirty feet square, the parties being, as lessor, the then Earl of Carlisle, and, as lessees, the Brampton Council. The purpose of the demise was to give to the Brampton Council a site for a subsidiary reservoir which is known as Blaebery Bent Tank. The terms were in many respects plainly very favourable to the Brampton Council, and the transaction undoubtedly followed on, and was, indeed, a part of, the scheme which had originated in the statute of 1898 and the arrangement for the taking from the Carlisle Corporation of these quantities of water. The important matter for present purposes which emerges from the lease is that



by it the Brampton Council contracted with the earl that the Carlisle supply, the Geltsdale free supply, should, via this tank or otherwise, be allocated exclusively to the four parishes which were named in the lease, Brampton being, as I have indicated, one, and the others being Castle Garrock, Irthington and Hayton. The covenant by the Brampton Council is not in law one on which the ratepayer or any parishioner of Brampton could rely since it is *res inter alios acta*. So much counsel for the ratepayer concedes, as plainly he must, but, as a result of it, pursuant to what was, no doubt, the scheme in the minds of all parties concerned, the cost of leading this free Geltsdale water to the beneficiary parishes, if I may use that word, was cast on those parishes, and I assume the whole of it was so discharged. At any rate, by an Order to which counsel has referred, made in December, 1908, by the then Local Government Board, total sums of money amounting to £8,000 or £9,000, which, I will assume, represented the cost of leading the Geltsdale water to the four parishes, was charged on those parishes as a special expense pursuant to the powers of the Public Health Act, 1875, s. 229.

The result is, says counsel, that those four parishes themselves paid all the cost that the Brampton Council was put to in regard to this water supply. Other parishes were wholly relieved of all those expenses, and that was, says he, plainly part of a scheme which had its origin in 1898, and the administrative steps later taken establish the facts as I have stated them and show as a result that the only cost which the council now has in regard to this supply to Brampton is the relatively small cost of maintaining the pipes and apparatus. When regard is had to the fact that the four parishes were intended, as he says, from the first to have this water and to have it free, and to the fact that they provided the cost of laying the pipes and having the apparatus installed for doing so, then there comes into existence so strong a claim as to amount to an enforceable equity, making it the duty of the council in the exercise of its statutory powers only to charge by way of water-rate against the consumers in the parishes that maintenance figure, which has been quantified by the judge at 7½d. in the pound of the net annual value. It is conceded by counsel that, apart from the creation of such an equity, there is power in the relevant statutes for the authority to spread the total cost of water supply as it thinks fit, and, in particular, uniformly over all the consumers throughout the total area, and that it is not bound to treat each parish as a unit and to calculate as regards each parish what the cost of the supply of water to that parish is, and levy water rates on the consumers in the parishes so as to balance the costs relevant to those parishes. That concession has made it unnecessary to go into some matters which were adumbrated during the argument, and I shall only find it necessary to refer in any detail to s. 126 of the Act of 1936. That section, it may be stated, took the place of s. 56 of the Act of 1875, which after some investigation we were able to discover was repealed by Part I of the schedule to the Act of 1936. Section 126 provides:

“(1) Subject to the provisions of this Part of this Act, a local authority who supply water under this Act to any premises for domestic purposes may charge in respect thereof a water rate, which shall be assessed on the net annual value of the premises as appearing in the valuation list for the time being in force . . . Provided that the authority may fix a minimum charge applicable in all cases to premises supplied with water.”

Such a minimum charge would, *prima facie*, I conceive, be a sum of money, say 10s. in respect of all the relevant premises. Obviously, therefore, the proviso is important as indicating that it is within the powers of the council, and within the contemplation of the Act, that there may be a uniform charge or scale of charge over the whole area of supply. As counsel for the ratepayer has raised a subsidiary argument on the word “supply,” I should mention that the duty as regards supply of the local authority is contained in s. 111. It is its duty,

by virtue of para. (ii) of that section, to secure that every house has rendered available to it within a reasonable distance "a sufficient supply of wholesome water for domestic purposes." A later section of the Act, s. 308, gives power to an authority to make contributions in relief, so to speak, of water-rate from its general sources of revenue, and to do so by treating any specific cost incurred as special expenses to be paid out of ordinary rates and charged specifically, save as therein expressly provided, on the parish for the benefit of which the expenses were incurred. It was in pursuance of such a provision in the predecessor of that Act that the special expenses of the construction of the pipes, and so on, were charged specifically to the four parishes.

The effect of the presence of that section, it was suggested, might be to show that it was the intention of Parliament to make a parish the unit for all purposes when a local authority had to consider how it should recover from the persons entitled to the benefits the cost incurred of supplying water. If that were right, it might have, or have had, an influence on the proper construction of s. 126, but it is important to note that by a later Act, namely, the Rural Water Supplies and Sewerage Act, 1944, s. 6, the effect of s. 308 of the Act of 1936 which I have tried to state was revised, for s. 6 provided:

"Notwithstanding anything in s. 308 of the Public Health Act, 1936, all expenses incurred (whether before or after the passing of this Act) by a rural district council in connection with . . . a supply of water shall, in so far as they fall to be defrayed out of rates [*i.e.*, general rates] made in respect of periods beginning after the end of March, 1945, be general expenses."

In other words, it is indicated that, so far as charging out of general rates is concerned, the intention of Parliament thenceforth was that there should be a spread of the whole cost over the whole area, instead of treating *prima facie* as the proper unit for levying these charges the contributory places or parishes. In so far, therefore, as the construction of s. 126 might thitherto have been affected by what I will call the parochial emphasis in s. 308, that emphasis has now gone. Counsel for the ratepayer, however, has never made it part of his argument, as I have said, that s. 126 on its true construction points to parochial assessment, but he has sought to get some help from s. 6 of the Act of 1944 by saying that, since now you must spread all the expenses, which are to be charged on rates generally, uniformly over the whole area, your only means of doing justice, when the costs incurred differ between one parish and another, is to make use of the power you have in s. 126 to charge differential water rates, reflecting the actual costs to the several parishes.

I only wish to refer to one other statutory provision, and that is s. 126 (4), which provides that any ten persons rated to the general rate in a borough or urban district, or any five persons rated to the general rate in a contributory place in a rural district, if aggrieved, putting it briefly, by the way in which the local authority has assessed its water-rate, may appeal to the Minister of Health, and the Minister can make an order, as he thinks fit, varying the water rate as charged. That sub-section is now replaced by the general s. 40 of the Water Act, 1945, which provides that

"(1) . . . on an application made to him by any statutory water undertakers supplying water under a local enactment, or by a local authority within whose county or district any such undertakers supply water, or by twenty or more persons supplied with water . . ."

the Minister may make an order as he thinks reasonable as to the proper way in which the rate should be levied. That is important, for the reason that, assuming, as counsel for the ratepayer admits, that there is *prima facie* power in the local authority to levy differential rates as well as uniform rates, and

assuming against the ratepayer that there is here no duty on the authority to levy differential rates, then there may still be a remedy if persons aggrieved think it to be unfair, namely, the remedy of application to the Minister. Indeed, it may, I think, be put more strongly. The fact that there is such a remedy obviously makes less forcible the argument that there must be found, in such a case as this, some equity compelling the authority to make differential rates unless injustice be done. Such an equity, difficult on any view, as I think it is, to extract from the circumstances, is plainly less compelling if there is found some other remedy rendered available by Parliament.

I have, I think, stated all the facts, and, I hope, all the statutory provisions to which it is necessary to allude. It, therefore, only remains to come back to the point of law which counsel for the ratepayer has made the basis of his argument, namely, that on the facts here there is an equity which compels the local authority to exercise its powers (admittedly sufficient to enable the authority in the absence of some compulsion to levy the water rates it did) so as to levy them in accordance with the principles which appealed to the county court judge. Reference was made in the course of the argument to the case in this court of *Northampton Corpn. v. Ellen* (1), for the purpose of showing that a water rate is something quite different in character from a general rate. In other words, the use of the word "rate" is not to be deemed to give to a water rate all the characteristics, statutory or otherwise, which properly belong to a poor rate or rates which derive their origin from the statute of Elizabeth. Passages were read from the judgment of SIR RICHARD HENN COLLINS, M.R., and from that of ROMER, L.J. I will cite a few lines from the latter. At the beginning of his judgment, ROMER, L.J., says ([1904] 1 K.B. 316):

"... having heard the case fully argued, and on examination of the various Acts on which the question depends, I have come to the conclusion that there is nothing in the words of those Acts [relating to water-rate] sufficiently strong to justify the court in saying that the charge in respect of all houses in the borough for water supplied for domestic purposes must be at an equal rate in the pound . . . I cannot find in that Act [the Waterworks Clauses Act, 1847,] anything sufficiently clear to indicate that, whenever what is called a 'water rate' has to be paid in respect of dwelling-houses in a district, the amount of the charge must be arrived at by taking an equal percentage on the values of all such houses."

That was a case in which complaint was made because some premises had been charged 7½ per cent. on the rateable value and others five per cent. It was held that it was within the powers of the authority so to differentiate and that neither the word "rate" nor the phrase "water rate" imported any necessary implication of uniformity. That really has not been, as the argument has turned out, the issue in this case. In the absence of this so-called equity, it is conceded by both the learned counsel in this case that s. 126 would authorise such rates as have been levied as water rates in this case. Can it, therefore, be said, having regard to the transactions, the history of which I have described from 1898 onwards, resulting, as they have and must have done, in the parishes of Brampton and the other three parishes now getting a water supply for the most part—for I do not forget that some at any rate derive their supply from Glazier Spring—which is far less expensive to the authority than is the supply to the other parishes, and when regard is had to this special levy made on the parishes in 1908 to recover the cost of the laying of the pipes, that the rural authority cannot be permitted by these courts to take advantage of its powers otherwise than by limiting the water rate in the case of Brampton and the other three parishes to a figure relating to maintenance only?

I can well understand the feeling of grievance which has given rise to these proceedings, but it does not seem to me that the grievance can create any equity



such as this court can comprehend or will enforce. This is merely a matter of discretion for the authority, and there is nothing, to my mind, which compels it to do otherwise than it has done. If the ratepayer and his colleagues have a grievance, he is not without remedy by virtue of the provisions of s. 40 of the Act of 1945, though I am not suggesting that, if he makes application, the Minister will hearken to his prayer. On that I express no view whatever. I am satisfied that there is here no such equity as these courts can comprehend and enforce. A

By way of subsidiary argument it was said the word "supply" in the phrase "who supply water" in s. 126 means on the facts of this case, and means only, or covers only, the maintenance of the pipes and other apparatus. If that is so, the only charge they can make "in respect thereof" is the charge in respect of maintenance, but, with all respect to counsel's plea, I cannot see that this water, emanating, as it does, from the Geltsdale Springs, which the council secured as the result of the statute, is any the less a supply by the local authority in accordance with its statutory duty merely because it is alleged that it now costs nothing beyond the cost of maintaining the pipes. I cannot on that ground, any more than on the other, persuade myself that the powers which have been exercised under s. 126 have been wrongly exercised. For these reasons, I have come to the conclusion that the view of the learned judge cannot be supported in law, and that the appeal ought to be allowed. I gather that no question arises on the particulars, and the result will be to substitute for the figure of £9 10s. 10d., for which the learned judge gave judgment, the figure claimed in the particulars of claim of £18 13s. 0d. B C

**SOMERVELL, L.J.:** I agree with the MASTER OF THE ROLLS that this case turns primarily on the construction of the Public Health Act, 1936, s. 126. Though it is unnecessary to decide it, I think it is fairly plain on the face of that section that one of the reasons why it and its predecessor or predecessors were necessary was that statutory authority was needed to enable local authorities supplying water, possibly to charge at all, but certainly to charge on the basis which is first provided for, namely, by an assessment on the net annual value of the premises. If that had been sought to be done without statutory authority, one can well understand an argument: "No, you cannot charge for water like this. You will have to show how much water has been consumed in these premises and charge accordingly." Section 126 (1), therefore, with the proviso, seems to be directed, and also sub-s. (2), to the manner in which water may be charged for, and does not seem to make any reference to the considerations which are to be taken into account or the considerations which should not be taken into account in arriving at the rate or other charge which the local authority seek to impose. D E

At one time in the course of the argument, I was inclined to think that the provisions in s. 308 dealing with expenses incurred in connection with the supply of water which fell to be treated as special expenses chargeable on that contributory place might be relevant to the construction of s. 126. It might at least, it seemed to me, have been suggested that, that being the principle with regard to expenses which fall on the general rates, a local authority, in fixing its water rate, ought to have regard to the cost of supplying water not to individual houses, but to any particular contributory place. Counsel for the ratepayer did not contend for that construction, and, indeed, owing to the fact that s. 308 has been replaced by s. 6 of the Act of 1944 which has been already cited, the question is, perhaps, an academic one. On the whole, I have come to a different conclusion from that which I suggested in argument. I think, without throwing any doubt on the power of a local authority to make differential water rates, it might well be said that the general scheme or policy contemplated by the two sections was that the water rate should be, broadly speaking, uniform, or fairly uniform, if I may put it in that way, any special differences in costs as F G H

between different contributory places being left to be dealt with, not by using the power to make a differential water rate, but by using the power to charge special expenses under s. 308. But, as I have said, and as has been stated by the MASTER OF THE ROLLS, that provision in s. 308 has now been replaced, in respect of that part of it with which we are concerned, by s. 6 of the Act of 1944. I think that that section places a difficulty, which did not exist before, in the way of the argument of counsel for the ratepayer that we must here find some right or equity which would enable these parishes which are specially favoured, in the sense that their water costs less than others, to get the advantage of that financial position. I think that s. 6 of the Act of 1944 indicates a policy in this area of legislation—again without throwing any doubt on the power to levy a differential rate—that in these rural areas the costs should be spread rather than dealt with parish by parish or contributory place by contributory place. Parliament having embodied that policy in that section, so far as expenses falling on the general rates are concerned, I should have thought it weakened any argument of the kind that counsel seeks to put forward in respect of the favourable position of these parishes. I also think there is great force, and I do not want to add anything to what has been said, with regard to the effect of the argument on s. 126 (4) of the Act of 1936 and s. 40 of the Act of 1945.

I would like to add a word in conclusion on the passage which counsel for the ratepayer relied on in MAXWELL ON INTERPRETATION OF STATUTES, and the case to which he referred us. There are cases which show that in certain circumstances, although the word “may” is used, if the act which the authority, or whoever it may be, is given power to do is not done, process is made available to compel it to be done. The case most often quoted is *Julius v. Bishop of Oxford* (2), but the case to which counsel for the ratepayer drew attention was *R. v. Barlow and Jeans* (3) which is the authority for this sentence in MAXWELL, 9th ed., p. 250:

“But an enactment that churchwardens ‘may’ make a rate for the reimbursement of constables . . . is no mere permission to do such acts, with a corresponding liberty to abstain from doing them.”

I have altered what he writes to some extent because he deals with other cases, but that is how he describes the effect of that case and those cases. He says: “A duty is at the same time cast upon the persons empowered.” The defendants were churchwardens of the parish of St. Warburgh in Derby. They were required to make a rate for the reimbursement of constables. The court is quoted as saying (Carth. 293):

“But the court would not quash the indictment, because the defendants were blameable, it being very reasonable that the constables should be reimbursed; and, therefore, as to the first objection, *viz.*, the inequality of the charges of the several parishes, it shall be taken *reddendo singula singulis*. And as to the other objection, that the words of the statute are, that they may make a rate, and so ’tis at their election, whether they will make one or not: *per curiam*, where a statute saith, that such a thing may be done, ’tis always understood it must be done.”

That last sentence obviously goes beyond what has been laid down. It is sufficient to say of this case that I can see no analogy between the discretion conferred on a local authority in deciding what water rate to levy and the case where a statute clearly intended that constables should be reimbursed and those who had the power to put in operation the machinery which enabled them to be reimbursed were refusing to do so. I do not think counsel for the defendants succeeds in bringing his clients within the principle which was acted on in that case. For these reasons, I agree that this appeal should be allowed.

**HODSON, J.:** The ground has been so fully covered by the judgments which have been delivered by my Lords that I hope I shall not be thought guilty of any disrespect to the learned county court judge if I do not add anything. I agree that the appeal should be allowed for the reasons given.

*Appeal allowed with costs.*

Solicitors: *Kinch & Richardson*, agents for *T. L. Sibson*, Carlisle, clerk to the Border Rural District Council (for the council); *Moodie, Randall & Carr*, agents for *R. Milburn & Son*, Bampton (for the ratepayer).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## CHELL ENGINEERING LTD. v. UNIT TOOL AND ENGINEERING CO., LTD.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.JJ.), January 23, 24, 1950.]

*Costs—Claim—Counterclaim—Recovery by plaintiff of larger sum on claim than that recovered by defendant on counterclaim—Form of judgment—Amount of costs recoverable by plaintiff.*

The plaintiffs claimed £909 9s. 6d. for work done under a contract between them and the defendants who denied liability and counterclaimed for damages for breach of the contract. Eight days before the day fixed for hearing the defendants paid £250 into court in full satisfaction of the claim, but the plaintiffs (who were not notified of this within the prescribed seven days) did not take this sum out of court and the action was heard. The commissioner of assize awarded the plaintiffs £350 on the claim, gave the defendants £300 1s. 9d. on the counterclaim, and gave judgment for the plaintiffs for the balance, £49 18s. 3d.

**HELD:** (i) the sum awarded to the defendants was for damages for breach of contract and should not be treated as a set off against the award to the plaintiffs.

*Stooke v. Taylor* (1880) (5 Q.B.D. 569), *applied*.

(ii) where a plaintiff succeeds on his claim and the defendant succeeds on his counterclaim the more convenient course is not to enter judgment for the balance in favour of the party entitled thereto, but to enter judgment for the plaintiff for the amount for which he succeeds on the claim and to enter judgment for the defendant for the amount for which he succeeds on the counterclaim. In the ordinary course, if there are costs on both claim and counterclaim, each party is entitled to the costs which he has had to incur to recover the sum recovered on the claim and counterclaim respectively.

(iii) the payment of £250 into court did not exceed the amount awarded to the plaintiffs, and the fact that it exceeded the balance of £49 18s. 3d. did not deprive the plaintiffs of costs after the date of the payment into court.

[AS TO COSTS AWARDED ON CLAIM AND COUNTERCLAIM SUCCEEDING, see HALSBURY, Hailsham Edn., pp. 518, 519, para. 768; and FOR CASES, see DIGEST, Vol. 40, pp. 433-436, Nos. 548-568.]

Cases referred to:

- (1) *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909], 2 K.B. 344; 78 L.J.K.B. 702; 109 L.T. 726; 40 Digest 431, 533.
- (2) *Stooke v. Taylor*, (1880), 5 Q.B.D. 569; 49 L.J.Q.B. 857; 43 L.T. 200; 44 J.P. 748; 40 Digest 369, 2.



- (3) *Winterfield v. Bradnum*, (1878), 3 Q.B.D. 324; 38 L.T. 250; 40 Digest 433, 545.
- (4) *Mandel v. Steel*, (1841), 8 M. & W. 858; 1 Dowl. N.S. 1; 10 L.J. Ex. 426; 39 Digest 472, 961.
- (5) *Davis v. Hedges*, (1871), L.R. 6 Q.B. 687; 40 L.J.Q.B. 276; 25 L.T. 155; 40 Digest 387, 180.

**A** APPEAL by the plaintiffs against an order for costs following judgment delivered on May 3, 1949, in an action on contract tried before Mr. Commissioner GENTLE, K.C., at Manchester Assizes.

The commissioner found that both the claim by the plaintiffs and a counter-claim by the defendants succeeded. He awarded the plaintiffs £350 on the claim and the defendants £300 *ls. 9d.* on the counterclaim, and, deducting one sum from the other, gave judgment for the plaintiffs for £49 *18s. 3d.*, the balance, with costs. He also gave the defendants costs on a recoverability of £300 *ls. 9d.* It was contended that, as the plaintiffs had recovered less than £100 in the High Court in an action founded on contract, by the County Courts Act, 1934, s. 47 (1) (b) (i), they were only entitled to county court costs on scale B, and, further, that, as the defendants had paid into court the sum of £250 in satisfaction and only £49 *18s. 3d.* had been recovered, the plaintiffs were not entitled to costs after the date of payment into court. Leave to appeal against the order as to costs was granted by ORMEROD, J. The Court of Appeal, in allowing the appeal, held that the plaintiffs were entitled to High Court costs on their claim, including costs after the payment into court.

**D** *Henry Burton* for the plaintiffs.  
*Leslie Rigg* for the defendants.

BUCKNILL, L.J.: I will ask SINGLETON, L.J., to give the first judgment.

**E** SINGLETON, L.J.: The plaintiffs sued for a sum of money being the balance of an account for work done by them as manufacturers of press tools. They claimed £909 *9s. 6d.*, admitting that they had received from the defendants a payment of £550 on account of a total sum of over £1,400. The defendants denied that they were indebted to the plaintiffs and counterclaimed for damages for delay, work not properly done, etc. Claim and counterclaim were heard together, and Mr. Commissioner GENTLE found in favour of the plaintiffs on their claim for £350 and in favour of the defendants for £300 *ls. 9d.*

**F** He said that the defendants were entitled to set off the £300 *ls. 9d.* against the £350, leaving a net balance of £49 *18s. 3d.* in the plaintiffs' favour, for which there would be judgment with costs, and there would be judgment for the defendants on their counterclaim, with costs upon a recoverability of £300 *18s. 3d.*, which would include all items referable to the counterclaim.

**G** Counsel for the plaintiffs asked for judgment on the claim for £350 and costs. The commissioner said: "No. £49 is all that is recovered." A discussion took place in which counsel pointed out that judgment for £49 would only carry county court costs, and the commissioner said: "I have given the costs, whatever they may be, on the amount recovered." Counsel for the defendants submitted that the proper order was that the plaintiffs should recover on the claim with county court costs on scale B. The commissioner said: "No special order. Just costs." In the result the order was drawn up in this way, after the recitals:

"It is adjudged that the plaintiffs recover against the defendants on the claim £49 *18s. 3d.* and their costs of the claim up to Mar. 17, 1949, to be taxed, and that the defendants recover against the plaintiffs their costs of the counterclaim with a recoverability of £300 *0s. 0d.* excluding the costs, if any, on the issues arising in paragraphs 10 and 12 of the counter-

claim, to be taxed, and that the defendants further recover against the plaintiffs their costs on the claim subsequent to March 17, 1949 to be taxed."

There is a question as to costs before and after Mar. 17, 1949, arising out of the payment into court by the defendants to which I will refer later. This appeal is directed solely to the order as to costs, and leave was given by ORMEROD, J. Both sides regard the order as confining the rights of the plaintiffs to county court costs in so far as they were entitled to any costs. The defendants contended that the order meant that the commissioner had determined to penalise the plaintiffs in that way for some reason or other. I need only say as to that that the commissioner did not at any time say that he intended to penalise the plaintiffs. All that he said was: "No special order as to costs." In other words, he left the law to take its course.

The first thing to determine is what was the nature of the counterclaim? Counsel for the defendants submitted that it was a set-off, or that, in any event, the defendants were entitled to treat it as a set-off. It appears clear that the sums which were recovered by way of counterclaim were awarded as damages and that they were recovered on a counterclaim and in no other way. It is true that at the end of the defence and counterclaim it is pleaded that the defendants "claim to set-off an equal sum parcel thereof against the amount (if any) found due" to the plaintiffs, but the counterclaim ended by counter-claiming damages. The question of counterclaim is dealt with in R.S.C., Ord. 21, r. 17, which provides:

"Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

The notes in the ANNUAL PRACTICE, 1948, p. 410, set out the practice:

"After the Judicature Act came into operation, it was the practice when the plaintiff recovered a sum of money on his claim and the defendant on his counterclaim, to enter one judgment only for the balance . . . This rule is still adopted in some cases. But the court may give the plaintiff judgment on the claim for £—— and costs of the claim, and the defendant judgment on the counterclaim for £—— and the costs of the counterclaim. And this course was approved by the Court of Appeal in *Provincial Bill Posting Co. v. Low Moor Iron Co.* (1) . . . In the case of a pure set-off . . . it is still proper to enter judgment solely for the balance."

I have always thought that where there is a claim and a counterclaim and the plaintiff succeeds on the claim and the defendant on the counterclaim the more convenient course is to enter judgment for the plaintiff for the amount for which he succeeds on the claim and to enter judgment for the defendant for the amount for which he succeeds on the counterclaim, and in the ordinary course, if there are costs both on the claim and on the counterclaim, each party is entitled to the costs which he has had to incur to recover the sum recovered on the claim and on the counterclaim respectively.

It should be made clear that on this appeal we are dealing with a counterclaim only, and no question of set-off arises. That distinction has been pointed out many times. It was dealt with very fully in *Stooke v. Taylor* (2), in the judgment of SIR ALEXANDER COCKBURN, C.J., and in the judgment of MANISTY, J., who said (5 Q.B.D. 587):

"A counterclaim, properly so called, is the creature of the Judicature Act, 1873. It is an independent suit, which, for the sake of convenience of procedure may be tried at the same time as the claim (see *per* BRETT, L.J., in *Winterfield v. Bradnum* (3)). It differs essentially from a pure set-off.

Assuming a plaintiff to have a good claim, founded either in contract or tort, for a sum exceeding £50 he cannot, by giving credit for an amount not the subject of set-off, but which can only be recovered by way of counterclaim or cross action, get relief in a county court—therefore, notwithstanding the defendant by a counterclaim recovers a sum which, when the verdicts on the claim and counterclaim come to be set-off one against the other, leaves a balance due to the plaintiff of less than £20 or £10 as the case may be, and for which he obtains judgment, still the plaintiff is entitled to his costs of and relating to his claim, and why ? because he has *recovered by verdict* (see s. 5 of the County Court Act, 1867) more than £20 or £10, as the case may be; and in like manner the defendant in such case is entitled to his costs of and relating to his counterclaim.”

A

B Later he said (*ibid.*, 591):

“I am at a loss to see any principle upon which such a result could be justified. Take the case of a plaintiff bringing an action for goods sold and delivered, in which he gets a verdict for, say, £100, and the defendant counterclaims for a libel and gets a verdict for, say, £105, so that judgment would be given for the defendant for £5. If the defendant’s contention in the present case be right, the defendant in the supposed case would be entitled to his costs, but the plaintiff would not be entitled to any. Surely that would not be just, and I do not believe it is the law.”

C

That case was followed nearly 30 years later by *Provincial Bill Posting Company v. Low Moor Iron Company* (1), where KENNEDY, L.J., said this ([1909] 2 K.B. 351):

D

“Now, however, a counterclaim may in ordinary cases be established, and if it exceeds the amount recovered on the claim the court has power to give judgment for the defendant for the balance, if it thinks it right to do so; and similarly judgment for the balance may be given for the plaintiff if the amount recovered on the claim exceeds that recovered on the counterclaim. But the court must consider in each case whether it would be right to give judgment for the balance, and if it would not be reasonable or right to deal with the claim and counterclaim by a judgment for the balance, then judgment should be given for the plaintiff on the claim and for the defendant on the counterclaim, costs following in each case.”

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I respectfully point out that if judgment is given for the plaintiff for the amount to which he is entitled on the claim with costs and judgment is given for the defendant for the amount to which he is entitled on the counterclaim with costs—if the court thinks it right to give costs in each case—questions such as arise on the present appeal would be avoided. This dispute arises in part out of a misunderstanding as to the meaning of s. 47 of the County Courts Act, 1934. That section provides:

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“(1) Where an action is commenced in the High Court which could have been commenced in a county court, then, subject to the provisions of sub-s. (3) and sub-s. (4) of this section . . . (b) if the plaintiff recovers—(i) in the case of an action founded on contract, a sum of £40 or upwards but less than £100 . . . he shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in a county court.”

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Bearing in mind the difference between set-off and counterclaim and that this was an action in which the judge held that work done by the plaintiffs merited a payment of £900 and, £550 having been paid to them, they were entitled to a balance of £350, I think it is clear that the action could not have been commenced in the county court. In giving judgment for the balance of £49 the commissioner was allowing against the plaintiffs’ claim the sum awarded on



the counterclaim. It becomes apparent that it is usually better that the judgment should be in the form to which I have been accustomed, namely, judgment for the plaintiff for so much on the claim with costs and for the defendant for so much on the counterclaim with costs. The order can include a provision for mutual set-off as to claims and costs. That course prevents an involved argument about the difference between set-off and counterclaim. This claim could not have been commenced in the county court, and, therefore, in my view, s. 47 of the County Courts Act, 1934, does not apply at all. The parties thought it did apply, and if they had gone before the district registrar to tax I have no doubt that it would have been said that taxation must be on scale B in the county court. The plaintiffs' costs on taxation might have been £20 or £30 on their claim, whereas under the order as drawn the defendants' costs as taxed might well have amounted to several hundred pounds. I do not think it is certain that the learned commissioner intended that result. He left the law to take its course, and it seems to me that the plaintiffs are entitled to their costs on the High Court scale.

If my reading of s. 47 is wrong, I still think that the commissioner has not found anything which would disentitle the plaintiffs to their costs on the High Court scale. I do not forget for one moment that the question of costs is within the discretion of the trial judge under R.S.C., Ord. 65, r. 1. If the commissioner had exercised his discretion with regard to these costs for good cause I should not have thought that this court ought to interfere, but, as the matter stands, I see no reason why the plaintiffs should not be entitled to High Court costs.

That leaves one matter outstanding, the payment into court by the defendants of the sum of £250. The action should have been tried at some earlier date than it was in fact heard. It was adjourned by consent to a later date, and on Mar. 15 the defendants paid into court the sum of £250. This is the form of their notice:

"Take notice that the defendants, Unit Tool & Engineering Co. Ltd., have paid into court £250 and say that sum is enough to satisfy the plaintiffs' claim."

That sum was not sufficient to satisfy the claim. After the commissioner had expressed his view as to the manner in which costs should be dealt with, counsel for the defendants said:

"There is a sum of money in court, £250, which we paid in on Mar. 15. As I apprehend it, the effect of that will be payment out of the balance to the defendants, and that the plaintiffs' order on costs in any event shall only run down to the date of payment in, and that the defendants should have the whole costs of the action after payment in. That is the ordinary and customary order.

Mr. Commissioner GENTLE: I was not aware that there was any money in court.

Counsel for the defendants: There is £250 in court, and, that must vary your lordship's order as to costs to that extent."

I think it is a matter for regret that if the commissioner was to be asked to make an order of that kind reference was not made to the rules. It cannot be the ordinary and customary order, if plaintiffs on their claim have recovered £350 and only £250 has been paid into court, that the defendants should have the whole of their costs of the action after payment in. It was only after deducting the amount awarded on the counterclaim that there was £49 odd payable to the plaintiffs. In my view, the payment into court was not a payment with regard to the counterclaim at all. The payment in was made in respect of the plaintiffs' claim. If the plaintiffs had taken that sum out of court, they would not have been entitled to payment of the £350 which they were awarded. They could only take the amount out in respect of the claim. Therefore, to my mind, the payment into court of £250 ought not to affect the plaintiffs' costs at all.

In the result, this appeal ought to be allowed. I am not sure that it is necessary to quash the whole of the order as to the plaintiffs' costs, but certainly I think this court ought to make clear that the plaintiffs are entitled to costs on the claim on the High Court scale. Over and above that there must clearly be struck out of the order the words which limit the plaintiffs' costs to Mar. 15 and give the defendants' costs on the claim after Mar. 15 because of the payment into court. It seems to me, further, that the plaintiffs were bound to come to this court to make the matter clear on both points, and that, therefore, they should have the costs of this appeal.

**DENNING, L.J.:** The distinction between a counterclaim and a set-off is rarely of importance nowadays, but it does happen to be so in this case because the costs depend on it. The claim was for a sum due under a contract for work and labour; the counterclaim was for damages for breach of that contract. In such cases in the old days the court often allowed a defendant to set up the damages in reduction of the price (*Mandel v. Steel* (4)), but the damages were, and are, in strictness, not set-off, but counterclaim only: *Davis v. Hedges* (5) and *Stooke v. Taylor* (2). It follows that in this case the claim could not have been brought in the county court because the plaintiffs recovered £350 on it. It is true that, by reason of the counterclaim, the judge gave judgment for the balance of £49 18s. 3d. only, but still the claim could not have been brought in the county court, and there is nothing in s. 47 of the County Courts Act, 1934, to prevent the plaintiffs recovering High Court costs. So, on the judgment as it stands the plaintiffs are entitled on the claim to High Court costs. The defendants paid £250 into court in regard to the claim. That did not exceed the amount recovered, which was £350. It is true that the £250 exceeded the amount of the balance judgment for £49 18s. 3d., but that is not sufficient to deprive the plaintiffs of their costs on the claim. The counterclaim is a separate matter, as is shown by the fact that if the plaintiffs had taken out the £250 the defendants could still have gone on with the counterclaim. I agree, therefore, that the plaintiffs should have their costs on the claim on the High Court scale throughout even after the payment into court.

I would only add that in most of these cases it is desirable that a judge should consider whether a special order should be made as to costs because the issues are often very much interlocked, and the usual order of "judgment for plaintiff on claim with costs and for defendant on counterclaim with costs" does not always give a just result.

**BUCKNILL, L.J.:** I agree. The only difficulty I have felt in the case is whether we were being asked to disturb an order based on the discretion of the judge. If I had thought that the commissioner intended to limit the plaintiffs' costs to county court costs, that would have been such a disturbance, but it seems to me clear that the commissioner never intended that. I think that the commissioner had s. 47 of the County Courts Act, 1934, somewhat imperfectly in his mind and was not clear whether this was a case which could have been brought in the county court or not, so he left the matter at large. For the reasons which have been given in the judgments already delivered I agree that this is not a case which could have been commenced in the county court. Therefore, I think the ordinary order should follow, that the plaintiffs are entitled to their costs on the High Court scale, and that this appeal should be allowed.

*Appeal allowed with costs. Order as to costs varied. Plaintiffs to have costs on their claim on the High Court scale even after the payment of £250 into court by the respondents on Mar. 15, 1949.*

Solicitors: *L. Bingham & Co.*, agents for *Linder, Myers & Pariser*, Manchester (for the plaintiffs); *Simpson & Ashworth*, Accrington (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

## GWYTHER v. BOSLYMON QUARRIES, LTD.

[KING'S BENCH DIVISION (Roxburgh, J., sitting as additional judge), November 16, 18, 1949, January 11, 12, 13, 20, 1950.]

*Income Tax—Deduction of tax—Royalties—Sand gotten—Deduction of tax by tenant—Landowner accepting deduction under mistake of law—Estoppel—Accord and satisfaction—Later objection to deduction—“Difference . . . with regard to the deduction”—Jurisdiction of court—Rent payable in respect of easement—Recoupment of rent by reduction of royalties—Excess rent under short lease—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 22 (1) (a)—Finance Act, 1934 (c. 32), s. 21 (1) (a)—Finance Act, 1940 (c. 29), s. 15 (1).*

A landowner, who owned a farm and was assessed on the whole of it under sched. A., granted to a company a lease of part of the farm, together with the right to take stone, sand and gravel therein and thereunder in consideration of a fixed rent of £10 a year, which was to merge in royalties payable for the stone, sand and gravel gotten. During the tax years 1942/43, 1943/44 and 1944/45, the company deducted tax at the standard rate from royalties due (apparently under the impression that this was authorised by s. 21 (1) (a) of the Finance Act, 1934) sending to the landowner monthly credit notes accompanied by cheques for the net amount and certificates of deduction of tax. Deductions from a part of the royalties for the year 1942/43 were acquiesced in by the landowner and accounted for by the company to the revenue authorities. As regards the rest of the royalties for the year 1942/43 and all royalties for the years 1943/44 and 1944/45, the landowner accepted the credit notes and certificates of deduction and cashed the cheques, but before the tax so deducted had been paid over to the revenue authorities he disputed the deductions. The company, nevertheless, paid the deductions to the revenue. When the decision in *Russell v. Scott* ([1948] 2 All E.R. 1) was given by the House of Lords it became apparent that the tax was not deductible under s. 21 (1) (a) of the Finance Act, 1934, and the landowner claimed from the company the amount of the royalties underpaid by reason of the alleged deduction of tax. For the company it was contended that (i) the jurisdiction of the court was excluded by r. 22 (1) of the All Schedules Rules under the Income Tax Act, 1918; (ii) the deductions were authorised by s. 21 (1) (b) of the Finance Act, 1934, or by s. 15 or s. 17 of the Finance Act, 1940.

HELD: (i) r. 22 only applied where a deduction could legally be made, but the amount was in dispute.

*Dictum of LORD NORMAND (Lord President) in Fife's (Duke) Trustees v. George Wimpey & Co. (1943, S.C. 384), applied.*

(ii) the words “the rent” in s. 21 (1) (b) of the Act of 1934 did not include royalties, but was confined to the fixed rent which, in the present case, never became payable because it merged in the royalties.

(iii) although s. 15 (1) of the Act of 1940 applied to the present case, thereby excluding it from the provisions of s. 17, this did not entitle the company to make the deductions since, by virtue of r. 1 of the Miscellaneous Rules Applicable to Sched. D., r. 1, and the Rules Applicable to Case VI of Sched. D., assessments under s. 15 (1) had to be made on the recipient of the royalties, *i.e.*, the landowner.

(iv) as regards the part of the 1942/43 royalties for tax on which the company had accounted to the revenue authorities before the landowner objected to the deduction, the landowner was estopped from denying that tax had been properly deducted, but, as regards the later deductions to which he had objected before the company had accounted to the revenue authorities, there was no estoppel, nor did the acts of the landowner in receiving the credit notes, cashing the cheques and accepting the certificates



of deduction constitute a settlement of account or accord and satisfaction so as to modify the terms of the original agreement to pay the royalties in full, and the landowner was entitled to claim from the company the amount of the royalties underpaid.

[As to ESTOPPEL BY CONDUCT, see HALSBURY, Hailsham Edn., Vol. 13, pp. 486-498, paras. 555-567; and FOR CASES, see DIGEST, Vol. 21, pp. 328-398, Nos. 1221-1594.]

FOR THE INCOME TAX ACT, 1918, ALL SCHEDULES RULES, r. 22 (1) (a), (2), (3), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 191; FOR THE FINANCE ACT, 1934, s. 21 (1) (a) (b), (4) (c), see *ibid.*, pp. 347, 348; and FOR THE FINANCE ACT, 1940, s. 15 and s. 17, see *ibid.*, pp. 465, 467.]

Cases referred to:

- (1) *Russell v. Scott*, [1948] 2 All E.R. 1; [1948] A.C. 422; [1948] L.J.R. 1265; 2nd Digest Supp.
- (2) *Ecclesiastical Comrs. for England v. Sackville Estates Ltd.*, [1937] 2 All E.R. 720; [1937] 2 K.B. 600; 106 L.J.K.B. 798; 157 L.T. 555; Digest Supp.
- (3) *Fife's (Duke) Trustees v. George Wimpey & Co.*, 1943, S.C. 377; 2nd Digest Supp.

ACTION by the owner of land to recover from a company, to which part of the land had been leased for getting sand, stone and gravel, amounts of royalties in respect of sand gotten underpaid by reason of the company having purported to deduct tax from the sums due. The company had accounted to the revenue authorities for the tax so deducted by submitting to assessments of its trading profits without claiming deduction of the amount of the royalties as a trading expense, and, since such assessments had become final and conclusive, the company had no means of recovering from the authorities the tax so accounted for. ROXBURGH, J., held that tax was not deductible from the royalties under any provisions of the Income Tax Acts, but that the landowner was estopped from recovering such amounts from the company where he had allowed the deduction without protest before the assessment on the company became final and conclusive. The facts appear in the judgment.

*Honeyman* for the plaintiff landowner.

*Christopher Shawcross, K.C.*, and *Bickford Smith* for the company.

*Cur. adv. vult.*

Jan. 20. ROXBURGH, J., read the following judgment. In 1942 a subsidiary of the defendant company obtained a contract for the construction of a runway at an aerodrome at Brawdy, Pembrokeshire, and for that purpose required suitable material for making up the surface under the foundations of the runway and also sand and gravel for making concrete and cement. Such material was available in the neighbourhood, and, in particular, under the plaintiff's farm. Accordingly, on Nov. 24, 1942, the company entered into an agreement with the plaintiff of which the following were the most important terms:

"1. The landlord demises unto the tenants first all those pieces or parcels of land part of the farm known as Brawdy Farm . . . and all the stone sand and gravel in and under such pieces of land and secondly the rights and privileges hereinafter mentioned to hold unto the tenants for the term of two years from Nov. 14, 1942, yielding and paying therefor the rents and royalties hereinafter reserved and subject to the provisions hereinafter contained.

"2. The tenants shall and may at all times during the said term work and get from or out of the said lands so much stone sand and gravel as they shall think fit.

" 3. The tenants may from time to time during the said term (a) lay place and stack on or upon any convenient part of the said lands all or any of the stone sand and gravel to be gotten under the powers hereof and all earth and rubbish which shall be gotten thrown up or collected in carrying on the works hereby authorised (b) carry and convey away all such stone sand gravel earth and rubbish as aforesaid and all materials used in or about the said works (c) remove any hedges that may be necessary.

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" 4. The following rents and royalties are hereby reserved in respect of the premises hereby demised and shall be paid by the tenants to the landlord namely (a) The yearly rent of £10 to be paid during the term hereby granted by equal half yearly payments on Nov. 14 and May 14 in every year the first of such payments to be made on May 14 next such yearly rent to merge in the royalties hereinafter mentioned (b) The royalties of 1/6d. per cubic yard for sand and gravel and 1/- per cubic yard for stone which shall or may be gotten from or out of the said lands in any year of the said term to be paid half yearly on Nov. 14 and May 14 in every year in respect of stone sand and gravel gotten as aforesaid during the then preceding half year.

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" 5. The tenants hereby agree with the landlord in manner following namely . . . (c) To cause the weight or measurements of all materials got by virtue of this agreement to be duly ascertained to the satisfaction of the landlord or his surveyor or agent and not to remove or suffer to be removed any of the same from the said lands without the weight or measurement thereof being so ascertained (d) To keep or cause to be kept on the said lands or at some other place approved by the landlord proper books of account wherein shall be entered the quantities of all materials got by virtue of this agreement with the dates of production and all such particulars as may in the opinion of the landlord be necessary or convenient for ascertaining the amount of the royalties to be paid hereunder and to permit the landlord or his surveyor or agent at all reasonable times to inspect the said books of account and to take copies thereof or extracts therefrom And within fourteen days after each of the rent days hereinbefore specified to make out and deliver to the landlord or his surveyor or agent a sufficient abstract of the said books of account of the royalties then payable."

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In December, 1942, the company or their subsidiary entered with one or more bulldozers and excavators. The bulldozer cleared the ground, which was pasture, and removed the top soil. The excavator scooped out sand and gravel to a depth which at one point may have been as much as forty feet, but averaged ten to sixteen feet. The excavator also scooped out dirty gravel and lumpy agglomerations of pebbles and sand lying in faults in the gravel face. This was suitable for making up the surface under the foundations and was so used. It was described by the company and paid for as "stone," though the plaintiff calls it "hoggin." It certainly was not stone in the ordinary sense and was of no use except for making up a surface or some like purpose. There was stone in the usual sense (sandstone or limestone) beneath the seams of sand and gravel under the demised premises, but this was never worked. In this judgment I use the word "stone" in the usual sense, and do not mean "hoggin."

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The plaintiff exercised no supervision over the company's activities at the pit and had no representative on the spot either to check quantities or for any other purpose. In view of an argument which has been addressed to me, I must point out that the fixed rent merged in the royalties and never became payable. The company, early in April, 1943, sent to the plaintiff's solicitors what they called a "credit note" for royalties for the period December, 1942, to March, 1943, which read:

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" Credit note. T. H. Gwyther Esq., Brawdy Farm. By royalty on sand

and gravel during period December, 1942, to March, 1943: 7,451 cubic yards at 1/6d. cubic yard, £558 16s. 6d., less tax at 10/- in the £, £279 8s. 3d."

A A cheque for the balance, £279 8s. 3d. was enclosed, but there was a discussion about the appropriate payee, and ultimately this cheque was cancelled and another substituted. These were the only royalties attributable to the financial year ending Apr. 5, 1943. In May, 1943, the company sent a "credit note" for the month of April and a cheque for £227 10s. 3d. On May 17, 1943, the plaintiff's solicitors wrote to the company's secretary:

B "We thank you for cheque received this morning for £227 10s. 3d. payable to the [plaintiff] together with credit note. We have passed this on to Mr. Gwyther and assume that you require no other acknowledgement. In view of the large amount of the tax deducted however we think you should furnish us on behalf of our client with a proper certificate of deduction and perhaps we may have this in course of post."

On June 4 the company sent the substituted cheque for £279 8s. 3d., and on June 15 sent certificates of deduction of tax in respect of the two periods. One of the certificates, which are in common form, reads

C "I certify that on paying to T. H. Gwyther Esq., Brawdy Farm, the sum mentioned in the third column of the statement overleaf, I deducted the amount of income tax shown in the fourth column of the statement and I further certify that this tax has been or will be paid by me either personally to the proper officer for the receipt of taxes or by way of deduction from rent or other income when received by me."

D It is signed by the secretary of the company, dated June 15, 1943, and on the back there is:

"Royalty on sand and gravel, Brawdy Farm, £558 16s. 6d. Amount of income tax deducted by me: £279 8s. 3d. Period: December, 1942, to March, 1943."

E In each case the certificates were sent at the request of the plaintiff's solicitors. There is no other correspondence about remittances. Thereafter, until March, 1944, the company sent monthly "credit notes" accompanied by cheques and certificates of deduction of tax, but without any covering letter. On Aug. 3, 1944, they sent a "credit note," cheque and certificate of deduction of tax for the period from April to June, 1944, and on Sept. 5, 1944, they sent a final "credit note," cheque and certificate for July, 1944, when the workings stopped. In all, £1,883 11s. 3d. was paid and £1,883 11s. 3d. was deducted. The plaintiff endorsed the cheques and received payment and also received and retained the "credit notes" and certificates. He gave no receipts. At an early stage he made some remark to one of the company's employees questioning the deduction of tax, but he carried the matter no further at that time.

G This pit was, undoubtedly, a sand and gravel pit and not a stone quarry, and the decision of the House of Lords in *Russell v. Scott* (1) (which was not, however, given until 1948) makes it clear that these royalties were not taxable under sched. A, No. III, to the Income Tax Act, 1918, the properties referred to in which were rendered chargeable under sched. D, Case I, by s. 28 of the Finance Act, 1926, but there is no doubt that throughout both the company and the inspector of taxes proceeded on the assumption that they were, and, accordingly, they dealt with the income tax position as follows. The gross amount of the royalties was £3,767 2s. 6d., which was in the company's accounts distributed over three years as follows: Year ending Mar. 31, 1943, £558 16s. 6d.; year ending Mar. 31, 1944, £2,628 5s. 6d.; year ending Mar. 31, 1945, £580 0s. 6d.; making a total of £3,767 2s. 6d. The deductions made by the company amounted to £1,883 11s. 3d., and they were paid or accounted for to the Commissioners of Inland Revenue as follows. The deduction from the royalties for the period



from December, 1942, to March, 1943, amounting to £279 8s. 3d., was accounted for in the assessment made on the company's trading profits for the tax year 1943/1944 which became final in May, 1944. No further part of the deductions made by the company had been made or accounted for to the commissioners when, on Feb. 27, 1945, the plaintiff, through his solicitors, unequivocally objected to them.

[HIS LORDSHIP referred to correspondence between the plaintiff's solicitors and those of the company in which the former, by a letter dated Feb. 27, 1945, contended that the company was not legally entitled to make the deductions, and continued:] The company ignored the plaintiff's contentions and, without even bringing them to the notice of the inspector of taxes, proceeded to pay over or account for the balance of the deductions amounting to £1,604 3s. 0d. under various assessments which became final between the date of the plaintiff's objection and February, 1946. I have not overlooked the payment of tax in respect of the year 1944/1945 which was made in February, 1945 (shortly before the plaintiff's objection), but, as no final assessment for that year had then been made, any over-payment could then easily have been recovered.

The plaintiff's solicitors, having failed to obtain any effective answer to their letter of Feb. 27, 1945, [which contained a formal demand for the payment to the plaintiff in full of all sums due to him under the agreement] and, presumably, not suspecting that the company would pay over any more of the deductions to the Commissioners of Inland Revenue in the face of their objection, took no further action till *Russell v. Scott* (1) was finally decided, when, on Nov. 5, 1948, they issued the writ in this action.

The short effect of *Russell v. Scott* (1) was that the produce of sand and gravel pits, like the produce of the soil, was an element in the annual value of the land which had to be taken into account in raising an assessment under sched. A in accordance with No. I (which is the general rule for estimating the annual value of lands) and not otherwise, so that, in the present case the plaintiff, notwithstanding an agreement for letting, was and remained assessed to tax under sched. A on the whole of the farm, including the part let to the company. In *Russell v. Scott* (1) there was no actual letting of the land. I shall not lose sight of this distinction. The sched. A assessment on the farm took no account of war-time sources of profit in connection with the building of aerodromes, and, if the plaintiff succeeds in the present action, he looks like making a handsome tax-free war-time profit, but he is entitled to take advantage, if he can, of a rule described by LORD SIMON ([1948] 2 All E.R. 5) as "so obscure and so difficult to expound with confidence." The company have accounted for the whole of the deductions which they made to the Commissioners of Inland Revenue, and if (as they say) the commissioners will not refund in the event of the plaintiff's success, they will pay a heavy penalty for making a pardonable mistake in assembling the complex units of the tax-gathering machine, but the company paid over £1,604 3s. 0d. out of the total claimed in the teeth of the plaintiff's opposition.

The company's first defence is that the jurisdiction of the court is excluded by r. 22 of the All Schedules Rules under the Income Tax Act, 1918, which reads:

"(1) If a difference arises—(a) between tenant and landlord or any other persons with regard to the deduction on account of tax to be made from any annual sum . . . the general commissioners of the division shall settle the proportion of the payments or deductions to be made according to the provisions of this Act . . . (2) In any such case the determination of the general commissioners shall be final. (3) In this rule 'annual sum' means any . . . rent . . ."

In sundry official publications the word "the" has fallen out before the word "deduction." The issue in the present case is whether any deduction ought to have been made. Rule 22 seems to me to presuppose that some deduction

ought to be made, only the amount being in dispute. There is nothing in *Ecclesiastical Comrs. for England v. Sackville Estates, Ltd.* (2) which is inconsistent with this view, and, in adopting it, I think that I am following the Scots case of *Fife's (Duke) Trustees v. George Wimpey & Co.* (3), in which LORD NORMAND (Lord President) said (1943, S.C. 384):

- A    "The Lord Ordinary has held that the jurisdiction of the court is not excluded by r. 22, and I agree with him and with the reasons which he gives for his conclusion. I shall only add that, in my opinion, r. 22 applies where an annual sum of the nature of rent falls to be paid and there is a dispute about 'deduction on account of tax to be made from it.' The general commissioners then have exclusive jurisdiction to 'settle the proportions of the payments or deductions to be made according to the provisions of the Act.' But, when the dispute is whether the sum due under a contract is an annual sum or the price due under a sale, the general commissioners have no jurisdiction under r. 22 until it is decided by the court that the sum due is an annual sum within the meaning of the section. The defenders relied on *Ecclesiastical Commissioners for England v. Sackville Estates Ltd.* (2), but in that case there was no dispute that the plaintiffs were owed rent by the defendants, and the dispute concerned the amount of deduction for tax which the defendants were bound to make."
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The next defence is that the deductions were authorised by s. 21 of the Finance Act, 1934. The substantial parts of that section read:

- D    "(1) Where rent is payable in respect of any land the property in which is not separately assessed and charged under sched. A, or in respect of any easement, and—(a) the land or easement is used, occupied or enjoyed in connection with any of the concerns specified in rr. 1, 2 and 3 of No. III of sched. A; or (b) the lease or other agreement under which the rent is payable provides for the recoupment of the rent by way of reduction of royalties or payments of a similar nature in the event of the land or easement being used, occupied or enjoyed as aforesaid; the rent shall be charged with tax under sched. D and shall, subject to the provisions of this section, be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty . . . (4) For the purpose of this section—(a) the expression 'land' means lands, tenements, hereditaments and heritages; (b) the expression 'easement' includes any right, privilege or benefit in, over or derived from land; (c) the expression 'rent' includes a rent service, rent charge, fee farm rent, feu duty or other rent, toll, duty, royalty or annual or periodical payment in the nature of rent, whether payable in money or money's worth or otherwise, but does not include any of the payments enumerated in rr. 1 to 6 of No. II of sched. A. (5) Rule 5 of No. III of sched. A (which provides for the computation of the annual value of the produce of any such concern as aforesaid) shall cease to have effect."
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- H    The case cannot fall within sub-s. 1 (a) because this sand and gravel pit is not a concern specified in No. III of sched. A, but the rent is payable in respect of land the property in which is not separately assessed, and the letting certainly contains provisions to the effect mentioned in sub-s. (1) (b), for there is a right to quarry stone, though no stone was ever quarried. Accordingly, counsel for the company argued, "the rent" (which, by definition, includes royalties) falls to be dealt with as indicated in that sub-section. In spite of the definition clause, the words "the rent" in sub-s. (1) (b) cannot include royalties, because if "rent" there included royalties, it could not be recouped by reduction of royalties, and, since it is coupled with the opening words of s. 21 by the word "and," cannot differ from "the rent" first mentioned in the section, and, further, "the rent" which is mentioned after the semi-colon at the end of sub-s.

(1) (b) cannot differ from the rent first mentioned and last mentioned. Accordingly, in my judgment, s. 21 (1) (b) must be confined to the fixed rent which never became payable because it merged in the royalties. It is, of course, easy to apply the definition of "rent" in connection with (1) (a).

The next line of defence is based on s. 15 or, alternatively, s. 17 of the Finance Act, 1940. I have already pointed out that the landowner, who owned the farm and was assessed on the whole under sched. A and occupied most of it, let a small portion to the company together with the right to take stone, sand and gravel for a term of two years at a rent of £10 per annum which was to merge in the royalties, and, accordingly, this case differs from *Russell v. Scott* (1). Section 13 (1) of the Finance Act, 1940, provides:

"The next five succeeding sections apply only to land in the United Kingdom chargeable to tax under sched. A, and in this and the said next five succeeding sections the following expressions have the meanings hereby respectively assigned to them, that is to say—'immediate lessor' means in relation to any premises—(a) if different parts of the premises are the subject of separate tenancies or separate occupations, a lessor of the whole or any part of the premises whose estate or interest extends to the entirety of the premises and is not subject, immediately or mediately, to a lease of the entirety thereof . . . 'lease' includes an agreement for a lease if the term to be covered by the lease has begun, and any tenancy, but does not include a mortgage, and 'lessee' and 'lessor' shall be construed accordingly and include, respectively, the successors in title of a lessee or a lessor; 'long lease' means a lease granted for a term exceeding fifty years, other than a lease which is or takes effect as a lease for a term of years determinable after the death or marriage of any person; 'short lease' means a lease which is not a long lease; 'unit of assessment' means any land which forms a unit of assessment for the purposes of sched. A."

Section 15 provides:

"(1) If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of sched. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the rules applicable to sched. A set out in sched. I to the Income Tax Act, 1918) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a) the actual amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection; or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases. (2) Where the immediate lessor of any unit of assessment is occupying any part thereof, sub-s. (1) of this section shall apply as if the rent to which he is entitled in respect of the unit under any lease or leases to which this section applies were increased by so much of the annual value of the unit (as ascertained for the purposes of sched. A) as is attributable to the part which he is occupying. (3) Where for any year an assessment has been made on an immediate lessor by virtue of this section, the amount of any relief which may be claimed by him under r. 8 of No. V of sched. A shall be such amount as could have been claimed by him if the annual value of the unit had been determined in the manner described in sub-s. (1) of this section. (4) A lease shall be deemed to be a lease to which this section applies if, and only if, the following conditions are fulfilled with respect to it—(a) that it is a short lease; (b) that the



land comprised in it is or forms part of a single unit of assessment; (c) that the rent under it is payable to the immediate lessor of that unit; (d) that the estate or interest of the immediate lessor of that unit is not, as respects any part of that unit, subject to any short lease which comprises also land not wholly within that unit, being a lease the rent under which is payable to that immediate lessor."

**A** In my judgment, that section applies to the present case, but it will not aid the company because assessments under s. 15 have to be made on the recipient of the excess rent under r. 1 of the Miscellaneous Rules Applicable to Sched. D, and the Rules Applicable to Case VI of Sched. D and, accordingly, a tenant cannot be assessed thereon and cannot make any deduction in respect thereof. Section 17 provides:

**B** " (1) This section applies to the following payments, that is to say—(a) rents under long leases; (b) other annual sums as defined in para. (2) of r. 4 of No. VIII of sched. A, not being rents under a short lease or annuities within the meaning of the Tithe Act, 1936, being payments falling due on or after April 6, 1940. (2) Rules 1 and 4 of No. VIII of sched. A shall not apply to any payment to which this section applies, but any such payment shall, so far as it does not fall under any other Case, be charged with tax under Case VI of sched. D and be treated for the purposes of such of the provisions of the Income Tax Acts as apply to royalties paid in respect of the user of a patent as if it were such a royalty."

**C** As I have held that the fixed rents and royalties are within s. 15, they are excluded from s. 17. I note in passing the absence from s. 15 of the important words in s. 17 (2), which enable the party paying the annual sums to make deductions.

I now come to the defence of estoppel. Here a distinction must be drawn between the deduction of £279 8s. 3d., which was the only deduction accounted for to the Commissioners of Inland Revenue before the plaintiff objected to the deductions, and the other deductions. The payment of £279 8s. 3d. and deduction of £279 8s. 3d. were effected through solicitors. The plaintiff's solicitors actually asked for a certificate of deduction of tax when accepting the payment on behalf of the plaintiff who cashed the cheque, and, in my judgment, thereby evinced an intention not to dispute the deduction. With hesitation I hold that (notwithstanding their later disregard of the plaintiff's views) the company acted on that indication of intention, and, if they did, the detriment is clear. As regards all the other deductions except one, the plaintiff did not ask for certificates of deduction, but merely accepted them and cashed the cheques, but I am still prepared to hold that he thereby evinced an intention not to dispute the deductions. The company did not act on these indications of intention, for when he changed his attitude they took no notice but went on as before. Moreover, they had not paid over these deductions (notionally or otherwise) to the Commissioners of Inland Revenue before the plaintiff had changed his attitude. The negotiations which they were then conducting with the inspector of taxes would have been necessary in any event, and there is no evidence that the plaintiff's delay in clarifying his position increased the cost of those negotiations. Accordingly, the company suffered no detriment as a result of the plaintiff's attitude. Some point has been made of the long period which elapsed between the formal demand on Feb. 27, 1945, and the issue of the writ, but the correspondence during 1945 closes with two unsuccessful attempts by the plaintiff's solicitors to get an answer to their letters, and the company, instead of answering the plaintiff's solicitors' letters and advising the inspector of taxes of the dispute, proceeded forthwith to allow themselves to become liable to the Commissioners of Inland Revenue for part of the money in dispute and by February, 1946, had allowed themselves to become liable for

the whole. The company were not influenced by the plaintiff's delays, but by their own over-confidence. Accordingly, in my judgment, there is no estoppel except as regards the first deduction of £279 8s. 3d.

It is further contended that the acts of the plaintiff in receiving the "credit notes," cashing the cheques and accepting the certificates of deduction, constituted a "settlement of account" or "accord and satisfaction." In my judgment, there was, and is, no question of account between the parties. The question at issue is one of principle, namely, whether the company were entitled by the Income Tax Acts to make any deductions from admitted sums. Moreover, in my view, the conception of a "settlement" is alien to a situation in which each party thought that he had no option and acted accordingly. Similar difficulties beset the conception of "accord and satisfaction." I have no doubt that the company made the deductions because they thought that they had a right to do so, and that the plaintiff only acquiesced as long as he thought that he was bound to do so. It is, in my judgment, impossible to spell a contractual relationship out of conduct dictated by such considerations and "accord and satisfaction" necessarily involve some contractual modification of the original bargain. I must hold that neither party intended to modify the terms of the letting or agreed to treat payment of half the royalties, together with delivery of a certificate of deduction of tax, as satisfaction for an obligation to pay the whole. Each acted independently in supposed compliance with income tax law, and so long as each took the same view of it, their actions were in harmony. Those circumstances no more constitute an agreement in law than would the circumstance that two opposing litigants concurred in carrying out an order of court which afterwards turned out not to bind them. Accordingly, all the defences fail, except the defence of estoppel in relation to the first deduction, and there must be judgment for the plaintiff for £1,604 3s. 0d.

*Judgment for the plaintiff with seven-eighths of his costs.*

Solicitors: *L. Bingham & Co.*, agents for *Lewis Morgan, Browne & Haslam*, Cardiff (for the landowner); *Reynolds & Co.* (for the company).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

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## BARKWAY v. SOUTH WALES TRANSPORT CO., LTD.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Morton of Henryton, Lord Reid and Lord Radcliffe), November 8, 9, 10, 14, 15, 16, 17, 1949, February 9, 1950.]

*Negligence—Res ipsa loquitur—Highway—Omnibus—Accident due to tyre burst—Impact fracture of tyre—Supervision of condition of tyre—Duty of owners of vehicle—Breach of regulation—Right of action—Motor Vehicles (Construction and Use) Regulations, 1941 (S.R. & O., 1941, No. 398), reg. 71.*

The appellants' husband was killed while travelling as a passenger in the respondents' omnibus, which at the time of the accident was being driven at a speed of some twenty-five miles per hour in a "black-out." After the offside front tyre had burst, the omnibus veered across the road and fell over an embankment. Evidence was given that the cause of the bursting of the tyre was an impact fracture due to one or more heavy blows on the outside of the tyre leading to the disintegration of the inner parts. Such a fracture might occur without leaving any visible external mark, but a competent driver would be able to recognise the difference between a blow heavy enough to endanger the strength of the tyre and a lesser concussion. The appellant contended that in the circumstances the speed at which the

omnibus was driven was excessive and caused it to be thrown off the road when the tyre burst, that the defect in the tyre would have been revealed had adequate steps been taken regularly to inspect it, and that the respondents were negligent in not requiring their drivers to report occurrences which might result in impact fractures. The respondents contended that they had a satisfactory system of tyre inspection, which took place twice a week, and that impact fractures were so rare as to be a negligible risk which the public using their vehicles must take.

HELD: (i) the application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence, was by itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the respondents to give an adequate explanation, if the facts were sufficiently known the question ceased to be one where the facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be inferred.

(ii) it could not be said on the evidence that the speed at which the omnibus was being driven at the time of the tyre burst had any causal connection with the subsequent accident.

(iii) despite the statements of the respondents' witnesses that their system of tyre inspection was satisfactory and accorded with the practice of other omnibus companies, the evidence showed that the respondents had not taken all the steps they should have taken to protect passengers because they had not instructed their drivers to report heavy blows to tyres likely to cause impact fractures.

(iv) the cause of the accident was a defect of the tyre which might have been discovered by due diligence on the part of the respondents, and the respondents were liable although it was not possible to affirm that the fracture would have been discovered by the exercise of due diligence.

By the Motor Vehicles (Construction and Use) Regulations, 1941, reg. 71: "All the tyres of a motor vehicle . . . shall at all times, while the vehicle . . . is used on a road be maintained in such condition as to be free from any defect which might in any way cause . . . danger to persons on or in the vehicle . . ."

HELD: this regulation gives no right of action to persons injured by a breach of it.

*Decision of the COURT OF APPEAL* ([1948] 2 All E.R. 460), *reversed*.

[As to the PRESUMPTION OF NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-675, paras. 956-958; and FOR CASES, see DIGEST, Vol. 36, pp. 88-92, Nos. 589-607.]

Cases referred to:

- (1) *Scott v. London Dock Co.*, (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J. (Ex.) 220; 13 L.T. 148; 36 Digest 14, 48.
- (2) *Morton v. William Dixon, Ltd.*, 1909, S.C. 807.

APPEAL from an order of the Court of Appeal (reported [1948] 2 All E.R. 460). The husband of the appellant was killed while travelling as a passenger in an omnibus belonging to the respondents. She claimed that the respondents were negligent because the omnibus was driven at an excessive speed during a "black out," and she also alleged that a tyre burst which resulted in the omnibus falling down an embankment was due to the faulty methods of tyre inspection adopted by the respondents. SELLERS, J., found that the respondents were guilty of negligence in their system of tyre maintenance and awarded the appellant £2,000 damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. That finding was reversed by



the Court of Appeal where it was held by a majority (SCOTT and ASQUITH, L.JJ., BUCKNILL, L.J. dissenting) that the respondents by their evidence had displaced the presumption of negligence raised by the fact that the omnibus had fallen over the embankment and that they had exercised adequate and reasonable care in maintaining and inspecting the tyres and were not responsible for the defect which caused the accident. The House of Lords now allowed the appellant's appeal, set aside the majority judgment of the Court of Appeal, and ordered that the judgment of SELLERS, J., should be restored.

*O'Sullivan, K.C.*, and *Platts Mills* for the appellant.

*Fox-Andrews, K.C.*, and *Gerwyn P. Thomas* for the respondents.

The House took time for consideration.

Feb. 9. The following opinions were read.

**LORD PORTER:** My Lords, this appeal is from a judgment of the Court of Appeal reversing a decision of SELLERS, J., by which he found the respondents liable for negligence in bringing about the death of the appellant's husband and awarded her £2,000 damages. The members of the Court of Appeal themselves were not unanimous. BUCKNILL, L.J., was for dismissing the appeal whereas the majority allowed it. The negligence alleged against the respondents was that one of their omnibuses had met with an accident owing to their want of proper supervision of its tyres and owing to the excessive speed at which it was driven. The circumstances in which the accident occurred must be fully set out, but for the moment it is sufficient to point out that the majority thought no negligence had been established whereas BUCKNILL, L.J., agreed with SELLERS, J., that the respondents were negligent, though he does not appear to have arrived at this conclusion wholly on the same ground.

The respondents are a transport company, and had at the material time undertaken to carry workers from the Royal Ordnance factory at Pembury to Gorseinon by omnibus. The omnibus in question, a double-decker, was some twenty-six feet long, seven feet six inches wide, and weighed ten tons. On the early morning of Feb. 27, 1943, it was driven by one Lewis Enoch, and left Pembury for Gorseinon with a full load of passengers, fifty-three in number, of whom the appellant's husband was one. After it had travelled about five miles, the offside front tyre burst while the omnibus was passing through the village of Pwll. There was a loud explosion and the omnibus veered across the road to the offside footpath, tore down some iron railings, fell over an embankment, and lay on its off side in contact with a truck or trucks standing on the railway line below the road. Shortly after the explosion the burst tyre became deflated. Before it had done so the omnibus proceeded for some eighty-two feet and then, as a result of the rim cutting through the deflated tyre, caused marks on the road which continued for eighty-six feet, two inches. At that point it mounted the pavement and continued to travel on the edge of the embankment for a further eighty-two feet. In these circumstances the appellant claims that the doctrine of *res ipsa loquitur* applies. Omnibuses, it is said, which are properly serviced, do not burst their tyres without cause, nor do they leave the road along which they are being driven. If the evidence stopped there, the statement is unexceptional. As was said by ERLE, C.J., in *Scott v. London Dock Co.* (1) (3 H. & C. 601):

"... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an

- adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not. In the present case, the evidence given and accepted by SELLERS, J., was that the omnibus left Pembury works at 6.15 and the accident occurred not later than 6.30. The distance covered between the start from the works and the place of the accident was five miles, 220 yards, but the first  $1\frac{3}{4}$  miles was along a private, narrow and dangerous road and the remaining  $3\frac{3}{4}$  miles along a road which was somewhat narrow and winding and in poor condition. Over the earlier portion the prescribed and safe limit was ten miles an hour. Over the second portion the limit during blackout hours in wartime was twenty miles an hour. BUCKNILL, L.J., points out in the course of his judgment that, if the driver proceeded at the proper speed of ten miles an hour over the private road, his average speed over the public road must have been some thirty-two miles an hour. This calculation was accepted by the respondents in your Lordships' House, but it does not conclude the matter or determine the speed at the moment when the accident took place. There was a considerable body of evidence at the trial to the effect that the omnibus was driven at a very fast speed in the conditions obtaining, and even that it increased speed just before the accident. On the other hand, many of the witnesses who gave this evidence had previously made statements to the police that the vehicle was being driven at a moderate speed. The driver himself asserted that he was going no more than fifteen-twenty miles an hour at the vital moment, but SELLERS, J., has not accepted this estimate and has put the speed at about twenty-five—twenty-six miles an hour. The exact speed must, of course, be no more than a rough estimate, but in the circumstances I see no reason for departing from the opinion expressed by SELLERS, J. It appears that shortly before the accident the road rises slightly uphill, and, though the evidence is not positive, there is a suggestion that gear was then changed down, an event which would lead passengers to suppose, from the increased revolutions of the engine, that the speed had increased. Moreover, it is exceedingly difficult, even for an expert, to estimate speed in the dark, and in the particular case it is doubtful if the speed could ever have exceeded thirty miles an hour as the engine was fitted with a governor preventing it from proceeding faster than that pace. If I were left to myself, I should be inclined to say that the driver must have exceeded the prescribed speed over all portions of the course, including the first portion, and, as regards the first portion, that in effect is the result of his evidence. If the prescribed rate of ten miles an hour was exceeded on that portion so that it reached fifteen or twenty miles an hour instead of ten miles an hour, the speed on the later portion need not have been much greater than twenty miles an hour. In this, therefore, as in all matters where SELLERS, J., saw the witnesses and formed his impression from the evidence given, I suggest that it would be unsafe for your Lordships to depart from the conclusion at which he arrived. I have dealt a little at length, and shall hereafter have to deal with, the question of speed because it was one of the foremost contentions relied upon in support of the appellant's case. But for the speed, it was said, the accident would not have happened, the tyre would not have burst, and the omnibus would have kept the road.
- The second ground of complaint is that in the case of an omnibus which has been properly serviced, the tyre would not have burst. Again, if there were no explanation, the mere happening of the accident would be fatal to the defence. After the accident, however, the tyre was inspected by two experts who were called to give evidence before the learned judge. It appears that under the system adopted by the respondents, tyres are examined twice weekly, and this particular tyre was examined by a Mr. Jenkins two days before the accident took place. When it was examined at the trial some four years after the accident,

it was found that there was an unfilled gash in the outer cover. This outer cover is made up of a layer of rubber called the tread which comes into contact with the road surface. Inside the tread lies another layer of rubber called the breaker and inside that again is the cord which is about an inch thick and is the portion of the tyre which resists the pressure of the air with which the inner tube is filled. It is composed of twelve plies of cotton material each of which is sheathed in rubber and its innermost layer lies directly against the surface of the inner tube. The tread when new is .845 inches thick, but the tyre in question had run some 25,000 miles and the pattern had worn level over five inches of the width of the tyre. These tyres, however, are normally serviceable for 33,000 miles and the condition of its tread had nothing to do with the bursting of the tyre.

At the time of the trial the gash or puncture in the surface of the cover extended through the tread, and, apparently, right through the cord, and originally the appellant relied on it as being the cause of the burst, but the tyre was opened up at the trial, and, though it was within some inches of the place where the burst occurred, it was found to have no connection with the bursting of the tyre. On the evidence given and accepted by SELLERS, J., it is plain that the cause of the burst was what is known as an impact fracture. This condition is recognised by the trade as being caused by one, or possibly more, heavy blows on the outside of the tyre. The evidence shows that a blow of sufficient severity may sever some of the plies close to the breaker strip and these when severed rub against and disintegrate the inner parts of the cord. It is not possible to state how long the process of disintegration takes, or either by external or internal inspection, to discover the weakness until the last two or three plies have been reached. Moreover, in approximately fifty per cent. of the cases, no mark whatsoever is left on the outside of the tyre from which the existence of damage could be ascertained.

The case for the appellant originally rested on a belief that the puncture in question was the cause of the burst. It was alleged, and SELLERS, J., found, that the puncture, in the state which it had reached when the case was heard, was such that the tyre ought to have been removed and replaced, or, at any rate, the puncture hole filled in. If the evidence had established that the state of the puncture was the same at the time of the accident as it was when the trial was held, this argument would require careful consideration, but SELLERS, J., has found that the state differed and there was ample evidence on which he could so find. Admittedly the puncture, when examined just after the accident took place, did not go right through the outer tyre. If it had, it would have left a mark on the inner tube, and there was no such mark. Moreover, the tyre was carefully examined by two experts in order to ascertain what the cause of the fracture was, and they did not regard the puncture as of sufficient importance even to require mention in their report. Both asserted that it would be most unlikely that they should have omitted to refer to it if the tyre, when they examined it, had been in the same condition as it was at the time of the trial. The witness, Jenkins, who examined it and whose duty it was to do so, had given evidence at a previous trial held before LEWIS, J., to determine another claim arising out of the same accident, but he had died before the appellant's claim was heard. In the case now engaging your Lordships' attention some questions were asked of one of the witnesses on material derived from the testimony given by Jenkins before LEWIS, J., but nevertheless no application was made then or at any time to SELLERS, J., who was trying the case to admit the transcript of his evidence as evidence in this case. Application to do so was, however, made to the Court of Appeal and to your Lordships. In each case the application was refused—in the Court of Appeal on the ground that it did not come within s. 1 (1) of the Evidence Act, 1938, and also because no request had been made to SELLERS, J., to admit it, and in your Lordships' House on



the principle that evidence which was available in the court of first instance but was not produced should not normally be admitted on appeal even in cases where it has been difficult to obtain or its existence or admissibility has been overlooked. As this was the ground for your Lordships' refusal, it is not necessary to consider or decide whether the Court of Appeal were right in what I believe to have been their unanimous view that in any case the wording of the Act

A did not make the evidence admissible.

Jenkins, however, was an experienced and competent workman, and it would be unlikely that he should have permitted an obviously dangerous tyre to remain in position. The matter derives its importance from the fact that SELLERS, J., thought him to have been negligent in not having the tyre removed, and inferred that he might have been careless also in other matters. I do not think this

B view is justified, having regard to the evidence adduced, and see no reason for supposing that he omitted the ordinary precaution that a skilled workman would take. The appellant sought to argue from the condition in which the tyre must have been that a careful examiner would have seen the puncture, would have been unable to determine how deep it went, would, consequently, have ordered the removal of the tyre, and, if he had done so, the deterioration might

C have been discovered in the inside surface since by that time the original impact fracture might have spread to the last few plies and be visible on internal inspection. I do not think that the conclusion follows. The evidence, it is true, established that a puncture of the kind now visible must have been caused by a nail or similar object, and that that object would not come out of itself and must have been removed by some special tool, but, whether the removal was

D effected by Jenkins himself or by someone else, the operator would see the length of the object which did the damage, and would, therefore, know the depth of the hole. Moreover, anyone in charge of the maintenance of the tyre would naturally probe the hole if he had no other means of discovering how far it extended into the cover and would then ascertain whether it was necessary to take off the tyre or not. In any case, the assumption that the inner surface

E of the tyre would show the disintegration of the plies at the time of the examination is purely conjectural, and the whole line of argument too speculative from which to draw any safe conclusion.

In addition to this suggestion the appellant relied on two other matters as constituting evidence of negligence on the part of the respondents—(1) that the omnibus was travelling too fast at and before the moment that the burst

F took place, and (2) that no proper system had been established to ensure the reporting of severe blows to the tyres and that in fact no such reports were made. So far as the speed is concerned, I have indicated that, in my view, the finding of SELLERS, J., that it did not at the material time exceed twenty-five—

G twenty-six miles an hour should be accepted. It is argued on behalf of the appellant that even this speed gives rise to an inference of negligence which

contributed to the accident. Two reasons were put forward in support of this view. First, it is said, there is evidence that an increased speed causes the disintegration to proceed more rapidly, and that, if the omnibus had not been driven on this journey so fast, no accident would have happened, or, at any rate, not this accident. I find nothing in the evidence from which this conclusion

H can be derived. It is quite true that the faster the omnibus is driven the more likely is it to meet with a blow severe enough to cause an impact fracture, but there is no evidence of any severe blow on this occasion save the unsupported inference of one of the witnesses for the respondents resting on a reconstruction of the accident as he thinks it must have happened. All the other evidence leads in the opposite direction, since no one of the passengers or the driver speaks to any severe blow, and the road in the vicinity was searched by a policeman afterwards and no obstruction was found. Nor has anyone said that twenty-six miles an hour or even a greater speed would create any more rapid deterioration

in the tyre than would a speed of under twenty miles an hour. Indeed, it would be odd if a speed of thirty miles an hour, which is permissible in daylight, should be negligent in the dark, not because of any danger caused by inability to see but because some change in the internal condition of the tyre might take place. But the appellant relies on another and more persuasive ground for imputing negligence to the respondents. If, she says, the omnibus had not been driven so fast, the driver would have been able to bring it to a standstill, and thus have prevented the accident. She agrees that once the burst had taken place no blame could be placed on the driver, but she argues that, if he had not driven so fast before the burst, he could have put on his brakes and held the vehicle on the road. The driver himself said that as a result of the shock of the burst he was thrown or partially thrown out of his seat, though he managed to keep his left hand on the wheel, and that as a result he was not able to apply his brakes, or at any rate not until too late. SELLERS, J., has accepted his evidence in this respect, and further evidence has been given that a slower speed, so far from being an advantage, would have caused the deflation of the tyre to swing the head of the omnibus to the offside more rapidly and bring about an earlier accident—the theory, as I understand it, being that in a faster moving vehicle it is easier to turn the wheel, and that in this particular case the driver was able to keep his vehicle on the road so long as he did, because, despite the fact that he was partially thrown from his seat, he was able to steer it more easily than if it had been going more slowly. Again, I think it would be unsafe for your Lordships to differ from SELLERS, J., in this matter, which must depend upon the weight to be given to the testimony of the witnesses who gave evidence at the trial. In these circumstances I do not think it can be said that the speed at which the omnibus was driven at the time of the burst has been proved to have any causal connection with the subsequent accident.

The further question is still to be determined, whether there was negligence in the system of inspection which the respondents adopted or negligence to be imputed to any of the respondents' drivers in not reporting a blow severe enough to cause an impact fracture to the tyre. In my view, one or either of these matters is a circumstance from which negligence on the part of the respondents or their servants might be deduced. The findings of SELLERS, J., which are supported by the evidence are that the fracture could only be caused by a very heavy blow or conceivably by more than one very heavy blow, though the latter alternative is very unlikely, as the learned judge found, and that a blow heavy enough to cause such a disintegration would be known to and recognised by a competent driver who would be aware that it was sufficiently severe to be a possible cause of damage and to require a report to be made to his employers. It is answered that (i) a driver would have difficulty in recognising the seriousness of the blow required, and (ii) that, even if he did recognise it, it would be difficult, if not impossible, to induce him to make the required report. Whatever weight may be given to these criticisms, the evidence given at the trial establishes the fact that a competent driver would recognise the difference between a blow heavy enough to endanger the strength of the tyre and a lesser concussion. If this be so, the fact that he would be unlikely to report it would still leave him negligent in not doing so, and for that negligence his employers must answer. In the second place, it was, I think, the duty of the respondents, who are fully aware of the possibility of an impact fracture, to instruct their employees as to the effect which a heavy blow may produce, and to impress upon them the necessity of reporting its incidence. It might be that an uninstructed driver would neither know of nor have experience of such a danger, and that difficulty would be surmounted if proper instructions were given. It is quite true that an accident of this kind and the burst of a tyre owing to an impact fracture is a rare event—so rare, indeed, that at least one of the witnesses on behalf of the respondents regarded it as negligible, and thought that the public must

take their chance of its occurring. The duty, however, as I see it, of a transport company is to take all reasonable precautions for the safety of their passengers and not to leave them in danger of a risk against which some precautions, at any rate, can be taken. It was said by some of the respondents' witnesses that there was no difficulty in instructing their drivers to report heavy blows to a tyre, and one at least of the witnesses acknowledged that it would be prudent to do so and thought that the respondent company did include it in their system.

A In these circumstances, despite the evidence of the majority of their witnesses that their system of inspection was satisfactory and was in accordance with the practice of companies carrying on a similar occupation, the respondents did not, in my opinion, take all the requisite steps they should have taken to protect their passengers from risk. So far as their practice of inspection and overhaul of tyres in other respects was proved in evidence, I should myself agree with SCOTT and ASQUITH, L.JJ., that it was adequate, and no fault could be found with the course they adopted.

B My Lords, before I finish I should wish it to be clear that I am conscious that the opinion I have formed differs not only from that of the majority of the Court of Appeal but also from that arrived at by LEWIS, J., in the earlier trial. It is unfortunate that in dealing with the same general situation two diverse results have been arrived at, but it is accepted doctrine that each case must depend and depend only on the evidence presented. As the learned judge pointed out, the evidence in the case heard before LEWIS, J., must have differed to a considerable extent from that given before him, and, indeed, any decision of fact may be proved wrong by a fuller knowledge of the circumstances or a more precise grasp of the technical possibilities or difficulties involved. So far as I am concerned the conclusion at which I have arrived is strictly confined to the evidence adduced before and findings of fact by C D SELLERS, J. Guided by those considerations I think he rightly found the respondents liable in damages, though I should not include a failure to remove the tyre because of the existence of the puncture among the grounds of my opinion. I should allow the appeal with costs in your Lordships' House and below, and restore the judgment of SELLERS, J. E

LORD NORMAND: My Lords, I agree with my noble and learned friend on the Woolsack, but since there has been much difference of judicial opinion on more than one aspect of the case, I may be forgiven if I detain your Lordships by referring as briefly as I can to the main points of controversy. For this purpose it is superfluous to repeat the analysis of the evidence which my noble and learned friend has incorporated in the judgment which he has delivered. It is important to bear in mind, however, that the evidence, so far as it deals with the causation and development of impact fractures of tyres, represents only the present state of knowledge about a subject which is under investigation by tyre manufacturers. It is, nevertheless, the evidence by which this case G may be judged.

The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, H and, if the cause of the accident is proved, the maxim *res ipsa loquitur* is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury. The maxim is no more than a rule of evidence affecting *onus*. It is based on commonsense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. It is not necessary in the present



case to consider the intermediate position, when there is some evidence bearing on the causation of the accident and on the care exercised by the defendant, but the cause of the accident has not been proved, or to discuss what evidence in such a case may suffice to discharge the *onus*.

It is now common ground that the bursting of the tyre was, at any rate, a cause of the accident and that the burst was the result of the disintegration of the plies in the outer cover which was in turn the result of an impact fracture of the plies. The appellant maintained also that the omnibus was negligently driven at an excessive speed at the material time and that the excessive speed caused or contributed to the accident in one or both of two ways, first, by accelerating the process of disintegration and so bringing about the burst at the time when it took place, and, secondly, by disabling the driver from controlling the omnibus and bringing it to a stop before it went over the bank. On the first of these submissions it is enough to say that there is no evidence to show that the speed in fact accelerated the process of disintegration, and so SELLERS, J., found. On the second, the findings are that the speed limit of twenty miles an hour during black-out hours in a built-up area was exceeded, but that the speed was not more than twenty-five or twenty-six miles per hour at the time of the burst; that there is no reason to think that the omnibus would have been in any difficulty if the tyre had not burst; and that when the tyre burst the driver was partially dislodged from his seat though he kept hold of the steering wheel with his left hand. It is also found that it was not shown that the driver had any reason to anticipate that a tyre would burst. It must be added to this that the appellant's counsel imputed no fault of commission or omission after the moment when the tyre burst. On these facts SELLERS, J., declined to hold that there was negligence on the part of the driver contributing to the accident. The findings of fact were attacked by counsel for the appellant but there was a conflict of evidence about the speed and I am of opinion that the assessment of the value of the evidence by SELLERS, J., must be respected. If the findings stand, his refusal to find the driver in fault cannot be reversed. The fact that the speed limit in black-out hours was exceeded is not shown, and I think could not have been shown to have any relevance.

There remains the question whether there was negligence in relation to the defect in the tyre cover. Here it is convenient to say that I agree with my noble and learned friend on the Woolsack on the interpretation of art. 71 of the Motor Vehicles (Construction and Use) Regulations (S.R. & O., 1941, No. 398) and in holding that it gives no right of action to persons injured by the breach of it. The respondents are not insurers, but they have a duty, both at common law and by their contract, with those who travel in their omnibuses to take all reasonable care that the omnibus, including the tyres, is in good order and in a safe condition to carry a full load of passengers on the intended journey. Here again the *onus* is on the respondents since they alone are in possession of the relevant facts, but the evidence about the genesis of the fracture and the precautions taken by them for the good condition of their tyres, though not in all respects as ample or clear as it might have been, is sufficient for the decision of the case without resort to rules of *onus*.

Impact fractures of the cord or plies resulting in the bursting of a tyre are fortunately rare. From the evidence presented to the court in this case it appears that they are caused by an exceptionally severe impact against some obstacle, which would be felt and recognised as exceptional by the driver of the omnibus, though the possibility that two or more less severe blows on the same area of the tyre might cause a fracture cannot be wholly ruled out. It is the top or outer plies that are fractured by the external blow. The fracture of these plies may produce a bulge on the outer surface of the cover. On the other hand, there may be no external sign of damage at any time before a burst takes place. It is estimated that the bulge appears in about fifty per cent. of tyres damaged by

impact fractures. There will probably be no sign of damage on the inner surface of the cover until the damage has spread downwards to the lowest or innermost plies by friction and fraying caused by use on the road. How long it may take the damage to spread to the innermost plies cannot be known or estimated. When this process of disintegration has reached that stage there is great risk that the air pressure will force the inner tube between the broken plies where it may be pinched and so burst. These facts impose on omnibus owners a duty to take all practicable steps to diminish the obvious risk that a tyre which has once suffered an impact of exceptional severity may subsequently burst and bring about a grave accident such as occurred in the present instance. Even if it is not practicable wholly to eliminate the risk, it is obviously imprudent to neglect any practicable means of reducing it.

- A What then did the respondents do ? They had a regular system of a twice-weekly inspection for pressure and for external examination of the cover by tyre examiners whose duty it was to look for any signs of the treads having been penetrated by nails or stones and for any signs of cracking of the sides of the cover or for any unusual appearance. If the examiner discovered any defect indicating penetration of the plies it was his duty to remove the wheel and to send it to the respondents' central works where it would be stripped down and the tyre fully examined. If this examination revealed any sign that the plies had been penetrated the tyre would be put aside for inspection by the tyre company which owned it and supplied it to the respondents. Every week also the front wheels were jacked up and examined by spinning them. At the same time the tyres were inspected for cuts or the like. Every three or four thousand miles the wheels were removed so that a thorough external examination could be carried out. When a tyre had run 25,000 miles the wheel would be removed and sent to the main tyre shop. There it would be examined and it would be decided whether it was fit for further service. For that purpose it would not necessarily be stripped from the wheel. The life of a tyre in the respondents' services was 33,000 miles, after which it might be re-treaded for further use.
- D The system in use did not provide for a routine inspection of the inner surface of the tyre cover, and the tyre covers were not removed unless a puncture made that necessary or the external examination showed damage which suggested the need for an examination of the inner surface. The evidence of the respondents' chief engineer is that if an omnibus hits an obstacle with such force that a fracture of the plies might result the driver would be aware of it and that if he reported it some inspection would be made. There is no evidence that reports of this sort were made by the respondents' drivers, and the appeal was argued on the footing that the drivers of the respondents' omnibuses had not been instructed to report severe impacts and that they did not in fact report them.

- G As regards the tyre cover concerned in this appeal, the facts are that it was examined internally in August, 1942, when a puncture was repaired. It had then run 1,792 miles. The internal surface had never been examined again before the accident on Feb. 27, 1943, but it had been regularly examined externally, and was so examined eleven times in January and ten times in February, 1943. The last of these examinations took place on Feb. 24, 1943, three days before the accident. No report that it had received a severe impact had been made, and it is not possible to determine the date when the impact which caused the fracture took place. It is reasonably certain that it did not take place on the day of the accident, for no impact was felt on that day and, though a simultaneous fracture and burst is a possibility, no impact was felt at the time of the burst, and there was apparent no obstacle or unevenness on the surface of the road which might have occasioned it. The probability is that the fracture occurred a considerable time before the accident. The tyre had at the date of the accident run 23,545 miles and therefore it was not yet

due for the inspection which, according to the respondents' practice, falls to take place when a tyre has run 25,000 miles. The tread was worn smooth, but no one says it was for that reason not fit for use.

The respondents adduced a number of expert witnesses to speak to the practice of other omnibus companies. With one exception they deponed that the respondents observed all the precautions observed by others. The exception was Mr. Mernagh, a tyre technologist formerly employed in that capacity by a well-known company of tyre manufacturers. He is, therefore, not in as good a position to speak of the practice as some of the other witnesses who were employed by large omnibus companies. He was asked whether an omnibus company ought to have some system by which the drivers are required to report any event which might, within reason, cause a fracture of the plies. His answer was: "I think they do. Many omnibus companies do require it. I think this' one [the respondents] does require its drivers to report any occurrence of such a nature which in the driver's opinion would lead to its destruction." He was then asked: "You say that is common in omnibus companies, and you think it was prudent?" and he said "Yes." This is important evidence coming, as it does, from an acknowledged expert in tyres put forward by the respondents, and its importance is not greatly diminished by the fact that he has not been himself concerned in the management of an omnibus company. Evidence that the respondents' practice does not fall short of the precautions taken by other owners goes only part of the way to meet the case of negligence made against them. It is not a complete answer to the charge that they have omitted precautions which were obviously called for. In *Morton v. William Dixon, Ltd.* (2) LORD DUNEDIN (Lord President) dealt with this aspect of the proof of negligence and said (1909 S.C. 809):

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds—either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

That was said in an action between employee and employer where the *onus* was on the employee, but the principle which the Lord President applied in that case is of general application. If the evidence of Mr. Mernagh on practice is to be treated as outweighed by the evidence of other expert witnesses, it is still valid evidence on the precautions obviously wanted to diminish the danger resulting from impact fractures. It necessarily implies that the reporting of exceptionally severe impacts is both a possible thing and a useful thing. That it is possible and that a report would be followed by an examination is admitted by the respondents' chief engineer, but it was submitted that a report would lead to no useful result, because, it was said, the routine examinations would discover any external surface damage, and because no examination of the internal surface of the cover would reveal anything unless it took place in the brief and unpredictable period between the destruction of the innermost plies and the occurrence of the burst. Mr. Mernagh's evidence implies that an examination of the damaged tyre after a report of a serious impact may be expected to be better directed to discover signs of damage which may escape notice when no such report has been received. This is, to my mind, a reasonable, if not a self-evident, proposition. The alternative is to accept the submission that no report need be made because it could not lead to useful results and that what happened in this case is a risk which is normally taken because it cannot be prevented. It is not for a court of law to lay down a code of precautions which omnibus owners must observe, and it may be that the Court of Appeal were justified in saying that some of the recommendations of SELLERS, J., for I respectfully think that some of them were recommendations rather than findings.



of a duty based on the evidence, were not practicable. On the evidence it is proved that reasonable care was not exercised. The drivers themselves failed to report impacts which they ought to have reported, the respondents failed to instruct the drivers about impact fractures and to require them to report, and the tyre examiners ought to have been, but were not, informed. If these precautions were taken it is a reasonable conclusion that the risks of bursts caused by impact fractures would be sensibly reduced. It is not necessary to go farther or to suggest to omnibus owners what additional steps might be taken if the results of a careful and properly directed examination after receipt of a report were negative. It would, however, be in accordance with experience that a stricter attention to the duty of eliminating the risk would lead to the discovery of improved means of doing so.

I think, therefore, that on the evidence adduced in this case it is proved that the death of the appellant's husband was caused by a defect in the tyre which might have been discovered by due diligence on the part of the respondents. That is a finding which entitles the appellant to damages, though it is not possible to affirm that the fracture would have been discovered by the exercise of due diligence. My Lords, it is not necessary to go on to discuss the relevance of the hole which at the date of the trial penetrated through the outer cover, but I will briefly state the view which I have formed of the facts. SELLERS, J., found that when the tyre was first inspected after the accident this hole did not penetrate through the cover, and it is proved that the cover was much pulled about by persons examining it before the trial. It is also proved that it was carefully examined by experts in March, 1943. I think that it is most improbable that if the outer orifice had then been as large as it was at the date of the trial they would have failed, as they did, to take notice of it. It is, therefore, not proved that there was any negligence in failing to notice it on Feb. 24, if indeed any hole existed at that date. I would allow the appeal and restore the award of damages.

**LORD MORTON OF HENRYTON:** My Lords, I agree with the reasons which have led my noble and learned friends LORD PORTER and LORD NORMAND to find the respondents liable in damages. I think, moreover, that there is much weight in the additional reasons given by BUCKNILL, L.J., in the Court of Appeal. I need not, however, pursue that line of thought, as I agree that this appeal must be allowed, and the judgment of SELLERS, J., restored.

**LORD REID:** My Lords, I have had more difficulty than your Lordships have had in reaching the conclusion that the respondents were negligent in not having a better system for guarding against the danger of tyres bursting, but my doubts are not sufficiently strong to require me to dissent.

**LORD RADCLIFFE** (read by LORD MORTON OF HENRYTON): My Lords, I am at one with your Lordships in thinking that this appeal ought to be allowed. I do not think that the appellant was entitled to judgment in the action because of any special virtue in the maxim *res ipsa loquitur*. I find nothing more in that maxim than a rule of evidence, of which the essence is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence. In this action much more is known than the bare fact that the omnibus mounted the pavement and fell down the bank. The true question is not whether the appellant adduced some evidence of negligence, but whether on all the evidence she proved that the respondents had been guilty of negligence in a relevant particular. In my view, the important thing is that the tyre on the respondents' omnibus was defective. It was, indeed, their case that the burst of the inner tube was caused by the faulty condition of the structure of the tyre, and that that faulty condition had arisen from an impact fracture suffered at some unascertainable time before the accident. Now, a carrier's obligation to his passenger, whether it be expressed in contract or in tort, is to provide a carriage that is as free from defects as the exercise of

all reasonable care can make it. This care the respondents claim to have taken, and the majority, if not all, of the members of the Court of Appeal upheld their claim. In my view, the respondents failed to establish that they had observed an adequate standard of care, and it is for that reason that I think that the appellant is entitled to her damages.

It is unnecessary for me to repeat what has been said by others of your Lordships on this point. An impact fracture, I conclude, is, though a rare event, a danger well recognised by those responsible for the technical direction of omnibus undertakings. It is unreasonable to suppose that its nature and probable consequences are familiar to drivers in the same degree, if at all, but it is very likely, though not certain, that such a fracture can only be caused by a blow of exceptional severity on the tyre, of the occurrence of which a driver could not be ignorant. I have found it impossible to read the evidence as showing that the respondents had given any actual instructions to their drivers to the effect that they were to report any such violent blow as would be likely to cause an impact fracture. To say that it was a driver's duty to make such a report seems to me insufficient as a defence, unless measures had been taken to explain and bring home the duty to those directly concerned. It is possible to make much of the undoubted fact that a driver's impression is not an accurate recording instrument and that an interior examination of the tyre immediately following on a report might very well reveal nothing. That means, what is evidently true, that no measures could be devised to detect with any certainty the incipient disintegration of the tyre structure that follows on an impact fracture. It does not mean, however, that a system of reports, if each report were followed by a thorough internal examination and a special scrutiny of the outside of the suspected tyre at the ordinary bi-weekly inspections, would not have helped to reduce the risk and might not in this very case have prevented the tragic accident that took place. A court of law is in no position to lay down a code of precautions that ought to be observed by omnibus carriers on this head, but it is its duty to say whether on the whole of the evidence the respondents have shown that they observed as much care as could reasonably be required of them in guarding against this particular danger. I do not think that they did show that and consequently I do not think that they exculpate themselves from the consequences of running their omnibus with defective equipment.

*Appeal allowed. Judgment of SELLERS, J., restored. Respondents to pay costs of appeal in the House of Lords and Court of Appeal.*

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *D. Brinley, Morris & Co., Llanelly* (for the appellant); *Stanley & Co.*, agents for *David H. Clarke, Swansea* (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

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## THEOPHILE v. SOLICITOR-GENERAL.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Morton of Henryton, Lord Reid and Lord Radcliffe), November 22, 23, 24, 1949, February 9, 1950.]

*Bankruptcy—Petition—Service—Service out of the jurisdiction—"Debtor"—Foreigner—"Carrying on business"—Business continued till all debts paid—Bankruptcy Act, 1914 (c. 59), s. 1 (1) (a), (2) (c), s. 4 (1) (c).*

T., a citizen of Rumania, carried on a leather business in England, and on Jan. 1, 1946, two notices of assessment for £10,000 each were issued to him in respect of excess profits tax in connection with his business in respect of the chargeable accounting periods ending on Mar. 31, 1943, and Mar. 31, 1945. On Jan. 10, 1946, a further notice of assessment was issued to him for £10,000 for excess profits tax in respect of the chargeable accounting period ending on Mar. 31, 1944. T. left England on Oct. 31, 1946, and had ever since resided in Eire. By the end of 1946, T. had disposed of his business. On Nov. 14, 1947, a bankruptcy petition was presented at the instance of the Crown against T. in respect of the non-payment of excess profits tax amounting to £30,000. It was not denied that there was *prima facie* evidence of an intent in T. to delay or defeat the Crown in its claim by remaining out of England.

HELD: (i) section 1 (2) (c) of the Bankruptcy Act, 1914, by its express terms extended not only to British subjects but to foreigners, and was applicable to T., notwithstanding that he was a Rumanian subject and that the act of bankruptcy alleged was committed outside England.

*Re Debtors (No. 836 of 1935) ([1936] 1 All E.R. 875), considered.*

(ii) although T. was not actively carrying on business for many months before the presentation of the petition, he did not cease to trade for the purposes of the Act until all sums due in respect of the business were collected and all debts were paid, there being no difference in this respect between trade debts incurred by buying and selling and excess profits tax, and, therefore, T. was carrying on business in England at the time of the act of bankruptcy specified in s. 1 (1) (d) of the Act so as to be "debtor" within s. 1 (2) (c), and the Crown was not debarred by s. 4 (1) (c) from presenting the petition.

*Re Dagnall ([1896] 2 Q.B. 407), Re Worsley ([1901] 1 Q.B. 309), Re Clark ([1914] 3 K.B. 1095), Re Allen ([1915] 1 K.B. 285) and Re Reynolds ([1915] 2 K.B. 186) approved.*

*Decision of the COURT OF APPEAL (sub nom., Re A Debtor (No. 335 of 1947) ([1948] 2 All E.R. 533), affirmed.*

[AS TO BANKRUPTCY JURISDICTION OVER FOREIGNERS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 9, 10, 61-63, paras. 10, 74; and FOR CASES, see DIGEST, Vol. 4, pp. 24-26, Nos. 193-207.]

Cases referred to:

- (1) *Cooke v. Vogeler (Charles A.) Co.*, [1901] A.C. 102; 70 L.J.K.B. 181; 84 L.T. 10; 4 Digest 25, 199.
- (2) *Ex p. Crispin, Re Crispin*, (1873), 8 Ch. App. 374; 42 L.J. Bcy. 65; 28 L.T. 483; 37 J.P. 391; 4 Digest 25, 196.
- (3) *Ex p. Blain, Re Sawers*, (1879), 12 Ch.D. 522; 41 L.T. 46; 4 Digest 25, 197.
- (4) *Re Pearson, Ex p. Pearson*, [1892] 2 Q.B. 263; 61 L.J.Q.B. 585; 67 L.T. 367; 4 Digest 25, 202.
- (5) *Re Debtors (No. 836 of 1935)*, [1936] 1 All E.R. 875; [1936] Ch. 622; 105 L.J.Ch. 265; 154 L.T. 592; Digest Supp.
- (6) *Re Dagnall, Ex p. Soan and Morley*, [1896] 2 Q.B. 407; 65 L.J.Q.B. 666; 75 L.T. 142; 4 Digest 32, 267.



- (7) *Re Reynolds, Ex p. White Bros., Ltd.*, [1915] 2 K.B. 186; 84 L.J.K.B. 1346; 112 L.T. 1049; 4 Digest 33, 274.
- (8) *Re Worsley*, [1901] 1 Q.B. 309; 70 L.J.Q.B. 93; 84 L.T. 100; 4 Digest 32, 268.
- (9) *Re Clark, Ex p. Pope and Owles*, [1914] 3 K.B. 1095; 84 L.J.K.B. 89; 112 L.T. 873; 4 Digest 33, 271.
- (10) *Re Allen, Ex p. Shaw*, [1915] 1 K.B. 285; 84 L.J.K.B. 271; 112 L.T. 194; 4 Digest 33, 273. A

APPEAL by a debtor against an order of the Court of Appeal, dated July 16, 1948, and reported [1948] 2 All E.R. 533, allowing an appeal by the Crown from an order of Mr. REGISTRAR PARTON, made on Apr. 7, 1948, and discharging an order giving leave to serve a bankruptcy petition out of the jurisdiction. The respondent argued that, being a Rumanian subject, he was not a "debtor" within the meaning of the Bankruptcy Act, 1914, s. 1 (2), and that he had not committed an act of bankruptcy on which a petition could be grounded inasmuch as he did not carry on business in England at the date of the petition or during any portion of the three months prior thereto. The House of Lords dismissed the appeal. The facts appear in the opinion of LORD PORTER. B

*Caplan* for the debtor. C

*The Solicitor-General (Sir Frank Soskice, K.C.), J. H. Stamp and A. F. M. Berkeley* for the Crown.

The House took time for consideration.

Feb. 9. **LORD PORTER:** My Lords, the appellant is a citizen of Rumania. For some years, however, before the proceedings under review, he carried on a leather business in this country, apparently with success. On Jan. 1, 1946, two notices of assessment for £10,000 each in respect of excess profits tax in connection with this business, covering the two chargeable accounting periods ending on Mar. 31, 1943 and Mar. 31, 1945, were issued to the appellant, and on Jan. 10, 1946, a further notice of assessment was issued to him for another sum of £10,000 for excess profits tax in respect of the chargeable accounting period ending Mar. 31, 1944. Certain incidental proceedings were taken, but they are not material to the question now before your Lordships. It is enough to record that on Nov. 14, 1947, a bankruptcy petition at the instance of the Crown was issued in respect of the non-payment of these three sums, amounting to £30,000 in all, which had not then been paid, and are still unpaid. It appears that the appellant had disposed of his business by the end of 1946 and meanwhile he left this country on Oct. 31 of that year and has resided in Eire since that date. D

By the Bankruptcy Act, 1914, s. 1, it is provided :

"(1) A debtor commits an act of bankruptcy in each of the following cases:—(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof; (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt; (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house; . . . (2) In this Act, the expression 'a debtor,' unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—(a) was personally present in England; or (b) ordinarily resided or had a place of residence in England; E F G H

or (c) was carrying on business in England, personally, or by means of an agent or manager; or (d) was a member of a firm or partnership which carried on business in England.”

Section 4 of that Act provides:

A “(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and (d) the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England, or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business B in England, personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners, or an agent or manager . . .”

C In these circumstances the contention for the Crown is that the appellant has committed an act of bankruptcy because when the petition was issued he was a debtor in that he was carrying on business in England personally at that time and that being out of England he remained out of England with intent to defeat or delay his creditors and so committed the act of bankruptcy defined in s. 1 (1) (d). It is not denied that he is remaining out of England, nor that there is *prima facie* evidence of an attempt to defeat or delay the Crown in its endeavour D to collect the debt which is claimed to be due, but the appellant maintains that, being a Rumanian subject, he is not a debtor within the meaning of the Act, and that he has not committed an act of bankruptcy inasmuch as he did not carry on business in England at the date of the petition, or during any portion of the three months prior thereto. The Crown maintains that the wording of sub-s. (2) in terms embraces both English subjects and foreigners provided that E either class carried on business in this country at the date of the act of bankruptcy relied on, or within three months prior thereto, and that there is a long series of cases which establish that a business does not cease to be carried on in this country until all the debts incurred in the course of it have been discharged.

As regards the first point, the appellant maintains that, despite its wording, sub-s. (2) has no application save in the case of British subjects or persons F domiciled here or in a case where the act of bankruptcy relied on was committed in this country. In the present case he relies on the facts that the petition is based on an allegation that, being out of England, he has remained abroad, that he is a Rumanian subject, and that the alleged act of bankruptcy by its very nature has not been, and could not be, committed in this country. It would, he says, be contrary to the comity of nations and to the ordinary construction G of Acts of Parliament to decide that an act committed out of this country by a foreign national domiciled abroad should be held to come within the mischief of the Act.

My Lords, s. 4 (1) limits the circumstances in which a creditor can present a bankruptcy petition, but I do not think that it throws any further light on his right to do so. Before it can be presented, there must be a debtor and he must H have committed an act of bankruptcy. If those two pre-requisites are established, the petition may be issued subject to the conditions laid down in s. 4. The answer, therefore, to the question submitted to your Lordships depends, in the first instance, on the true meaning of s. 1 (1) (d) and (2) (c). Interpreted in accordance with its strict wording, the latter sub-section applies to British and foreign nationals alike, and, unless some principle to the contrary can be established, I should so construe it. If I am right in this, an invocation of the comity of nations is irrelevant. If the meaning of an Act of Parliament is

ambiguous, that doctrine may be prayed in aid, but, where an English statute enacts a provision in plain terms, no such principle applies. Any foreign nation of which the person affected is a member, or with whom such person is domiciled, is free to disregard the provisions of the English enactment, but the person concerned cannot himself take exception, though it may be he will escape from compliance with its terms because he is out of the jurisdiction and cannot be reached by English process. The principle is, I think, accurately expressed in HALSBURY'S LAWS OF ENGLAND, Halsham ed., vol. 31, p. 509, paras. 658, 659:

"658. There is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations. On the principles already stated, however, this presumption must give way before an intention clearly expressed. 659. Statutes are to be interpreted, provided that their language admits, so as not to be inconsistent with the comity of nations. International law, however, being mainly conventional, can, it seems, only be administered by the courts when it forms part of the law of this country. If, therefore, statutory enactments are clearly inconsistent with international law, they must be so construed, whatever the effect upon the rights of aliens not within the jurisdiction may be."

The observations of the EARL OF HALSBURY, L.C., in *Cooke v. Vogeler* (*Charles A.*) Co. (1) ([1901] A.C. 107) are to the same effect.

In considering the authorities, it is not, I think, necessary to refer to any case preceding *Ex p. Crispin, Re Crispin* (2), but before that and the succeeding cases are dealt with, and before the statements contained in them are appraised, it is essential to bear in mind what the relevant statutory provisions were at the time when they were decided. In *Crispin's* case (2), the statute applicable was the Bankruptcy Act, 1869, and that case in terms decided only that "an alien non-trader domiciled abroad who contracts debts in England cannot be made a bankrupt upon an act of bankruptcy committed abroad." In the course of his judgment, however, MELLISH, L.J., laid down (8 Ch. App. 380) three considerations as supporting the conclusion at which he had arrived. The first two referred to wording which is similar to that which is now to be found in s. 1 (1) (a), (b) and (d) of the present Act. Paragraph (a), he says, is clearly intended to relate to a conveyance which is to operate according to English law; para. (b) clearly means fraudulent by the law of England; and para. (d) implies that the person who remains out of England has his home or place of business in England and cannot reasonably be held to apply to the case of a foreigner remaining in his own home. In ascertaining the effect of this case, however, it has to be borne in mind that the Act of 1869 contained no definition of the word "debtor," and the court, being unable to find any intermediate meaning for that word between any debtor, whatever his nationality or domicile, who commits an act of bankruptcy anywhere and a debtor who commits an act of bankruptcy in this country or is otherwise subject to the law of this country, chose the latter. The act of bankruptcy alleged was the going or remaining out of England with intent to defeat or delay creditors, and the head-note is, I think, accurate in saying (*ibid.*, 374):

"An alien non-trader domiciled abroad, who contracts debts in England, is liable to be made a bankrupt under the Bankruptcy Act, 1869, if he commits an act of bankruptcy in England, although he may have left England before the petition for adjudication is presented. But he cannot be made a bankrupt upon an alleged act of bankruptcy committed abroad."

This language, indeed, but repeats the observations of the court (*ibid.*, 379).

*Ex p. Blain* (3) was also decided under the Act of 1869, and in it the court held (i) that an act of bankruptcy must be a personal act or default and cannot be committed through an agent nor by a firm as such, and (ii) that to use the words of BRETT, L.J. (12 Ch.D. 528):



"... upon the ground of the limited power of the legislature of England to legislate, all the authorities have held that it is necessary that the act of bankruptcy should have been committed in England, if the person against whom the statute is invoked is a foreigner who is not domiciled in England."

In that case, the persons against whom the petition was presented, and by order discharged, were Chilean subjects who had never been in this country, though they were members of a firm carrying on business here. Undoubtedly, the subsequent Bankruptcy Acts have altered the first principle decided; whether they have altered the second is the matter for your Lordships' consideration.

The Bankruptcy Act, 1883, like the Act of 1869, contains no definition of debtor, though it increases the number of acts which are acts of bankruptcy. It does, however, contain a fresh section—s. 6—which enacts that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless—s. 6 (1) (d)—the debtor is domiciled in England or, within a year before the date of the presentation of the petition, he ordinarily resided in or had a dwelling-house or place of business in England. In *Ex p. Pearson* (4) an American citizen who was resident in America but was said to have carried on business in England within a year was served with a bankruptcy notice in America and it was sought to make him bankrupt thereon. The court held that s. 6 (1) (d) made no difference in law—it did not enlarge the class of debtors but only limited the cases in which a bankruptcy petition could be presented. At the same time it affirmed the principle laid down in *Ex p. Blain* (3), FRY, L.J., saying ([1892] 2 Q.B. 268):

"... I can entertain no doubt that s. 4 of the Act of 1883 relates only to debtors who are subject, either by birth and natural allegiance or by temporary residence, to the English law."

*Cooke v. Vogeler (Charles A.) Co.* (1) raised a somewhat different question. In that case, two American subjects resided and carried on business in America, but they also carried on a branch of their business in this country, and had assets here. In December, 1899, they executed an assignment of all their property to their manager in America in trust to pay their debts. This was said to be an act of bankruptcy under s. 4 (1) (a) of the Act of 1883, which is in the same terms as s. 1 (1) (a) of the Act of 1914. They had, it was argued, "in England or elsewhere [made] a conveyance ... of [their] property to a trustee ... for the benefit of [their] creditors generally." The contention failed: LORD HALSBURY said ([1901] A.C. 108):

"The words 'debtor' and 'creditor' certainly cannot be sufficient to give jurisdiction to the English Court of Bankruptcy, because if unlimited they would give jurisdiction all over the world in respect of debts, petitions, or acts of bankruptcy committed anywhere ... Once it is admitted that a limit must be placed upon those words, it must follow that the limit must be 'debtor' and 'creditor' respectively who are subject to the jurisdiction of the English bankruptcy law ... The whole argument, I think, depended upon the generality of the word 'debtor'."

LORD DAVEY, who also spoke, affirmed the decision in *Ex p. Pearson* (4) to the effect that s. 6 was a limiting and not an enlarging section, and had not altered the law in this respect.

My Lords, in these cases no question arose as to the effect of the change in the law brought about by the description of debtor which was inserted for the first time in the Bankruptcy and Deeds of Arrangement Act, 1913, s. 8, and repeated in s. 1 (2) of the Act of 1914, but some discussion as to its effect took place in 1936 in *Re Debtors* (5). The problem in that case was the same as that in *Vogeler's* case (1). Two American citizens carried on a financial business in partnership in a number of foreign cities including London and Paris, the London business being managed by an Englishman. In 1935, the London

business was wound-up, and its assets were applied, so far as they went, in settlement of English claims. At this time both partners were living in America, and in August of that year executed in the State of New York an assignment of their property to trustees for the benefit of their creditors, an assignment which in the case of one partner comprised the whole of his property. Against that partner, the petitioning creditor relied on the execution of the assignment as an act of bankruptcy. The Court of Appeal, following *Vogeler's* case (1), held that an assignment executed abroad by a foreign national, not domiciled or resident in England, did not constitute an act of bankruptcy unless it was intended to operate in accordance with English law. The court considered itself bound by the decision in *Vogeler's* case (1) in spite of the fact that the Act of 1914 had added a definition of or additional meaning to the word "debtor." In the opinion of the members of the Court of Appeal, *Vogeler's* case (1) was decided on two grounds—(i) that the person petitioned against was not a debtor, and (ii) that the assignment was not an act of bankruptcy. As regards the first point, the court were inclined to think that the provisions of the Act of 1914 had disposed of the difficulty, and that the American gentleman who was petitioned against was a debtor, but, in their opinion, the House of Lords had also decided that a deed of assignment or conveyance executed by a domiciled foreigner in his own country is not an act of bankruptcy within the meaning of the Bankruptcy Acts if it is to operate according to the law of the foreign country in which it is made.

My Lords, whatever view one may take of this decision, it has no direct bearing on the question now under consideration. It is a decision on the terms of s. 1 (1) (a) not s. 1 (1) (d), and deals with the limitation to be placed on the meaning of the word "conveyance," not with the width of that class of persons who are included in the word "debtor." The appellant, however, relies on the fact that the provisions of s. 1 (2) are not definitive, *i.e.*, they do not say what a debtor is, but merely add a fresh type or fresh types to those who have been held in law to constitute the category of debtors, and therefore leave it still necessary to put some limit on so wide a class. Let me assume then, without expressing any opinion as to the validity of the contention, that the sub-section should read: "In addition to one who is already subject to the English bankruptcy law, the word debtor shall also embrace a non-British subject who, at the time when the act of bankruptcy was committed, was carrying on business in England." On this wording, if the appellant was carrying on business in England when he failed to pay his debt to the Crown, he would, *prima facie*, be a debtor since, as a result of the wording of the section, it is immaterial that he was not a British subject, and from the terms of para. (b) it is clear that residence is only one of four alternative requisites which constitute a debtor within the meaning of the Act—residence may be a factor which brings him within that class, but it is not a necessary element. Whatever limitation may formerly have been put on the meaning of the word "debtor," a wider sense has now been given to it. It includes not only persons who were in the past subject to the English bankruptcy law, but a new class consisting of persons who are not British subjects or domiciled in this country, but carried on business in England at the time when the act of bankruptcy was committed. Whether *Re Debtors* (5) was rightly decided or not, one still has to construe sub-s. (1) (d), and I find it difficult to see what bearing a narrowed construction of the word "conveyance" in s. 1 (1) (a) has on the width of the class of debtors who can commit the act of bankruptcy defined in s. 1 (1) (d). As LORD GREENE, M.R., points out ([1948] 2 All E.R. 536), an act within sub-s. (1) (d) can only be committed by someone abroad. That person must, of course, have been carrying on business in England within three months of the act of bankruptcy alleged, and the factors needed to fulfil this condition will require analysis at a later stage, but, once it is established that these requirements are fulfilled, the sub-section declares in terms that it does

not matter whether the person concerned is a British subject or not. He is a debtor provided he fulfils any one of the four conditions stipulated for in the sub-section. In seeking to say that the provisions are confined to a British national or British domiciled person or to a case where the act of bankruptcy is committed in this country the appellant seems to me to give the go-by to the words "whether a British subject or not," and I do not understand what  
 A extension of the law he suggests to have been intended by them unless his contention is that they apply to some of the acts of bankruptcy set out above, but not to all—at any rate not to the one relied on in this case. I cannot find that the wording of the Act makes any such differentiation between what is required to constitute one category of those whom the present Act declares to be included in the class of debtors and another, and I can see no reason for its  
 B implication.

My Lords, out of respect for a strenuous argument presented to your Lordships, I have dealt at some length with this aspect of the case, but in the end I find myself coming back to the judgment of the MASTER OF THE ROLLS and find myself in complete agreement with its expression and substance. Like him I think the point is disposed of if one reads the relevant words of the statute in  
 C their appropriate position. I repeat them as a convenient method of winding up the view I hold on this question. Section 1 (1) (d) will then run: "Any person, whether a British subject or not, who at the time when any act of bankruptcy was done by him was carrying on business in England commits an act of bankruptcy if, with intent to defeat or delay his creditors, being out of England, he remains out of England." So read, I find it impossible to add as a limitation  
 D the provision that no foreigner is hit by the Act unless he in some way owes allegiance to the law of England, or the act has been committed in this country. To adopt this construction is not to limit the meaning of the wording of the section but to contradict it.

The further argument, however, still remains open to the appellant that he was not carrying on business in England within three months of the presentation  
 E of the petition, and, therefore, was not a debtor within the meaning of the Act. In a sense it is true that the appellant was not actively carrying on business within three months of the presentation of the petition, but there is a series of cases beginning with *Re Dagnall* (6) and ending with *Re Reynolds* (7) which in unbroken sequence have decided that trading does not cease when, as the expression is, "the shutters are put up," but that it continues until the sums  
 F due are collected and all debts paid. It is true that all the decisions have been given in respect of married women's trading and that a distinction has been made between the earlier Acts, where the expression was "as a trader," and the later, where the phrase "carrying on trade" is found, but it is the later, not the earlier, phrase which has been adopted in the Act of 1914. It was suggested on behalf of the appellant that the decisions had application to married women  
 G only, because the wording was first used in the Married Women's Property Act, 1882, and transferred therefrom to the Bankruptcy and Deeds of Arrangement Act, 1913, and thence to the present Act. I cannot follow why the same wording should have one significance when employed of married women and another in the case of all other persons engaged in trade. More particularly, I think that the meaning placed on the words in the cases referred to must  
 H be followed when it is remembered that two Acts of Parliament have been passed since *Re Dagnall* (6) and *Re Worsley* (8) were decided and that those cases have been followed and approved in *Re Clark* (9), *Re Allen* (10) and *Re Reynolds* (7). In my opinion, those cases were rightly decided, and are conclusive of the present question.

There is, however, one further matter which requires consideration. In all the cases referred to the debts which were to be paid or collected were strictly trade debts, and it is maintained that in that respect they differ from the case



under appeal in that the debt claimed by the Crown to be due is in respect of excess profits tax, and that such a debt is not a trade debt but a sum due for taxes, and no more connected with the appellant's business than income tax or any other tax liability. Whatever else may be said about excess profits tax, however, it is imposed on the debtor because he has been trading, and I do not see any reason for confining trade debts to those incurred in buying or selling. *Re Allen* (10) shows that they extend to liabilities incurred in incidental matters which occur during the course of carrying on the trade, including a liability for careless driving of a servant resulting in an accident. In *Dagnall's* case (6) VAUGHAN WILLIAMS, J., said ([1896] 2 Q.B. 410):

"It seems to me that trading is not completed until you have performed all the obligations that the fact of trading imposed upon you"

and this language was quoted with approval by SWINFEN EADY, L.J., in *Re Reynolds* (7) ([1915] 2 K.B. 191). I think it is accurate, and that the payment of excess profits tax was one of the obligations imposed on the appellant by his trading. I would dismiss the appeal with costs.

**LORD NORMAND:** My Lords, I concur in the judgment of my noble and learned friend on the Woolsack.

**LORD MORTON OF HENRYTON:** My Lords, I concur.

**LORD REID:** My Lords, I concur.

**LORD RADCLIFFE:** My Lords, I have nothing to say in this appeal except that I agree that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors: *William Foux & Co.* (for the appellant); *Solicitor of Inland Revenue.*

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

## HOBSON v. BARTRAM AND SONS, LTD.

[COURT OF APPEAL (Tucker and Asquith, L.JJ., and Roxburgh, J.), January 25, 26, 1950.]

*Negligence—Ship—Invitee—Injury to employee of independent contractor during ship's trial—Ship under command of employee of shipbuilders—Negligence of purchasers' servants on board—Common interest of shipbuilders and purchasers in success of trial—Control of purchasers' servants by shipbuilders' employee—Liability of shipbuilders.*

The plaintiff was employed by a company which was engaged by the defendants to instal refrigerating machinery in a ship which they (the defendants) were building for the Argentine government. When the ship was taken on its trial at sea the plaintiff was invited by the defendants to accompany it to complete the work which he was doing. On the trial, the defendants' general manager was in charge, and the ship was worked by a crew provided by the defendants. In addition, there was an Argentine crew on board, but their only purpose was to observe the ship's performance prior to it being accepted by the purchasers. On Oct. 1, 1947, the plaintiff was working near a hatchway, which was battened down, the place being lighted by a lamp. During the plaintiff's temporary absence, the hatch was opened and the lamp removed by members of the Argentine crew who wished to examine the hold. On his return to work the plaintiff fell down

the hatchway and was injured. On a claim by the plaintiff against the defendants for damages for negligence,

HELD: the fact that there was a common interest between the defendants and the purchasers in the inspection of the hold was not sufficient to make the Argentine crew, who were the servants of the purchasers, the agents of the defendants; the fact that the defendants' manager (who was in the position of captain) necessarily had control over all the acts of all persons in the ship did not make those persons his agents for all purposes; and, there being no evidence that the defendants had delegated any duties to any member of the Argentine crew, they (the defendants) were not liable for the injury caused by the Argentine seamen's negligent acts.

Case referred to:

(1) *Woodward v. Mayor of Hastings*, [1944] 2 All E.R. 565; [1945] K.B. 174; 114 L.J.K.B. 211; 172 L.T. 16; 109 J.P. 41; 2nd Digest Supp.

APPEAL by the defendants from an order of OLIVER, J., made on Oct. 17, 1949, at Newcastle Autumn Assizes, whereby he awarded the plaintiff £3,745 16s. 4d. damages for personal injuries.

The plaintiff, who was a plumber's mate engaged in the installation of refrigerating machinery, was injured by falling down a hatchway during the trial at sea of a ship being built by the defendants for sale to the Argentine government. The hatchway had been left open and unlighted by certain Argentine sailors, who were on board to observe the ship's performance, but were taking no part in the working of the ship. OLIVER, J., held that for the purpose of the ship's trial the sailors were the agents of the defendants, thus making the latter vicariously liable to the plaintiff for the injury. The Court of Appeal now allowed the appeal.

*Beney, K.C.*, and *J. Charlesworth* for the defendants.

*Harvey Robson* for the plaintiff.

TUCKER, L.J.: This is an appeal by the defendants from an order of OLIVER, J., made at the Newcastle Autumn Assizes in which he awarded the plaintiff £3,745 16s. 4d. damages for personal injuries.

The plaintiff was a plumber's mate in the employment of J. E. Hall, Ltd., who were sub-contractors for the defendants, Bartram & Sons, Ltd., in connection with certain work on the Rio Chico, a cargo vessel of some ten thousand tons, which the defendants were building for the Argentine government. J. E. Hall, Ltd., were putting refrigerating machinery into the ship. When the time came for the ship's sea trial, the work of installing the refrigerating machinery was not completed, and the plaintiff and some other employees of J. E. Hall, Ltd., were invited to join the ship during the trial to enable them to complete the work. The plaintiff was, accordingly, an invitee in the ship and it is conceded that the defendants were the occupiers of the ship.

The contract between the Argentine government and the defendants provided, by cl. 3:

"The vessel, including engines, boilers, machinery outfit and equipment as she is constructed, and all materials, wherever situated, appropriated to this contract shall immediately after payment of the first instalment, as the work proceeds, become the property of the purchasers, and shall not be within the ownership or disposition of the builders; but the builders shall at all times have a lien thereon for any unpaid purchase money and interest thereon, and for their charges for any additions, alterations or extra work."

The contract provided for the payment of the purchase price by instalments, the balance to be paid when the ship was delivered or on the handing over of the builders' certificate, whichever should be the earlier. Clause 9 of the contract provided:

"In the event of a sea trial trip being carried out in accordance with cl. 6 to purchasers' account the engine-builders, for the purpose of such trial, shall supply the attendants, fuel and engine consumable stores for the propelling machinery. The builders shall provide pilotage and towage, and the purchasers shall provide the crew necessary for the safe handling and navigation of the vessel, whilst proceeding to or from and during the trial."

The engine builders there referred to are defined in cl. 1 of the contract as being the North-Eastern Marine Engineering Co. (1933) Ltd., of Sunderland, who are not parties to this contract. It is, however, doubtful whether the provisions of cl. 9 provide for what is to happen in the event of a sea trial trip being carried out in accordance with cl. 6 whereby the purchasers have to provide the crew for the safe handling and navigation of the vessel, because the wording of cl. 6 in the present contract was different from that which formerly prevailed in this form of contract. Clause 6 used to provide "the total expenses of a sea trial trip, if available, will be extra to purchasers' account." Those words in the contract between the parties have been omitted, and, accordingly, it is very doubtful whether the words in cl. 9 are applicable. On the evidence and on the finding of the learned judge it appears that, whatever the obligation of the purchasers may have been under the contract, they did not, in fact, supply the crew for the navigation and working of this vessel. The learned judge's finding on that matter, which is not disputed, was as follows:

"There was an Argentine crew with officers on board, but they were there, not to work the ship, but to observe her performance during the trials preparatory to her being accepted or otherwise by the buyers, the Argentine government. The ship was being worked by the defendants' sailor crew from the shipyard and other tradesmen were aboard to stand by in case of breakdown."

On Oct. 1, 1947, the plaintiff was working on the installation of the refrigeration machinery in a position in the 'tween deck adjacent to a hatchway leading to a hold. When he left where he was working to have his lunch there was a lamp which lit up the place, the hatch cover was battened down, and everything was safe and in order. The plaintiff had to walk across the hatch cover when going to his lunch. When he came back, the lamp had been removed, the hatch cover was off, no guard rope or rail had been put round the open space, and he fell down the hatchway without any negligence on his part, suffering serious injuries. In those circumstances he brings this action against the defendants. He claims against them for breach of the duty owed to an invitee by an invitor. The learned judge has found as a fact that this accident was brought about by some of the Argentine seamen moving the light, taking off the hatch, opening up the hatchway, and going down to examine the hold. The learned judge found, further, that, unless these Argentine sailors are to be regarded as the agents of the defendants, the defendants were not in breach of any duty owed by them as invitores because they had not been guilty of negligence. They had not failed to take reasonable care to have the premises reasonably safe for the invitee. They were unaware that the hatch covers had been opened and removed. If the Argentine sailors were their agents, however, then the defendants were liable for their agents' acts, and the knowledge of the sailors would be attributed to the defendants.

The whole of this case turns on the question whether the plaintiff has proved that these Argentine sailors were, in the circumstances I have outlined, the agents of the defendants. The evidence showed that the Argentine government had put on board a captain, thirty-eight officers, six engineers, a wireless operator, eight petty officers, eight stewards, ten motormen, and ten seamen. The defendants' general manager was on board and there was a pilot. The general manager was, no doubt, in the equivalent position of a captain of the ship. He



had complete charge of her, but the defendants also had a crew of ten seamen who were attending to the driving of the vessel. The learned judge said in giving a preliminary judgment:

"On looking at this case, I have come to the conclusion that, on the footing of agency, the defendants, for the purpose of this ship's trial were, by their manager, in control of the foreign crew, and, on that footing, although the manager knew nothing about it, nevertheless, the foreign crew vicariously make the defendants liable."

After an interval, he delivered a more detailed judgment, and, dealing with the question of agency, he says:

"Turning once more to the question of agency, the situation to be examined is the position of the Argentine crew *qua* the defendants during the trial, not at any other time. Considering the number of ships which must have undergone similar trials during the last century or so, it seems rather unusual that there should be no authority establishing the relationship between the buyer's crew and the builders during such a trial as this, but none has been discovered. I have come to the conclusion that, inasmuch as both the defendants and the Argentine government were equally interested in the success of the trials, or otherwise, the Argentine crew were, *pro tem*, under the orders of the defendants, and their examination of all parts of the ship was an integral part of the trial and they were agents of the defendants when they went below to make their examination."

Earlier he had said:

"It has been conceded on the part of the shipbuilders, the defendants, that the plaintiff was an invitee and also that the defendants were at the time occupiers of the premises. It was contended, in the circumstances, that the fact that the hatch cover was removed did not involve the defendants in liability, inasmuch as the concealed danger was not known to their manager, nor could he with reasonable diligence have discovered it. That proposition is undoubtedly sound, unless, in law, at the time the Argentineos committed their act of negligence and folly, they were the agents of the defendants. I have come to the conclusion—though not without some hesitation—that they were their agents."

I am of a contrary opinion. It seems to me that there is nothing in this case to show that the Argentine sailors were at any time during this trial the agents of the defendants. They were there on behalf of the Argentine government, who were the intending purchasers of the ship, to satisfy themselves and their government with regard to the performance of the vessel before they took delivery of it. They were in exactly the same position as the agent of any purchaser who goes to inspect goods before the actual purchase is completed. It is true that there is a common interest in the success of the trial between the builders of the ship and the purchaser, but that is not sufficient to make the servants of the purchaser the agents or servants of the builders. It is true that the defendants' manager, who was in charge of the ship, admitted that he had a control for certain purposes over these men. Every captain of a ship (and this man was in the position of a captain) necessarily has control in a certain sense over all the acts of all the persons in a ship, but that does not make them for all purposes his agents. It is not necessary to consider what is the liability of the shipowner when the captain gives an order to some person in the ship, who is in no sense his agent or servant, to do something or refrain from doing something and somebody is injured as a result of the negligent way in which that order is obeyed. That is not this case. These men were not going down into the hold pursuant to any order given by the manager, nor were they going down into the hold for the purpose of the business of the manager or his employers,

although, no doubt, the learned judge has found that there was a common interest between the parties in the result of the inspection of the hold. That is another matter altogether.

The passages in the evidence relied on by counsel for the plaintiff with regard to control, appear in the cross-examination of Mr. Mellanby, the manager, where he was asked:

"(Q.)—And the Argentines you say (and, no doubt, quite rightly) had no control over your men? A

(A.)—Yes, that is correct.

(Q.)—And had you control over them? I suppose you could direct them where to go on the ship.

(A.)—Yes.

(OLIVER, J.): If you had seen them doing something you disapproved of, you would have stopped them. B

(A.)—Yes, unless it was an urgent requirement, then I would not stop them. Otherwise I would have approached their officers and they would have had to obey if I had ordered them to do something or not to do something in the ship.

(Q.)—You said they had no business to go below and if you had seen them you would have stopped them. C

(A.)—I would have stopped them because it was obvious that the hatch should be covered to prevent such an accident."

In my view, those answers fall far short of establishing that these Argentine sailors were either for all purposes during the trial the agents of the builders or that they were their agents in connection with the particular operation which they were carrying on prior to the plaintiff's accident. It is not a matter which permits of any elaboration. Counsel for the plaintiff has referred to *Woodward v. Mayor of Hastings* (1). The facts in that case were entirely different from the present. DU PARCQ, L.J., delivering the judgment of the court said ([1944] 2 All E.R. 567): D

"Even if the cleaner [who was cleaning some snow covered steps on school premises and whose negligence had caused injury to a pupil of the school] was not temporarily under the control of the defendants, and thus for the time being their servant, they are liable on the ground that they delegated to her the performance of the duty which was incumbent on them." E

He held that in those circumstances the defendants, the school governors, were liable. In the present case there is no evidence that the defendants had ever delegated any duties, the performance of which lay on them, to the Argentine sailors. For these reasons this appeal must succeed. F

ASQUITH, L.J.: I entirely agree.

ROXBURGH, J.: I also agree. G

*Appeal allowed with costs here and below.*

Solicitors: *Taylor, Willcocks & Co.*, agents for *Nesbitt, Cook & Carter*, Sunderland (for the defendants); *Iliffe, Sweet & Co.*, agents for *Winskill & Walker*, South Shields (for the plaintiff).

[Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

## Re SECHIARI (deceased). ARGENTI v. SECHIARI.

[CHANCERY DIVISION (Romer, J.), February 7, 1950.]

*Company—Capital profits dividend—Capital or income—Assets of company acquired by State—Profit on sale—Reconstruction of company as investment and holding company—Receipt of dividend by settlement trustees.*

A *Settlement—Capital or income—Tenant for life and remaindermen—Capital profits dividend—Profit on sale of company's assets—Company to continue as investment and holding company.*

By her will the testatrix, who died in 1924, settled her residuary estate which included £4,000 ordinary stock of a company which had considerable interests in passenger road transport and road haulage undertakings. As a result of the Transport Act, 1947, these interests were sold by the company to the British Transport Commission for the sum of £24,800,000, which was satisfied by an allotment to the company of British Transport three per cent. guaranteed stock at 101 per cent. At an extraordinary general meeting of the company its memorandum was altered so that the company then became entirely an investment and holding company, and, by an ordinary resolution at the same meeting, the company resolved to pay a special capital profits dividend on its ordinary stock by distributing to each stockholder £5 British Transport stock for each £1 of the company's ordinary stock held by him. As a result of this resolution, £20,000 British Transport stock was received by the trustees of the testatrix's residuary trust fund, and the question to be determined was whether this sum was to be treated as income or as an accretion to the capital of the fund.

D HELD: as a limited company not in liquidation could make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital, the sum of British Transport stock was to be treated as income of the testatrix's residuary trust fund.

*Hill (R.A.) v. Permanent Trustee Co. of New South Wales* ([1930] A.C. 720), *applied*.

E [As to DISTRIBUTION BY COMPANY OF PROFITS AS DIVIDENDS OR CAPITAL, see HALSBURY, Hailsham Edn., Vol. 29, pp. 647-650, paras. 929, 930; and FOR CASES, see DIGEST, Vol. 40, pp. 662-666, Nos. 1999-2042, and Supplement.]

Case referred to:

F (1) *Hill (R.A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; 144 L.T. 65; *sub nom.*, *Re Hill (Richard)*, *Hill v. Permanent Trustee Co. of New South Wales*, 99 L.J.P.C. 191; Digest Supp.

ADJOURNED SUMMONS to determine whether a sum of £20,000 British Transport stock, received by the trustees of the testatrix's will as capital profits dividend on £4,000 ordinary stock in Thomas Tilling, Ltd., on the acquirement of that company's interests in road transport undertakings by the British Transport Commission, which stock formed part of the testatrix's residuary trust fund, was to be treated as income or an accretion to the capital of the trust fund. ROMER, J., held that it was income. The facts appear in the judgment.

*E. Irvine Goulding* for the plaintiff (one of the trustees).

*Wilfrid Hunt* for the tenants for life.

*Charles Russell, K.C.*, and *Winterbotham* for the remaindermen.

H ROMER, J.: The question raised by this summons is whether, on the true construction of the will of the testatrix and in the events which have happened, a certain sum of £20,000 British Transport three per cent. guaranteed stock 1968/73, which has been received by the trustees of the testatrix's will as a capital profits dividend on £4,000 ordinary stock of Thomas Tilling, Ltd., and forms part of the residuary trust fund of the testatrix, ought to be treated as income of such fund, or as an accretion to the capital of the fund, or how other-

*Applied. Re KLEINWORT'S SETTLEMENT TRUSTS. [1951] 2 All E.R. 328.*  
*Distinguished. Re WINDERS' WILL. [1951] 2 All E.R. 362.*  
*Followed. In re KLEINWORT'S SETTLEMENTS. [1951] 1 Ch. 866.*



wise the same ought to be dealt with. I am not proposing to deliver judgment at any length in this case, because the point, so far as this court is concerned, is, in my view, entirely covered by binding authority.

The testatrix, who died in February, 1924, made her will in 1907, giving her residuary estate to her trustees on trust for all her children in equal shares, and directing the trustees to settle each child's share on trust to pay the income to the child for life with remainder to that child's issue. She had six children, all of whom survived her, and there are three grandchildren, who are interested in the capital of the trust fund. Among the assets constituting the residuary trust fund, there was a sum of £4,000 ordinary stock of Thomas Tilling, Ltd. I think I may take the relevant facts from the affidavit which has been sworn in support of the summons:

"The company was the owner of substantial holdings of shares in omnibus companies and of other interests in passenger road transport and road haulage undertakings affected by the Transport Act, 1947. Since the passing of that Act the company has been re-organised by the carrying out of a number of transactions, which may be summarised as follows. The company sold all its interests in passenger road transport and road haulage undertakings affected by the Transport Act, 1947, to the British Transport Commission set up by that Act, under an agreement negotiated between the company and the commission. The consideration for such sale was £24,800,000, which was satisfied by the allotment to the company of British Transport three per cent. guaranteed stock 1968/73, at a price of 101 per cent. The company distributed £20,600,000 of the said British Transport stock as a special capital profits dividend on its ordinary stock, each ordinary stockholder on the register on Feb. 21, 1949, receiving £5 British Transport stock for every £1 ordinary stock of the company held by him. At the same general meeting of the company which declared the said capital profits dividend, the memorandum of association of the company was altered, and new articles of association were adopted, with a view to facilitating the co-ordination by the company of branches of business unconnected with public transport, in particular investment business and building."

There are also exhibited to the affidavit certain documents, which were circulated by the company to its ordinary stockholders, explaining the position and telling them that the company thenceforward would be entirely an investment and holding company and that the transference of the British Transport stock as capital profits dividend to holders of the company's ordinary stock would be free of tax and would, accordingly, commend itself to them. The resolution that was passed regarding the relevant matter was an ordinary resolution, put to the members at an extraordinary general meeting of the company on Mar. 17, 1949, and unanimously carried:

"That a special capital profits dividend on the ordinary stock of the company of £20,806,000 payable out of the profit realised by the company on the recent sale of part of its undertaking to the British Transport Commission be and the same is hereby declared and that such dividend be payable to the ordinary stockholders on the register on Feb. 21, 1949, in proportion to their holdings of ordinary stock and be paid and satisfied by the distribution amongst them as at Apr. 1, 1949, of £20,600,000 British Transport three per cent. guaranteed stock 1968/73 (part of the consideration received by the company from the British Transport Commission for the sale above referred to) taken at its issued price of 101 per cent., being in the proportion of £5 British Transport stock for every £1 ordinary stock of the company held by them."

It was in pursuance of that resolution that the trustees of the testatrix's will received this £20,000 British Transport stock now in question.

The principle which is decisive of the question is to be found in the judgment of the Judicial Committee of the Privy Council delivered by LORD RUSSELL OF KILLOWEN in *Hill v. Permanent Trustee Co. of New South Wales* (1). LORD RUSSELL enunciated ([1930] A.C. 730) five principles which are directed to the position of beneficiaries of a settled trust fund which comprises shares in a company in regard to the distribution by the company of moneys to its shareholders, and I think, for present purposes, that the second of these principles is the most important. LORD RUSSELL OF KILLOWEN said (*ibid.*, 731):

“(2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called ‘dividend’ or ‘bonus,’ or any other name, it still must remain a payment on division of profits.”

Then the third principle is:

“(3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate.”

Those observations, coupled with the rest of the judgment of the Board in that case, completely cover the present position so far as this court is concerned, as counsel for the remaindermen, in presenting the case, was disposed to concede. Although that decision, as a decision of the Privy Council, is not strictly binding on this court, it formulates in an extremely clear way, as one would expect from its author, the principles applied, both before and since, by the High Court in this country, which are binding on me. I will, accordingly, apply them, and I will make a declaration that this sum of British Transport stock ought to be treated as income of the trust fund, but that declaration, which is limited to being a declaration on the construction of the will and in the events which have happened, will leave the way open to such steps as have been suggested as possible by counsel for the remaindermen. The declaration will, accordingly, be qualified by a proper provision somewhat resembling the one which was inserted by the Privy Council in *Hill v. Permanent Trustee Co. of New South Wales* (1).

*Declaration accordingly, but the order to be without prejudice to any question whether, in the circumstances, in the administration of the trust, the court has, or would exercise, any jurisdiction to apportion the dividend on equitable principles between income and capital.*

Solicitors: Janson, Cobb, Pearson & Co. (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

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## CHARLES RICKARDS, LTD. v. OPPENHEIM.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.J.J.), January 12, 13, 16, 1950.]

*Contract—Time of performance—Sale of goods—Work and labour—Contract to build motor car body—Time of the essence—Original condition in regard to time waived—Subsequent notice fixing time for completion—Reasonableness—Conduct amounting to waiver.*

By a contract made between the plaintiffs and O., the plaintiffs agreed to supply a motor car chassis to O. and to have a body built on to it within seven months, time being of the essence of the contract. The plaintiffs gave the work of building the body to sub-contractors and authorised them to accept instructions in regard to the work direct from O. The sub-contractors failed to complete the work within the time stipulated, but O. waived the original condition in regard to time by pressing for delivery to be made on successive later dates. Eventually, on June 28, 1948 (about three months after the date originally fixed for delivery), the sub-contractors' manager informed O. that the car would be ready in two weeks' time, and on the following day O. gave a written notice to the sub-contractors stating that, unless he received the car within four weeks, he would be unable to accept delivery. The sub-contractors sent the notice on to the plaintiffs after eight or nine days. The car was not delivered within four weeks and was not completed until Oct. 18, 1948, when O. refused delivery. The plaintiffs brought an action against him claiming the price of the body-work, and he counterclaimed for the chassis or its value.

HELD: (i) as there was an initial stipulation making time of the essence of the contract, O., after waiving that initial stipulation, was entitled to give a reasonable notice making time of the essence of the matter, whether the contract was for the sale of goods or for work and labour.

(ii) the reasonableness of the notice had to be judged at the time at which it was given, and it could not be held to be bad because, after it was given, there were unanticipated difficulties in making delivery.

*Observations of LORD PARKER OF WADDINGTON in Stickney v. Keeble ([1915] A.C. 419), followed.*

(iii) on the facts of the case, the notice of June 28, 1948, was reasonable, and it was a good notice to the plaintiffs, even though it was given by O. only to the sub-contractors.

(iv) waiver of the notice could be inferred only from conduct which showed an intention to affect the legal relations of the parties, and, therefore, O.'s failure to reply to a letter from the plaintiffs, written on July 16, 1948, in which they assumed that he would take delivery of the car at a later date, notwithstanding the notice of June 28, did not amount to a waiver of the notice, and O. was entitled to rescind the contract and to receive the chassis or be repaid its value.

[AS TO TIME OF PERFORMANCE OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 190-194, paras. 268-273, and Vol. 3, pp. 220-222, paras. 376-380; and FOR CASES, see DIGEST, Vol. 12, pp. 309-317, Nos. 2554-2621.]

Cases referred to:

- (1) *Hick v. Raymond & Reid*, [1893] A.C. 22; 62 L.J.Q.B. 98; 68 L.T. 175; 12 Digest 308, 2547.
- (2) *Plevins v. Downing*, (1876), 1 C.P.D. 220; 45 L.J.Q.B. 695; 35 L.T. 263; 40 J.P. 791; 12 Digest 357, 2968.
- (3) *Besseler, Waechter Glover & Co. v. South Derwent Coal Co., Ltd.*, [1937] 4 All E.R. 552; [1938] 1 K.B. 408; 107 L.J.K.B. 365; 158 L.T. 12; Digest Supp.



- (4) *Panoutsos v. Raymond Hadley Corpn. of New York*, [1917] 2 K.B. 473; 86 L.J.K.B. 1325; 117 L.T. 330; 12 Digest 434, 3516.
- (5) *Bruner v. Moore*, [1904] 1 Ch. 305; 73 L.J.Ch. 377; 89 L.T. 738; 12 Digest 79, 465.
- (6) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 2nd Digest Supp.
- (7) *Hartley v. Hyman*s, [1920] 3 K.B. 475; 90 L.J.K.B. 14; 124 L.T. 31; 12 Digest 357, 2969.
- (8) *Stickney v. Keeble*, [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664; 40 Digest 113, 912.
- (9) *Foot Clinics* (1943), *Ltd. v. Cooper's Gowns, Ltd.*, [1947] K.B. 506; [1947] L.J.R. 938; 177 L.T. 330; 2nd Digest Supp.
- (10) *Bird v. Hildage*, [1947] 2 All E.R. 7; [1948] 1 K.B. 91; [1948] L.J.R. 196; 177 L.T. 97; 2nd Digest Supp.

APPEAL by the plaintiffs, motor traders, from a decision of FINNEMORE, J., dated July 27, 1949, whereby he gave judgment for the defendant in an action claiming the price of a motor car body and on the defendant's counterclaim for the chassis or its value. By a contract between the parties, the defendant bought the chassis from the plaintiffs and ordered a body to be built within a stipulated time. The original stipulation in regard to time was waived by the defendant, but, some months later, he gave a notice requesting delivery within a stated time. The car was not delivered within the time stipulated by the notice, and the defendant cancelled the contract. The learned judge held that he was entitled to do so, and the Court of Appeal now dismissed the appeal from his decision. The facts appear in the judgment of DENNING, L.J.

*Eric Sachs, K.C.*, and *Gorst* for the plaintiffs.

*Levy, K.C.*, and *Faulks* for the defendant.

BUCKNILL, L.J.: I will ask DENNING, L.J., to give the first judgment of the court.

DENNING, L.J.: Early in 1947 the defendant, Mr. Oppenheim, wanted a new Rolls Royce car, and he placed an order in two parts with the plaintiffs, Charles Rickards, Ltd., who are motor car traders. He first ordered the chassis, a Rolls Royce Silver Wraith chassis, for estimated delivery in June, 1947, but he also wanted a body built on the chassis, and he particularly wanted to know the time within which that body could be made. The plaintiffs made inquiries of various firms for an estimated time for building a body on to the chassis. In July, 1947, Rolls Royce themselves estimated twenty-one months, and Park Ward at about the same time estimated fifteen months. Those times were too long for the defendant's satisfaction, so the plaintiffs obtained an estimate from Jones Brothers (Coachbuilders), Ltd., who said that they could do it within "six months or, at the most, seven months." Thereupon, the plaintiffs gave the same time to the defendant and he gave them the order for the body on that footing. The order was placed in July. The plaintiffs sub-contracted it and put out the work with Jones Brothers (Coachbuilders), Ltd. The actual time from which the six or seven months started is not precisely ascertained. The chassis was actually delivered to the sub-contractors on July 30, 1947, and, if that is taken as the date from which the time ran, the seven months would be up at the end of February, 1948, but the specification for the body work was not finally agreed until Aug. 20, 1947. If that date is taken, the latest time for delivery would be Mar. 20, 1948. Whichever date is taken, though, is immaterial, for the time was plainly exceeded. The body was not built on to the chassis by Mar. 20, nor, indeed, until many months later—not until Oct. 18, 1948, was the car completed.

Meanwhile, however, as from Mar. 20, 1948, at least, onwards, the defendant had been pressing for delivery. During the winter of 1947/8 he went to America,

and in the autumn of 1947, before he left, he told the plaintiffs that he hoped the car would be ready by the time he came back. He came back in March, and the car was not ready by Mar. 20, 1948. He could have cancelled the contract there and then, but he did not do so. By pressing for delivery he waived the stipulation as to time. He asked for delivery in time for Ascot, but he did not get it. He asked for delivery in time to take the car on his holiday abroad at the beginning of August, 1948. He did not get it. He was given promises from time to time for early delivery—not definite guarantees, but promises which were not fulfilled. These promises were made not so much by the plaintiffs as by the sub-contractors, but the defendant was well justified in dealing direct with the sub-contractors, as, not only were they actually doing the work, but, on Aug. 7, 1947, the plaintiffs had written to them telling them that it was in order for them to accept any instructions with regard to the body that were given by the defendant, and asking them to keep the plaintiffs *au fait* with the situation. It was, therefore, quite natural for the defendant to deal direct with the sub-contractors, to talk to them about the work, and to press them for delivery. He also pressed the plaintiffs for delivery, but they did not go further than to say that the car would be delivered as early as possible.

Eventually, not having got the car for Ascot and wanting it in time to take it abroad at the beginning of August, on June 28, 1948, the defendant saw Mr. Musk, the sub-contractors' manager, who told him that it would be ready in two weeks' time. On the next day the defendant wrote to the sub-contractors a letter on which much of this case turns. He sent it "For the attention of the managing director." It says:

"Further to my conversation with Mr. Musk to-day, I regret that I shall be unable, unless my plans change, to accept delivery of the Rolls you are making for me after July 25. For six months I have had a reservation to take a car abroad on Aug. 3 for my holiday and it would appear to me to be impossible for me to alter this date. I shall therefore have to buy another car."

He also asked in the letter whether there was any definite likelihood of receiving the car before July 25. A week later, about July 7, Mr. Musk intimated that the car would not even be ready for him to take abroad by Aug. 3. Thereupon the defendant bought elsewhere another car, a Rolls Bentley, and asked the plaintiffs to return the money which he had paid for the chassis—he was ready to let them keep the chassis and have the advantage of the work that had been done on the body. This request was followed by an interview on July 10 at which, according to the evidence of the plaintiffs, the defendant in effect waived his notice of cancellation and agreed that the plaintiffs should go on with the work and he would take the car later. The judge has negatived any such waiver on the facts, and I do not see any reason to differ from his finding. After that interview the plaintiffs, through the sub-contractors, completed the car. On Oct. 18, 1948, it was finished, but delivery was refused by the defendant. This action is now brought by the plaintiffs for the price of the body, and a counter-claim is made by the defendant claiming the return of the chassis or its value.

It is clear on the findings of the judge that there was an initial stipulation making time of the essence of the contract between the plaintiffs and the defendant, namely, that it was to be completed "in six, or, at the most, seven months." Counsel for the plaintiffs did not seek to disturb that finding—indeed, he could not successfully have done so—but he said that that stipulation was waived. His argument was that, the stipulated time having been waived, the time became at large, and that thereupon the plaintiffs' only obligation was to deliver within a reasonable time. He said that, in accordance with well-known authorities, "a reasonable time" meant a reasonable time in the circumstances as they actually existed, *i.e.*, that the plaintiffs would not exceed a reasonable

- time if they were prevented from delivering by causes outside their control, such as strikes or the impossibility of getting parts, and so forth, and that, on the evidence in this case, it could not be said that a reasonable time was in that sense exceeded. He cited the well-known words of LORD WATSON ([1893] A.C. 32, 33) in *Hick v. Raymond and Reid* (1) to support the view that in this case, on the evidence, a reasonable time had not been exceeded. If this had been
- A originally a contract without any stipulation in regard to time, and, therefore, with only the implication of reasonable time, it may be that the plaintiffs could have said that they had fulfilled the contract, but, in my opinion, the case is very different when there was an initial contract, making time of the essence, of "six or, at the most, seven months." I agree that that initial time was waived by reason of the requests for delivery which the defendant made after March,
- B 1948, and that, if delivery had been tendered in compliance with those requests, the defendant could not have refused to accept. Supposing, for instance, delivery had been tendered in April, May, or June, 1948, the defendant would have had no answer. It would be true that the plaintiffs could not aver and prove that they were ready and willing to deliver in accordance with the original contract. They would have had, in effect, to rely on the waiver almost as a cause of action.
- C At one time there would have been theoretical difficulties about their doing that. It would be said that there was no consideration, or, if the contract was for the sale of goods, that there was nothing in writing to support the variation. *Plevins v. Downing* (2), coupled with what was said in *Besseler, Waechter Glover & Co. v. South Derwent Coal Co., Ltd.* (3) gave rise to a good deal of difficulty on that score, but all those difficulties are swept away now. If the defendant, as
- D he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation in regard to time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he made a promise not to insist on his strict legal rights. That
- E promise was intended to be binding, intended to be acted on, and was, in fact, acted on. He cannot afterwards go back on it. That, I think, follows from *Panoutsos v. Raymond Hadley Corpn. of New York* (4), a decision of this court, and it was also anticipated in *Bruner v. Moore* (5). It is a particular application of the principle which I endeavoured to state in *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (6).
- F Therefore, if the matter stopped there, the plaintiffs could have said that, notwithstanding that more than seven months had elapsed, the defendant was bound to accept, but the matter does not stop there, because delivery was not given in compliance with the requests of the defendant. Time and time again the defendant pressed for delivery, time and time again he was assured that he would have early delivery, but he never got satisfaction, and eventually
- G at the end of June he gave notice saying that, unless the car was delivered by July 25, he would not accept it. The question thus arises whether he was entitled to give such a notice, making time of the essence, and that is the question which counsel for the plaintiffs has argued before us. He agrees that, if this is a contract for the sale of goods, the defendant could give such a notice. He accepted the statement of McCARDIE, J. ([1920] 3 K.B. 495), in *Hartley v. Hymans* (7), as
- H accurately stating the law in regard to the sale of goods, but he said that that statement did not apply to contracts for work and labour. He said that no notice making time of the essence could be given in regard to contracts for work and labour. The judge thought that the contract was one for the sale of goods, but, in my view, it is unnecessary to determine whether it was a contract for the sale of goods or a contract for work and labour, because, whichever it was, the defendant was entitled to give a notice bringing the matter to a head. It would be most unreasonable if, having been lenient and having waived the



initial expressed time, he should thereby have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment, he was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection to the suppliers is given by the requirement that the notice should be reasonable.

The next question, therefore, is: Was this a reasonable notice? Counsel for the plaintiffs argued that it was not. He said that a reasonable notice must give sufficient time for the work then outstanding to be completed, and that, on the evidence in this case, four weeks was not a reasonable time because it would, and did, in fact, require three and a half months to complete it. In my opinion, however, the words of LORD PARKER OF WADDINGTON in *Stickney v. Keeble* (8) apply to such a case as the present, just as much as they do to a contract for the sale of land. LORD PARKER said ([1915] A.C. 419):

"In considering whether the time so limited is a reasonable time the court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts . . ."

To that statement I would add, in the present case, the fact that the original contract made time of the essence. In this case, not only did the defendant press continually for delivery, not only was he given promises of speedy delivery, but, on the very day before he gave the notice, he was told by the sub-contractors' manager, who was in charge of the work, that it would be ready within two weeks. He then gave a four weeks' notice. The judge found that it was a reasonable notice and, in my judgment, there is no ground on which this court could in any way differ from that finding. The reasonableness of the notice must, of course, be judged at the time at which it is given. It cannot be held to be a bad notice because, after it is given, the suppliers find themselves in unanticipated difficulties in making delivery.

The notice of June 29, 1948, was, therefore, a perfectly good notice so as to make time of the essence of the contract, subject, however, to another point that counsel for the plaintiffs made. He said it was bad because it was given, not to the plaintiffs direct, but to the sub-contractors, and it would appear that the sub-contractors did not send it on to the plaintiffs for another eight or nine days. The answer to that argument is that the notice was given to the people who were actually doing the work, and the plaintiffs had, from the beginning, authorised the defendant to give instructions direct to the sub-contractors. This notice was, no doubt, important, and it would have been better for the defendant to have given it both to the plaintiffs and to the sub-contractors, but it seems to me that, in view of the authorisation in August, 1947, the fact that it was not given to the plaintiffs direct cannot make it a bad notice. In any event, the plaintiffs received it within eight or nine days, and, even if it was only received then, there was still more than a fortnight to go before July 25, and it would still be a reasonable notice. That point also, therefore, does not hold good.

There was yet one remaining point. Counsel for the plaintiffs said that, even accepting the notice of June 29 as a notice making time of the essence, nevertheless even that notice was afterwards waived by the defendant. On July 10, 1948, there was a discussion between the defendant, on the one hand, and Mr. Bates and Mr. Rickards, on the other, as to what was to be done about the car. Mr. Bates says that the defendant authorised the plaintiffs to go ahead with the work and promised to take delivery of the car after he came back and then decide whether they should sell it for him, whereas the defendant says that he only offered to do what he could to help them and that he suggested

their best course was to go on and complete it and sell it on their own account, not on his behalf, but in order to save any loss. The judge took the view that the defendant's memory about it was probably the more accurate, and I see no reason for taking a different view. This interview was followed on July 16 by a letter from the plaintiffs to the defendant in these terms:

A "In view of your comments during our conversation on this subject last week we assume that you are prepared to leave the order with [the sub-contractors] until you return from holiday, by which time the car should be ready for delivery. Every effort will be made on our part to expedite delivery, and we feel sure you appreciate our desire to settle this matter amicably."

B The defendant did not reply to that letter, and counsel for the plaintiffs says that the proper inference was that he assented to it. On this point I would say that to constitute waiver there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted on. The whole essence of waiver is that there must be an intention to affect the legal relations of the parties. If that cannot properly be inferred from the conduct, there is no waiver: see *Foot Clinics (1943), Ltd. v. Cooper's Gowns, Ltd.* (9) and *Bird v. Hildage* (10). In this case the conversation and the letter do not show any intention to affect the legal relations in the matter. They were only approaches with a view to settlement from which nothing concrete emerged. I agree, therefore, with the judge that nothing in them can really be said to amount to a waiver of the clearly expressed notice given on June 29, 1948.

C The case, therefore, comes down to this. There was a contract by the plaintiffs D to supply and fix a body on the chassis within six or seven months. They did not do it. The defendant waived that stipulation. For three months after the time had expired he pressed them for delivery, asking for it first for Ascot and then for his holiday abroad. But still they did not deliver it. Eventually at the end of June, being tired of waiting any longer, he gave a four weeks' notice and said: "At all events, if you do not supply it at the end of four weeks I must cancel," and he did cancel. I see no injustice to the plaintiffs in saying that that was a reasonable notice. Having originally stipulated for six to seven months, having waited eleven months, and still not getting delivery, the defendant was entitled to cancel the contract.

E On the counterclaim the judge has held that the chassis should be returned or its value paid. I assume that the plaintiffs will exercise their option of paying F for the chassis. They will then own the whole car, which they can sell for whatever they can realise. I cannot help sharing the regret of the judge that this car was not sold before and the proceeds used to meet the cost of the work, but we have only to deal with the strict legal rights of the parties. They are that the plaintiffs made a contract which they have not fulfilled and which the defendant G justifiably cancelled. I think that the learned judge was right and that this appeal should be dismissed.

H SINGLETON, L.J.: I am of the same opinion. I did not think I should add anything, but, perhaps, I ought to say a few words because a case such as this is of importance to the public as well as to the plaintiffs and to the defendant. This court is, of course, only concerned with the position as between the plaintiffs and the defendant. That position, it seems to me, falls to be determined on the facts, and on the facts, as found by the learned judge, the defendant was entitled to succeed on claim and on counterclaim. The defendant obtained a Rolls Royce chassis through the plaintiffs, and it was through them, and on their behalf that the sub-contract was made for the building of the body. It was found that the sub-contractors could give, or said they could give, much earlier delivery than other body builders who were in contemplation, and it was on that basis that the defendant and the plaintiffs decided that the sub-contractors should

build the body. The chassis was delivered in July, 1947, and the contract in regard to the building of the body was entered into about July 11, 1947. It was understood then—indeed, it was said—that the body should be completed in six to seven months. That did not take place. There were very many delays. In June, 1948, the defendant was told by someone in the employ of the sub-contractors, with whom he had been put in direct communication and relationship, that they could finish the body in two weeks' time. Thereupon he thought it right, in view of what had happened, to write to them the letter of June 29 to which DENNING, L.J., has referred in his judgment. That letter gave them virtually a month in which to complete the body. There was no answer to the letter, and the defendant spoke to the sub-contractors on the telephone and wrote to them again on July 7, 1948. Thereafter they answered and said that it was impossible to do that which he wished. The question that arises is: Was the notice which he gave a reasonable notice, or was the time which he allowed them for completion a reasonable time in the circumstances? The learned judge, in his judgment, said:

“He then, on June 29, called for the car within a month, namely, by July 25, which I think he was entitled to do, being a reasonable time in which to call for delivery of the car, which was then very considerably overdue.”

The evidence before the learned judge justified him in coming to that conclusion, and I do not think that this court has any right or duty to interfere with that finding.

Counsel for the plaintiffs, in his argument, raised a question whether the contract was a contract for goods sold and delivered or a contract for work and labour. He submitted that the learned judge was wrong in coming to the conclusion that this was a contract for goods sold and delivered, and that, if it was, on the other hand, a contract for work and labour done, the principle applied by the learned judge did not apply. I am not sure that I agree with the finding of the learned judge that this was a contract simply for the sale of goods, but I do not think that that matters. The law as to contract for the performance of work is stated in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 3, pp. 220-222. At p. 222, para. 380, the law is stated in this way, and I think it is applicable to this case in every respect:

“In cases where time has not been made of the essence of the contract, or where, although time originally was of the essence of the contract, the time so fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer has still a right by notice to fix a reasonable time for the completion of the work, and, in case the contractor does not complete by that time, to dismiss the contractor, just as a vendor would be entitled to rescind the contract in case of a contract for sale of land.”

As I have said, I do not think it matters whether this case was really a case of goods sold and delivered, or a case of a contract for work and labour to be done. If, in circumstances of this kind, the purchaser, or the one for whom the work is to be done, has no right to put an end to the contract if the goods are not delivered in reasonable time, or if the work is taking much too long a time, then, I think, the law is defective. The public point of view seems to me to be as follows, and the law ought to be sufficient to meet it, and I believe it is. If a person wants something done, or if he wants a particular article and agrees to buy it, and that which he has contracted to have done is not done within a reasonable time, or the article which he has bought is not delivered within a reasonable time, I think that he has the right, in the circumstances, to say: “Well, I will not have it unless you deliver it within a certain length of time”—and states a reasonable time. Great inconvenience may be caused by



the failure to comply with contracts, and, if there is no time stated, the delivery ought to be made, or the work ought to be done, within a reasonable time. I agree with the judgment which has been given to the effect that this appeal should be dismissed.

BUCKNILL, L.J.: I also agree that the appeal should be dismissed.

A

*Appeal dismissed with costs.*

Solicitors: *Keene, Marsland & Co* (for the plaintiffs); *Capel Cure, Glynn Barton & Co.* (for the defendant).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

B

## HARRIES AND OTHERS v. ASHFORD AND OTHERS.

C

[COURT OF APPEAL (Asquith, L.J., and Roxburgh, J.), February 3, 1950.]

*Pleading—Amendment—Claim made by writ omitted from statement of claim—Revival of claim.*

D

On Aug. 9, 1944, W.H. was killed in a motor car accident. On Aug. 7, 1945, a writ was issued in which W.H.'s widow and another person, described as administratrices of the estate of W.H., and W.H.'s widow in her personal capacity, were named as plaintiffs. The administratrices claimed damages under the Fatal Accidents Acts, 1846-1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, and the widow claimed under the Acts of 1846-1908. The administratrices, however, did not obtain a grant of administration of the estate of W.H. until Aug. 9, 1945. In the statement of claim, which was delivered on Nov. 4, 1946, the only claim made under the Acts of 1846-1908 was that of the administratrices. On Dec. 16, 1949, the plaintiffs applied for leave to amend the writ and statement of claim by the deletion of the administratrices as parties, and by making consequential alterations. They also sought to substitute in the statement of claim a claim by the widow under the Acts of 1846-1908 for that of the administratrices, the personal claim by the widow under those Acts, although included in the writ, having been omitted from the statement of claim.

E

F

HELD: as the administratrices were improperly joined, they should be struck out from the parties named as plaintiffs and consequential amendments should be made, but the restoration of the widow's claim under the Acts of 1846-1908 in the statement of claim could not be permitted.

G

*Per curiam*: even if the court had a discretion to order such an amendment, it would not, in this case, exercise it in favour of the plaintiffs having regard to their delay in making the application.

*Cargill v. Bower* (1878) (10 Ch.D. 502) and *Lewis and Lewis v. Durnford* (1907) (24 T.L.R. 64), *applied*.

H

[AS TO AMENDMENT OF PLEADINGS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 55-57, paras. 89-92; and FOR CASES, see DIGEST, Pleading, pp. 97-99, 108-114, Nos. 829-849, 935-1000.]

Cases referred to:

- (1) *Cargill v. Bower*, (1878), 10 Ch.D. 502; 47 L.J.Ch. 649; 38 L.T. 779; 9 Digest 127, 663.
- (2) *Lewis and Lewis v. Durnford*, (1907), 24 T.L.R. 64; 43 Digest 56, 571.
- (3) *Hilton v. Sutton Steam Laundry*, [1945] 2 All E.R. 425; [1946] K.B. 65; 115 L.J.K.B. 33; 174 L.T. 31; 2nd Digest Supp.

APPEAL by leave from an order of STREATFEILD, J., in chambers, dated Jan. 11, 1950, affirming an order of the district registrar at Cardiff refusing leave to amend a writ and a statement of claim.

On Aug. 9, 1944, William Harries and his wife, the plaintiff, Margaret Gwen Harries, were passengers in a motor car owned by the second defendants, Swansea Corporation, and driven by the first defendant, David Stanley Ashford, a servant of the corporation, when the car came into collision with an omnibus owned by the third defendants, United Services Ltd., and driven by their servant. William Harries sustained fatal injuries, and his wife was injured. On Aug. 7, 1945, a writ was issued by the wife and Brenda Mary Taylor, as administratrices of William Harries, and by the wife in her personal capacity, the administratrices claiming damages under the Fatal Accidents Acts, 1846-1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of William Harries, and the wife claiming damages under the Acts of 1846-1908 in respect of the said death, and also damages for her personal injuries. On Aug. 9, 1945, letters of administration to the estate of William Harries were granted to the persons named as administratrices in the writ. On Nov. 4, 1946, the statement of claim was delivered, and, by para. 5, it limited the claim under the Fatal Accidents Acts, 1846-1908, to that of the administratrices, the claim of the wife under those Acts not being repeated. On Dec. 16, 1949, the plaintiffs applied to the district registrar for leave to strike out the administratrices from the parties named as plaintiffs (they having been, in view of the date of the grant of administration, improperly joined), and to make consequential amendments in the writ and statement of claim, including an amendment to para. 5, so as to substitute a claim by the wife under the Acts of 1846-1908 for that of the administratrices. The Court of Appeal now dismissed the appeal as regards the substitution of the wife's claim, but allowed the appeal in respect of the deletion of the administratrices from those named as plaintiffs and the consequential amendments. The costs of the appeal were awarded against the plaintiffs, they having failed on the only issue of substance between the parties.

*Neil Lawson* for the plaintiffs.

*Edgedale, K.C.*, and *Schapiro* for the defendants, Ashford and Swansea Corporation.

*H. W. Springer* for the defendant, United Services, Ltd.

ASQUITH, L.J. (having stated the facts): Two authorities have been cited to the court which appear to decide that where a writ contains two separate claims endorsed on it, and later, when the statement of claim comes to be delivered, one of those claims does not appear in it, then either there is no power to grant leave to amend to restore it, or, at all events, the discretion of the court ought not to be exercised in favour of permitting such an amendment. The first authority is *Cargill v. Bower* (1). I need not consider, in detail, the facts therein, which are quite different from those in this case. In his judgment, FRY, J., said (10 Ch.D. 508):

"The plaintiff . . . issued his writ in November, and it was addressed to two things, rescission of the contract and indemnity against future liability arising under it. This, no doubt, was a perfectly consistent claim, for rescission might not be granted at the hearing, and liability might accrue under the contract before the hearing. Then, in December the plaintiff appeared as a contributory on the hearing of the winding-up petition and supported the prayer, and costs were allowed to him as a contributory supporting the petition. In April, 1876, he delivered his statement of claim, and he dropped out of the prayer all claim to relief in the nature of rescission of the contract, and only asked for relief in the nature of indemnity. Afterwards an application was made in the winding-up to put him on the list of contributories, he resisted the application, and it was

ordered to stand over until after the trial of this action. Under these circumstances I think that I ought not to give leave to amend the statement of claim. It is not necessary for me to say whether the plaintiff has finally elected to approbate the contract, but I think that he has by his conduct at any rate expressed an intention and desire to assert his claim to rescission of the contract only in the winding-up proceedings."

A The learned judge, therefore, refused to give leave to amend. That decision, which might seem to be based partly, at any rate, on the facts of that case, on approbation and reprobation, was considered in *Lewis and Lewis v. Durnford* (2), an action decided by SWINFEN EADY, J. He said (24 T.L.R. 65):

"... it was said that the claim for £100 liquidated damages precluded the granting of an injunction. It was true the writ claimed both forms of remedy; but the claim endorsed thereon was superseded by the statement of claim, and under Ord. 20, r. 4, a plaintiff was entitled in his statement of claim to alter, modify, or extend his claim without amending his writ. It had been held in *Cargill v. Bower* (1) that where a plaintiff in his statement of claim omits part of his claim, he will be deemed to have abandoned that part."

C Having regard to those two decisions, I think our proper course in this case is not to allow this amendment.

If, however, we are not bound by authority, but have a discretion, the question arises whether we ought to exercise our discretion to allow an amendment in a case in which there has been such a long lapse of time between the apparent abandonment of the claim and the attempt to revive it? The statement of claim was delivered on Nov. 4, 1946, and it was not until December, 1949, that this application for leave to amend was made. I think that in those circumstances amendment ought to be refused, and that part of the appeal, therefore, fails.

D The first paragraph of the endorsement on the writ, *viz.*, the claims of the administratrices, is a nullity under *Hilton v. Sutton Steam Laundry* (3). In that case, which was also a case under the Fatal Accidents Acts, it was held in an action brought by the plaintiff as administratrix of her deceased husband's estate, but who had not taken out letters of administration when the writ was issued, that the writ was a nullity and was not validated by the subsequent grant of administration. That decision was accepted by all parties in this court, and, therefore, to that limited extent the appeal succeeds.

E **ROXBURGH, J.:** I agree. The effect of the statement of claim in this case was to abandon the claim which it is now sought to restore to the statement of claim. If that claim has been abandoned, this application must be an application to raise the claim *de novo*, and I should hesitate long before allowing someone to raise a claim *de novo* by amendment if at that time he could not successfully raise that claim by an original action.

G *Appeal dismissed except to the extent indicated. Costs awarded against the plaintiffs.*

Solicitors: *Robertson, Martin & Co.* (for the plaintiffs); *William Charles Crocker* (for the first and second defendants); *Clifford Turner & Co.*, agents for *Dahne & Thomas*, Swansea (for the third defendant).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

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# THE REPUBLIC OF ITALY *v.* HAMBROS BANK, LTD. AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), January 25, 26, February 9, 1950.]

*Enemy—Enemy property—Financial agreement between Great Britain and ex-enemy Power—Action by ex-enemy Power to enforce agreement—Competence—Financial Agreement, Apr. 17, 1947 (Treaty Series, No. 31 (1947), Annex to No. 6), arts. 1, 2, 5.*

By the Treaty of Peace with Italy, Feb. 10, 1947 (Treaty Series, No. 50 (1948)), art. 79: "1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property rights and interests which on the coming into force of the present Treaty are within its territory and belong to Italy or to Italian nationals and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Italy or Italian nationals, including debts, other than claims fully satisfied under other articles of the present Treaty. All Italian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned. 2. The liquidation and disposition of Italian property shall be carried out in accordance with the law of the Allied or Associated Power concerned. The Italian owner shall have no rights with respect to such property except those which may be given him by that law . . . 6. The property covered by para. 1 of this article shall be deemed to include Italian property which has been subject to control by reason of a state of war existing between Italy and the Allied or Associated Power having jurisdiction over the property . . ."

By the Financial Agreement between the United Kingdom and Italy, Apr. 17, 1947 (Treaty Series, No. 31 (1947), Annex to No. 6: "1. The government of the United Kingdom will transfer to the Italian government all the liquid assets now held as Italian property by the Custodians. 2. The government of the United Kingdom will release to the original owners . . . any Italian property now vested in or under the control of the Custodians other than the liquid assets referred to above . . . 5. The Italian government, . . . will notify the Controller-General . . . under which of the following three categories it desires that such non-liquid property should be treated, *viz.*: (a) Properties to be realised in order to increase the sterling amount available for the payment of debts. (b) Properties to be released to the former owners or to their legal representatives. (c) Properties the disposal of which under (a) and (b) is to be deferred for further consideration."

King Victor Emanuel III of Italy possessed a private fortune in this country consisting of cash, British government securities, and investments, which, on the outbreak of war between Great Britain and Italy, became vested in the Custodian of Enemy Property under the Trading with the Enemy Act, 1939. King Victor Emanuel III abdicated his throne on May 9, 1946, and died in exile on Dec. 28, 1947. On Mar. 5, 1949, letters of administration of his estate were granted to Hambros Bank as attorney administrators. On January 18, 1949, the Custodian of Enemy Property, under directions of the Board of Trade, paid £78,248 by way of estate duty on the footing that the property had passed on the death of King Victor Emanuel III, and, on Mar. 10, 1949, transferred the balance to Hambros Bank. The Republic of Italy claimed a declaration that, by reason of the provisions of the Financial Agreement of Apr. 17, 1947, the transfer of the property by the Custodian of Enemy Property to Hambros Bank was a breach of his obligations, and an injunction to restrain Hambros Bank from dealing with the property.

HELD: the Financial Agreement of Apr. 17, 1947, was not cognizable or justiciable by the court, and, accordingly, did not confer rights on the Republic of Italy enforceable by the court.

[FOR THE TREATIES OF PEACE (ITALY, ROUMANIA, BULGARIA, HUNGARY AND FINLAND) ACT, 1947, see HALSBURY'S STATUTES, Vol. 40, p. 304; and FOR THE TREATY OF PEACE WITH ITALY, art. 79, see Treaty Series, No. 50 (1948), pp. 41-43, and FOR THE FINANCIAL AGREEMENT BETWEEN THE UNITED KINGDOM AND ITALIAN GOVERNMENTS, April 17, 1947, Annex to No. 6, see Treaty Series, No. 31 (1947), pp. 11-13.]

Cases referred to:

- (1) *Re Californian Fig Syrup Co.'s Trade Mark*, (1888), 40 Ch.D. 620; 58 L.J.Ch. 341; 60 L.T. 590; 43 Digest 184, 341.
- (2) *Salaman v. Secretary of State for India*, [1906] 1 K.B. 613; 75 L.J.K.B. 418; 94 L.T. 858; 1 Digest 655, 2731.
- (3) *Stoeck v. Public Trustee*, [1921] 2 Ch. 67; 90 L.J.Ch. 386; 125 L.T. 851; 11 Digest 543, 474.
- (4) *Civilian War Claimants Assocn., Ltd. v. R.*, [1932] A.C. 14; 101 L.J.K.B. 105; 146 L.T. 169; Digest Supp. 1941.
- (5) *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] 2 All E.R. 93; [1941] A.C. 308; 110 L.J.P.C. 17; 2nd Digest Supp.

#### ACTION.

The plaintiffs, the Republic of Italy, claimed a declaration that by reason of the provisions of a Financial Agreement of Apr. 17, 1947, between the Republic of Italy and the British Government, the property of the late King Victor Emanuel III of Italy in the United Kingdom was held by the Custodian of Enemy Property subject to a fiduciary obligation to give effect to the provisions of the Agreement and that the payment and transfer of the property by the Custodian of Enemy Property to Hambros Bank on Mar. 10, 1949, was unlawful and in breach of his obligations.

The plaintiffs also asked for an injunction to restrain the bank from dealing with the property, and, alternatively, claimed damages. VAISEY, J., held that the Financial Agreement of Apr. 17, 1947, was not cognisable or justiciable by the court and gave judgment for the defendants without costs other than a half contribution to the cost of the shorthand notes and transcript.

*Pascoe Hayward, K.C.*, and *V. Pennington* for the plaintiffs.

*Upjohn, K.C.*, *Cozens-Hardy Horne* and *Megaw* for the first defendants (Hambros Bank).

*Charles Russell, K.C.*, and *Denys Buckley* for the second defendant (the Custodian of Enemy Property).

*Cur. adv. vult.*

Feb. 9. VAISEY, J., read the following judgment. I wish to say at the outset that what I know of this case (though my knowledge is admittedly imperfect) has not a little disturbed me, for it was hinted to me (or, perhaps, rather more than hinted) that there had been some misapprehension of fact (entertained by I know not whom) which had given rise to the transactions of which the Republic of Italy, the plaintiffs in this action, are complaining. I gather that some person or authority (not identified) had acted in the erroneous belief that the plaintiffs had either given their previous consent to those transactions, or could be safely assumed to be willing to accord their subsequent approval to those transactions. I desire, therefore, to express myself with reserve, and to confine my judgment to what I conceive to be the one and only issue before me, that is to say, whether the plaintiffs can in this court and in this action obtain as against the defendants the relief which they are seeking, or any part of such relief. Have the plaintiffs a cause of action? Are these

proceedings maintainable? Or are they, in the time-honoured expression, "frivolous and vexatious" and an abuse of the process of the court"?—words familiar in our legal phraseology, though they might appear to the uninstructed to be somewhat incongruous when applied to such a case as the present. I do not like even in appearance to attribute to the Republic of Italy, to those who direct its fortunes, or to those who speak in its name, any feelings of, or even akin to, levity or disrespect, or to imply, however remotely, the existence of some possible impropriety in the method of their approach to this court. I would rather put the alternatives thus: Is the action maintainable, or is it misconceived? A

The point seems, indeed, to be narrowed down to this: Are the terms of a certain agreement, arrangement, or bargain made in Rome on Apr. 17, 1947, between the government of the United Kingdom, acting by His Majesty's ambassador there, and the government of Italy, acting by Count Sforza, its Foreign Secretary, which I may conveniently call "the Financial Agreement," justiciable or cognisable in the courts of this country, as forming part of our municipal or domestic law? Or is the agreement the outcome of a negotiation between high contracting parties, resulting in a treaty, placed apart from and above our general law and so outside my ken and purview? It was frankly admitted by counsel for the plaintiffs that their rights, if any, arise out of the Financial Agreement and have no other source, and that, unless the former of the two alternative views which I have just formulated can be established, their case must necessarily fail. C

The action concerns the private fortune in this country of the late King Victor Emanuel III of Italy, which is said to have amounted to some £1,500,000. At the outbreak of the war between this country and Italy, that fortune, consisting partly of cash, partly of British government securities, and partly of investments quoted on the London Stock Exchange, became vested in the Custodian of Enemy Property, the second defendant, under and for the purposes of the Trading with the Enemy Act, 1939, and the orders and regulations made thereunder. On or about May 9, 1946, the late King (who is admitted to have been at all material times an "Italian national") abdicated his throne. On Dec. 28, 1947, he died in exile. On Mar. 5, 1949, letters of administration to his estate were granted out of the Principal Probate Registry to Hambros Bank, Limited, the first defendants, as attorney administrators. On Feb. 10, 1947, a Treaty of Peace between the United Kingdom and certain other powers, on the one hand, and Italy, on the other hand, was signed in Paris, and, having been ratified by Italy on Sept. 15, 1947, it came into force on that day in accordance with its terms. This Treaty of Peace is a very lengthy document, but I need only refer to so much of art. 79 of it as empowered the United Kingdom to seize, retain, liquidate, or take any other action with respect to all property, rights, and interests which on the coming into force of the Peace Treaty were within its territory and belonged to Italy or to Italian nationals, and to apply such property or the proceeds thereof to such purposes as it might desire within the limits of its claims and those of its nationals (including certain debts), followed by a direction that all Italian property or the proceeds thereof in excess of the amount of such claims should be returned, meaning, I think, returned to the former owners of the property. Paragraph 2 of art. 79 provided that the liquidation and disposition of Italian property should be carried out so far as the United Kingdom was concerned in accordance with our law, and that the Italian owner should have no rights with respect to such property except those which might be given to him by our law. D E F G H

I now turn to the Financial Agreement which was entered into, as I have said, on Apr. 17, 1947. It took effect, according to its terms, on the date of the ratification of the Peace Treaty by Italy, that is to say, on Sept. 15, 1947. It sets out the provisions of art. 79 of the Peace Treaty, and recites that the



- Italian government, in consideration of the relinquishment by the United Kingdom government of certain of the debts mentioned in that article, desired to provide funds in the United Kingdom for the payment of certain debts which had not been so relinquished. Its operative parts deal with the liquidation and disposal of Italian property (thereby defined as meaning all property which on the relevant date, that is Sept. 15, 1947, was held by, among others, the defendant Custodian as belonging to Italy or Italian nationals) including, I should suppose, the property of the late King. It covered (a) Italian property consisting of liquid assets, and (b) other Italian property. Liquid assets were to be transferred to the Italian government to be utilised by them for the payment of the debts in this country with which Italian property was intended to be charged, as I shall presently mention, and the Italian government was to open an account, referred to as the Special Account, in the name of the Bank of Italy with the Bank of England into which the said liquid assets were to be paid. It would certainly seem that such of the late King's property as on Sept. 15, 1947, consisted of cash in the hands of the Custodian was liquid assets within the meaning and for the purposes of the Financial Agreement. As regards other Italian property, the Financial Agreement provided that it should at the request of the plaintiffs be realised and the net proceeds paid into the Special Account, with the object, so far as I can see, of increasing the amount available for the payment of the debts. The plaintiffs were to be liable for any deficit on the Special Account and were to be entitled to the free use of any surplus that might remain.

- The chronological order of events in this case is rather confusing, but I must next refer to the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947, which received the Royal assent on Apr. 29, 1947. This Act empowered His Majesty to make Orders in Council to give effect to the said Peace Treaty. Accordingly, by the Treaty of Peace (Italy) Order, 1948, it was directed that the provisions of (among other things) art. 79 of the Peace Treaty should (so far as they were by their nature capable of doing so) be and have effect as law, and that the property, rights, and interests therein mentioned (that is to say, the Italian property, rights, and interests referred to in the article) should be charged with the claims (including debts) therein mentioned. The Order further provided that any such property, rights, and interests so charged might, under the direction of the Treasury—and I quote the exact words (1948, S.I. No. 117, para 1 (2))—

- “... be transferred ... free of any such charge in accordance with the terms of any ... Agreement with the government of Italy affecting the said property, rights or interests to which His Majesty is or may be a party ...”

- It is here, if anywhere, that the Financial Agreement is brought into and made part of the law of this country. There are obvious difficulties about that view of the matter. In the first place, the words are permissive, not obligatory. Secondly, if the Financial Agreement was intended to be referred to, why was it not expressly mentioned? Thirdly, is there any authority or principle which enables me to hold that a contract such as the Financial Agreement made between high contracting parties and having all the appearance of a Treaty can be imported into and incorporated in our domestic law by a mere vague allusion, when there would have been no difficulty at all in doing so expressly and when an obvious opportunity for doing so presented itself?

The points which seem to arise are these. First, did the Financial Agreement confer rights on the plaintiffs which are enforceable in this court? Secondly, are those rights enforceable against the Custodian? Thirdly, are they enforceable against property in the hands of the defendant bank? Unless the first of these questions is answered in the affirmative, the action fails *in limine*. In my judgment, the reported decisions contain nothing to support, and everything

to negative, its being so answered. I have been referred to the following, among other cases: *Re Californian Fig Syrup Co.'s Trade Mark* (1), *Salaman v. Secretary of State for India* (2), *Stoeck v. Public Trustee* (3), *Civilian War Claimants Association Ltd. v. R.* (4), and *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* (5). None of these authorities assists the plaintiffs in contending either that the Financial Agreement is not, in substance, a treaty or that I can in such an action as this take cognisance of it. It is to be observed that neither of the two defendants was a party to the Financial Agreement and that the British government, which was a party to it, is not a party to this action. What happened was this. The Custodian, admittedly in good faith and acting under directions of the Board of Trade (as he was entitled and probably bound to do), but without the consent or approval of the plaintiffs, in the early months of 1949 parted with the whole of the late King's property. A sum of £78,248 was applied in purported satisfaction of a claim for estate duty payable on the late King's death, and the balance was handed over to the defendant bank as the attorney administrators of the late King's estate. The plaintiffs say that this was contrary to and inconsistent with the terms of the Financial Agreement and that they are prejudiced thereby by the increase *pro tanto* of their liability to meet any deficit on the Special Account and by the reduction of the amount of the surplus or possible surplus on such account. It certainly looks as if the plaintiffs were very closely concerned in the matter, having regard to the Financial Agreement, and I cannot understand why they were not consulted. The Financial Agreement appears to be still in operation. Was it forgotten or overlooked on this occasion?

I end, as I began, in an atmosphere of some bewilderment. There must surely be some explanation of what is to me so inexplicable. Italy's entry into the war as an enemy of this country was a tragedy, and I cannot believe that the further, though minor, tragedy of a misunderstanding will be allowed to ensue now that peace is restored. Any person who has created or contributed to such a misunderstanding must have done (I should have thought) a grave disservice to both countries. I dismiss this action on the ground that the Financial Agreement is not cognisable or justiciable in this court, but it is only right that I should add that, even if it were, I doubt whether the necessary parties to any action to enforce its terms are before me. I shall make no order as to the costs, except to direct that the cost of taking the shorthand note of the two days' hearing and the provision of one transcript for my use should be divided equally, half and half, between the plaintiffs and the defendants.

[After hearing argument on the question of costs his lordship said he would adhere to the conclusion he reached in writing his judgment but would grant leave to appeal on the question of costs].

*Judgment for the defendants. No order as to costs, except that cost of shorthand note and transcript be divided half and half between plaintiffs and defendants. Leave to appeal on order as to costs.*

Solicitors: *Coward, Chance & Co.* (for the plaintiffs); *Norton, Rose, Greenwell & Co.* (for the first defendants); *Solicitor to the Board of Trade* (for the second defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NOTE.*Re BENNETT (deceased).* BARCLAYS BANK, LTD. *v.*  
COATES AND OTHERS.

[CHANCERY DIVISION (Romer, J.), January 17, 20, 1950.]

A *Costs—Counsel's fees—Fees of counsel for trustees or executors on hearing of originating summons on the construction of a will.*

SUMMONS to review taxation.

On an originating summons for the construction of a will it was ordered, *inter alia*, that the costs of the plaintiffs and the defendants be taxed as between solicitor and client and raised and paid out of the estate of the testator in due course of administration. The taxing master disallowed a proportion of the brief fees of counsel. Certain parties objected to the reduction, and the master, in answering and overruling the objections, said that, in endeavouring to arrive at the amount to be allowed, account must be taken of the work involved, which included not only the perusal of documents, but also consideration of legal principles and authorities. Some regard must also be had to the amount involved in the decision. In this case there was only one affidavit besides the affidavit of fitness of the guardian *ad litem* of the infant concerned in the matter. The will was of eighty folios. There was no opposition to the order asked for by the originating summons, and the summons only came before the court because the Attorney-General for New Brunswick decided that, as he represented the Crown, he could not consent to the order proposed, but that he would not oppose it. The time occupied in court, one hour and seventeen minutes, was not relevant, as it was unknown when the fee was fixed. The master emphasised that he was not deciding what a client should pay his counsel, but what fee was reasonable to be borne by the trust fund. It had been suggested that all juniors in a construction summons or like application to the court were entitled to the same brief fee, but the master rejected the suggestion as being at variance with the practice that, in fixing the fee, the work involved should be considered. That was why the brief of counsel for the trustees asking for the court's directions was usually marked less than counsel for a beneficiary or other party who had some definite view to urge. ROMER, J., varied the master's certificate, and, in the course of his judgment (of which a report is not otherwise necessary), said that it was right that briefs for plaintiff executors and trustees in ordinary cases should be marked similarly to those for defendant beneficiaries.

Cases referred to:

- (1) *Ginn v. Robey*, [1911] W.N. 28; Digest, Practice, 955, 4956.
- (2) *A.-G. v. Carrington (Lord)*, (1843), 6 Beav. 454; Digest, Practice, 933, 4726.
- (3) *Parkinson v. Hanbury*, (1865), 12 L.T. 624; 29 J.P. 692; Digest, Practice, 933, 4728.
- (4) *Campbell v. Campbell*, [1887] W.N. 83; Digest, Practice, 939, 4801.
- (5) *Re Ogilvie*, [1910] P. 243; 79 L.J.P. 113; 103 L.T. 154; 42 Digest 216, 2430.

*Droop* for the plaintiff, the executor and trustee of the will.

H *Upjohn, K.C.*, and *Hillaby* for the first three defendants, beneficiaries under the will.

*L. K. Japhet (Gahan with him)* for the last defendant, the Attorney-General for the province of New Brunswick, Canada, who was interested in the testator's residuary estate.

ROMER, J., directed that the certificate of the taxing master be varied so far as the first three defendants were concerned by restoring the fee to leading and junior counsel as marked on their briefs, and, in the course of his



judgment, he said: My experience is that in the past the briefs for plaintiff executors or trustees in ordinary cases have been marked similarly to those for defendant beneficiaries, and, in my view, it is right that it should be so. Counsel for the plaintiffs in such cases has much preliminary work to do, which calls for skill and judgment and is remunerated only on a moderate scale. At the hearing such a counsel owes a considerable responsibility to his clients in seeing that nothing is overlooked. Further, the court is entitled to his assistance in argument, and frequently calls for it. For these reasons it would be very regrettable if a rule were to grow up that plaintiff's counsel should receive a fee lower than that of counsel for the beneficiaries.

Solicitors: *Horne & Birkett* (for the plaintiff and the first three defendants); *Redden & Booth* (for the last defendant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

## Re GREENWOOD'S AGREEMENT. PARKUS v. GREENWOOD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.), February 8, 9, 1950.]

*Landlord and Tenant—Lease—Renewal—Perpetual right of renewal—Lease for three years with option to renew for further period of three years on same terms “including the present covenant for renewal”—Law of Property Act, 1922 (c. 16), s. 145; sched. XV, para. 5.*

An agreement dated Jan. 29, 1946, whereby premises were let for a term of three years from Jan. 30, 1946, contained the following option to renew: “The landlord will on the written request of the tenants made three calendar months before the expiration of the term hereby granted and if there shall not be at the time of such request any existing breach or non-observance of any of the agreements on the part of the tenant herein contained . . . grant to them a tenancy of the . . . premises for the further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained (including the present covenant for renewal) . . .” The agreement contained the usual covenants by the tenants and also a positive covenant for the user of the premises. An assignee of the agreement contended that, in view of the terms of the option to renew, the agreement constituted a perpetually renewable lease within the Law of Property Act, 1922, s. 145 and sched. XV, para. 5, and that, therefore, there was vested in him a term of two thousand years.

HELD: (i) the covenant was a covenant running with the land, and the benefit of the option to renew was not limited to the original tenants, but enured for the assignee.

(ii) although the covenant was not in terms expressed to be one for perpetual renewal, on its true construction the lease was a perpetually renewable lease within s. 145 and sched. XV, para. 5, and so took effect as a demise for two thousand years.

*Hare v. Burges* (1857) (27 L.J.Ch. 86), *applied*.

*Green v. Palmer* ([1944] 1 All E.R. 670), *distinguished and criticised*.

*Decision of HARMAN, J.* ([1949] 2 All E.R. 743), *reversed*.

[AS TO COVENANTS FOR PERPETUAL RENEWAL OF LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 154-157, paras. 167, 168; and FOR CASES, see DIGEST, Vol. 31, pp. 79-81, Nos. 2240-2261.]

Cases referred to:

(1) *Green v. Palmer*, [1944] 1 All E.R. 670; [1944] Ch. 328; 113 L.J.Ch. 223; 171 L.T. 49; 2nd Digest Supp.

(2) *Hare v. Burges*, (1857), 4 K. & J. 45; 27 L.J.Ch. 86; 30 L.T.O.S. 255; 22 J.P. 84; 31 Digest 80, 2248.

(3) *Wynn v. Conway Corpn.*, [1914] 2 Ch. 705; 84 L.J.Ch. 203; 111 L.T. 1016; 78 J.P. 380; 31 Digest 81, 2261.

APPEAL of the assignee from a decision of HARMAN, J., dated Oct. 21, 1949, and reported [1949] 2 All E.R. 743.

A The assignee by his summons asked for a declaration that on the true construction of a lease dated July 29, 1946, for premises situate in Brick Lane, Stepney, he was granted a perpetually renewable lease which, under the provisions of the Law of Property Act, 1922, had been converted into a term of two thousand years. HARMAN, J., found that on the face of it the covenant for renewal in the agreement was not a covenant for perpetual renewal, but simply  
B a covenant to renew once, and, therefore, the Law of Property Act, 1922, sched. XV, para. 5, did not apply to convey the term of two thousand years. The Court of Appeal now allowed the appeal with costs, holding that the perpetual renewal clause in the lease operated as a demise for the statutory term.

*Michael Albery* for the assignee.

C *Hesketh* for the respondent.

SIR RAYMOND EVERSHED, M.R.: The short question raised by this appeal is whether the tenancy agreement or lease with which we are concerned (for it is conceded that for present purposes the result is the same, by whichever description it is called), created what is known to conveyancers as a perpetually  
D renewable lease, so that, according to the provisions of the Law of Property Act, 1922, the term granted by the document is converted into one of two thousand years. HARMAN, J., came to the conclusion that there was sufficient material to be found in the language of the document (and the intention of the parties which he discerned from the document) to avoid a conclusion which plainly, I think, he felt to involve almost an absurdity; and I confess I feel sympathy with the learned judge.

E This is an agreement between two persons for the tenancy of premises at 96 Brick Lane, Stepney, with a workshop at the rear, for the use by the tenant of those premises as and for the tenant's business of a tailor (which is still its use) or such other mode of business as may be approved by the landlord. The original term was one of three years. It is at least probable to my mind that  
F the parties to this document had not sufficiently informed themselves of the effect of modern legislation relating to real property. However that may be, HARMAN, J., in order to avoid a result from which he somewhat recoiled, found that, in applying the statute, a distinction could be drawn between cases in which there was to be found a covenant or an obligation in actual terms for perpetual renewal, on the one hand, and, on the other, cases in which the language used  
G might, under the old law, have produced a similar effect, but was not in terms a covenant or obligation for perpetual renewal. I have come to the conclusion, with all respect to HARMAN, J., that that distinction involves a refinement which cannot be supported.

It is first important to regard the language of the relevant sections of the Act of 1922 before approaching the material paragraph of sched. XV to that Act. Counsel for the assignee told us that these sections were not brought to the  
H attention of HARMAN, J. Perhaps, if they had been, he might have reached a different conclusion. The first relevant section is s. 145 which provides:

"For the purpose of converting perpetually renewable leases and underleases (not being an interest in perpetually renewable copyhold land enfranchised by Part V. of this Act, but including a perpetually renewable underlease derived out of an interest in perpetually renewable copyhold land) into long terms, for preventing the creation of perpetually renewable

leasehold interests and for providing for the interests of the persons affected, the provisions contained in sched. XV to this Act shall have effect."

That section clearly manifests an intention by Parliament to put an end to perpetually renewable leasehold interests. I turn to the definition section, s. 190, para. (iii), which says:

" 'A perpetually renewable lease or underlease' means a lease or underlease the holder of which is entitled to enforce (whether or not subject to the fulfilment of any condition) the perpetual renewal thereof, and includes a lease or underlease for a life or lives . . . "

In the light of that definition it seems impossible to hold that in setting its face against perpetually renewable leaseholds Parliament only intended to deal with those leaseholds where the covenant or obligation was one in actual terms for perpetual renewal. The definition makes it reasonably clear, to my mind, that Parliament is dealing also with any renewable lease which falls within the definition, that is, one whereunder any lessee is entitled to enforce the perpetual renewal thereof.

It is next convenient to look at the vital paragraph in sched. XV, which is para. 5.

"A grant, after the commencement of this Act, of a term . . . or other leasehold interest with a covenant or obligation for perpetual renewal . . . shall . . . take effect as a demise for a term of two thousand years . . . to commence from the date fixed for the commencement of the term . . . or other interest, and in every case free from any obligation for renewal or for payment of any fines, fees, costs, or other money in respect of renewal."

Other paragraphs in the schedule are relevant to the effect of this conversion, and, put briefly, the tenant, instead of having periodically to apply in the prescribed manner for a new lease and pay any fines, costs, or other monies to be paid, remains on with a right, on giving the requisite notice, to put an end to the demise of two thousand years, and thus, so to speak, to contract out of the bargain instead of contracting into it although that last formula does, perhaps, rather less than justice to the full nature of the change. From the words I have read from para. 5 it is clear that Parliament thought it right that tenants should be relieved from the financial burden of costs or fines which might be exigible on renewal. They are also relieved of another obligation. Commonly in such renewable leaseholds the obligation of the landlord to renew is made conditional (and these courts have tended to construe the condition strictly) on the tenant at the date of his request not being in any breach of his covenants for repair or otherwise, so that, practically speaking, the landlord has been given a fairly firm control of the tenant's performance of his obligations. The effect of the conversion is very much to lighten the burden on the tenant in practice. Counsel for the assignee points out, however, that the tendency of modern legislation has obviously been in favour of protecting the security of a tenant's tenure, and there may, therefore, be nothing surprising in the circumstance that conversion does, as I think, substantially favour the tenant.

But these general considerations are, perhaps, of more interest than relevance. The question is whether this document which we have to construe falls within the terms of the definition I have read. Its date is Jan. 29, 1946, and the parties are David Greenwood, who is described as "the landlord," and two persons, Mark Lee and Jack Barnett, who are described as "the tenants." The present assignee is the assignee of the tenants, but the defendant is the original party to the agreement. The tenants' obligations in cl. 2 of the lease are in a form common and appropriate for a three-years' term of the premises in question, which are partly business premises and partly a residence. I have already mentioned that the tenants covenant to use the premises for



their business "or such other mode of business as may be approved." There is a covenant against parting with possession though not in terms against assignment. Clause 11 provides :

A "The landlord hereby agrees with the tenants . . . (b) that the landlord will on the written request of the tenants made three calendar months before the expiration of the term hereby granted and if there shall not be at the time of such request any existing breach or non-observance of any of the agree-  
B ments on the part of the tenant herein contained at the expense of the tenants grant to them a tenancy of the said premises for the further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained (including the present covenant for renewal) the tenant on the signature of  
C such renewed agreement to sign a counterpart thereof and to pay the proper costs of such agreement and counterpart."

Counsel for the lessor took the point that the absence of any definition clause making the word "tenants" in this agreement comprehend not only Messrs. Lee and Barnett but all other persons in possession under the demise was a strong indication against treating this covenant which I have read as one for perpetual renewal. He did, however, concede that the provisions of s. 78 of the Law of  
D Property Act, 1925, will apply so that the covenants which can be said to relate to the land would enure for the benefit not only of the original tenants but also of any successors to their interest or estate. It is impossible to say (and counsel for the lessor was unable to support the suggestion with any authority) that a covenant for renewal in this form is not a covenant relating to land. It seems,  
E as a matter of construction, equally impossible to hold that, if the covenant in para. 11 (a) for quiet enjoyment and the covenant for renewal are treated as entered into with the tenants and their successors in title, nevertheless the benefit of the right to renew is limited to the original tenants. Therefore, we have to approach this clause by treating it as though it were an agreement or covenant by the landlord with the tenants and their successors in title giving to the tenants and their successors whatever right of renewal on its proper construction para. (b) contains.

That being so, the argument comes down to the single point: Is a covenant not in terms expressed to be one for perpetual renewal, that is to say, not using those words or using any cognate expression, but being one which provides for renewal on the terms and conditions "as are herein contained (including the  
F present covenant for renewal)," one for perpetual renewal within the meaning of the Act of 1922? *HARMAN, J.*, thought not, and he referred to, and I think in a measure relied on, the decision in *Green v. Palmer* (1), decided by *UTHWATT, J.*, as a judge of first instance, as supporting his view. I shall say something on *Green v. Palmer* (1) later, but I note that *HARMAN, J.*, though he derived some comfort from it, expressed himself as not entirely able to comprehend the  
G reasoning which underlay it. The truth is, I think, that it has been long established that as a matter of conveyancing machinery a well-recognised method of producing perpetually renewable leaseholds was by just this form of covenant which has been adopted here. The authority, and it has stood, not only unchallenged, but affirmed and cited time and again, for nearly one hundred years, is *Hare v. Burges* (2), a case which came before *LORD HATHERLEY*  
H as a judge of first instance. That was a lease for lives by deed and it contained various covenants including this covenant in regard to renewal. *Paul Lord Methuen*, who was the lessor (4 K. & J. 45)

"... did ... covenant, grant, and agree with and to Sir John Hare [the lessee] that in case Sir John Hare, his heirs or assigns, should, upon the decease of either of them the said Charles Hare, Leonard, and Harris, be desirous of taking a further or renewed lease of the said demised premises for another

life, and should, within the space of twelve calendar months next after such decease, give notice in writing of such desire unto Lord Methuen, or the person or persons for the time being entitled to the reversion of the premises expectant on the determination of the demise thereby made, and should nominate any person in the room or stead of the person who should have so departed this life, Paul Lord Methuen, or the person or persons for the time being entitled as aforesaid, would, at the request and at the costs and charges of Sir John Hare, his heirs or assigns, and on the surrender of the present lease, on payment of the sum of £134 5s. 0d. by way of fine or premium for such renewal, forthwith duly make and execute unto Sir John Hare, his heirs or assigns, a new and further lease of all and singular the premises thereinbefore demised, for and during the natural life of the person so to be nominated, and the lives of such of them the said Charles Hare, Leonard, and Harris, as should be then living, and of the survivors and survivor of them, at and under the same yearly rent, and with and subject to such and the same covenants, provisos and agreements, 'including this present covenant,' as were therein contained."

The argument was that each new lease granted should not be treated as containing the whole of that provision including particularly the words "including this present covenant" as set out in full again—in other words, that this provision should be construed as promising to put into the new lease all the provisions of the covenant in question except those words "including this present covenant," so that they operated once but no more. That argument was rejected and it was held that the effect of inserting those words, "including this present covenant", was to express in terms an intention to make the right to renew perpetual. The material part of the judgment, following the statement, which has been so often repeated, that there is a tendency in the court against construing provisions in documents of this kind as providing for perpetual renewal, is this (*ibid.*, 56):

"That being the rule of the court in construing a covenant so generally worded, conveyancers have taken this course: finding that the courts would not imply such an intention, they have said, 'we will express it.' And the course they have taken in order to express it has been, to add to the general words which the courts have held as necessary to imply such an intention [I think that should read 'as insufficient to imply such an intention'] the words 'including this present covenant.' That this has been the history of the law in these cases is clear . . ."

That statement seems to be as clear an authority as possible that the addition of the words "including this present covenant for renewal," or comparable words, to the general terms "upon like conditions and agreements as are herein contained" is as a matter of conveyancing to be taken as an expression of intention that the right of renewal is to be perpetual.

*Wynn v. Conway Corpn.* (3) was a case of a document different in form because it had language which in terms involved perpetual renewal. The significance for the present purposes of the case seems to be that in it *Hare v. Burges* (2) was approved in this court. Not only that, but from the examples given to us by counsel for the assignee, taken from DAVIDSON'S CONVEYANCING PRECEDENTS, 21st ed., and BYTHEWOOD AND JARMAN'S CONVEYANCING PRECEDENTS, 2nd ed., the statement of LORD HATHERLEY in *Hare v. Burges* (2) is obviously borne out by the facts. In those circumstances I feel unable to say that a lease containing such a formula as does the present is not within the definition which I have read from s. 190 (iii) of the Act of 1922. In other words, having regard to this formula, this is a perpetually renewable leasehold and the results of conversion pursuant to sched. XV to the Act of 1922 inevitably follow.

I said that I would say a word further on *Green v. Palmer* (1), a case in which,

perhaps, any judge would feel even stronger inclination than in the present to avoid a result which on the face of it would appear unlikely to have been contemplated by the parties, for it was a furnished tenancy for a period of six months only. The material passage which the court had to construe was ([1944] 1 All E.R. 670):

- A     “ “ The tenant is hereby granted the option of continuing the tenancy for a further period of six months on the same terms and conditions including this clause, provided the tenant gives to the landlord in writing four weeks’ notice of his intention to exercise his option.”

- UTHWATT, J., having regard to the circumstances of the case read into this provision the qualification that “ the same terms and conditions including this clause ” must be read as meaning “ including this clause ” on the first occasion,  
B but, when the clause came to be operated again there was no ground for once more reproducing the whole formula, including the option to renew. I share with HARMAN, J., considerable difficulty in following the logic of the argument, but it may well be a circumstance which has to be borne in mind that this was a six-month’s tenancy of furnished premises and we have not got in the report a full statement of all the terms of the lease. They may have contained covenants  
C or obligations with regard to specific furniture which might have forced a court to give a strained or artificial construction to a formula which otherwise in essentials I should have thought hardly possible to distinguish from that of the present case.

- Counsel for the lessor concedes that his main argument involved this court saying that *Hare v. Burges* (2) could not be treated as authority. He said that,  
D after all, counsel for the assignee had felt no reluctance in saying that we should overrule *Green v. Palmer* (1). If the whole of the facts in *Green v. Palmer* (1) are stated in the report it is difficult to see how that case can stand with *Hare v. Burges* (2), and, since I regard *Hare v. Burges* (2) as well-established, it would follow that *Green v. Palmer* (1) ought not to be followed. I, therefore, say no more about it than that it seems to me that, if *Green v. Palmer* (1) were to be  
E followed in another case, it would have to be shown that the facts in that other case were for practical purposes identical with the very special facts in *Green v. Palmer* (1). On the facts of the present case I do not think that *Green v. Palmer* (1) should be followed. I would, therefore, allow the appeal.

- SOMERVELL, L.J.: I agree. I cannot find any words in the Act of 1922  
F (and, as my Lord has said, we were referred to certain relevant sections to which the attention of HARMAN, J., was not drawn) which would justify the exclusion from the provisions of sched. XV of leases which on their true construction are perpetually renewable but where words referring to perpetual renewal or some such phrase are not to be found in the relevant covenant. I have nothing which I wish to add to the reasons which have been given by SIR RAYMOND EVERSHED,  
G M.R. I would also like to express my agreement with him when he said that, having regard to our decision in this case, *Green v. Palmer* (1) cannot be regarded as an authority.

JENKINS, L.J.: I agree.

*Appeal allowed with costs.*

Solicitors: *Evan Davies & Co.* (for the assignee); *Neve, Beck & Co.* (for the lessor).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

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*Re* MCGREAVY. *Ex parte* MCGREAVEY *v.* BENFLEET  
URBAN DISTRICT COUNCIL AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.J.J.), January 19, 20, February 9, 1950.]

*Bankruptcy*—"Debt"—*Arrears of rates—Arrears as basis for petition—Bankruptcy Act, 1914 (c. 59), s. 4 (1) (b), s. 33 (1) (a).*

M. and R. carried on a business in partnership on certain premises in respect of which they failed to pay to the B. council a large sum due to the council for rates. M. and R. committed an act of bankruptcy within the Bankruptcy Act, 1914, s. 1 (1) (a), by executing a deed of assignment of their property to a trustee for the benefit of their creditors. The council did not assent to the deed, and subsequently presented a bankruptcy petition against M. and R. On Sept. 28, 1949, a receiving order was made against M. and R. M. appealed on the ground that the debt alleged was not a good petitioning creditor's debt in law.

HELD: having regard to the use of the word "debts" in s. 30, s. 33, and s. 1 (1) (f) of the Act of 1914 the council was a "creditor" and the unpaid rates were a "debt" within s. 4 (1) (b) of the Act, and, therefore, the rates were a debt which would support a bankruptcy petition.

*Lloyd v. Heathcote* (1820) (5 Moore C.P. 129), *applied*.

*Dictum of* COCKBURN, C.J., in *Ex parte Muirhead, Re Muirhead* (1876) (2 Ch.D. 25), *explained*.

*Dictum of* LORD ESHER, M.R., in *Seaman v. Burley* ([1896] 2 Q.B. 347), *explained and dissented from*.

*Re North Bucks Furniture Depositories, Ltd.* ([1939] 2 All E.R. 549), *approved*.

*Decision of the Divisional Court of the Chancery Division (ante, p. 30), affirmed.*

[AS TO NATURE OF PETITIONING CREDITOR'S DEBT, see HALSBURY, Hailsham Edn., Vol. 2, pp. 56-65, paras. 69-75; and FOR CASES, see DIGEST, Vol. 4, pp. 113-116, Nos. 1025-1049.]

Cases referred to:

- (1) *Liverpool Corpn. v. Hope*, [1938] 1 All E.R. 492; [1938] 1 K.B. 751; 107 L.J.K.B. 694; 158 L.T. 215; 102 J.P. 205; Digest Supp.
- (2) *Lloyd v. Heathcote*, (1820), 2 Brod. & Bing. 388; 5 Moore, C.P. 129; 4 Digest 114, 1029.
- (3) *Rawley v. Rawley*, (1876), 1 Q.B.D. 460; 45 L.J.Q.B. 675; 35 L.T. 191; 28 Digest 162, 198.
- (4) *Francis v. Dodsworth*, (1847), 4 C.B. 202; 17 L.J.C.P. 185; 8 L.T.O.S. 391.
- (5) *Medlicot's Case*, (1731), 2 Stra. 899; 4 Digest 110, 985.
- (6) *Ex p. Muirhead, Re Muirhead*, (1876), 2 Ch.D. 22; 45 L.J.Bey. 65; 34 L.T. 303; 4 Digest 124, 1127.
- (7) *Re A Debtor* (No. 975 of 1937), *Debtor v. Petitioning Creditor and Official Receiver*, [1938] 2 All E.R. 530; Digest Supp.
- (8) *Seaman v. Burley*, [1896] 2 Q.B. 344; 65 L.J.M.C. 208; 75 L.T. 91; 60 J.P. 772; 18 Digest 422, 1603.
- (9) *Potts v. Hickman*, [1940] 4 All E.R. 491; [1941] A.C. 212; 110 L.J.K.B. 101; 164 L.T. 346; 105 J.P. 26; 2nd Digest Supp.
- (10) *Re Hunter*, (1879), 3 L.R.Ir. 465; 4 Digest 114, 1028 o.
- (11) *Re North Bucks Furniture Depositories, Ltd.*, [1939] 2 All E.R. 549; [1939] Ch. 69; 108 L.J.Ch. 275; 160 L.T. 523; 103 J.P. 207; Digest Supp.

APPEAL by a debtor from an order of the Divisional Court of the Chancery Division, dated Dec. 5, 1949, and reported *ante*, p. 30, dismissing his appeal

from a receiving order made on Sept. 28, 1949, by the registrar of the Southend County Court.

The petition was presented by the Benfleet Urban District Council to whom the debtor (and his business partner, who did not resist the petition or appeal against the order) owed a large sum in rates. The debtor argued on appeal that the unpaid arrears of rates were not such a debt as would support a bankruptcy petition. The appeal was dismissed. The facts appear in the judgment of the court.

*Aronson, K.C.*, and *M. V. S. Hunter* for the debtor.

*Christie, K.C.*, and *Caplan* for the Benfleet Urban District Council.

*C. W. Chandler* for the trustee in bankruptcy.

*Cur. adv. vult.*

Feb. 9. **SOMERVELL, L.J.**, read the following judgment of the court. The issue raised by this appeal is whether rates assessed, demanded and unpaid are a "debt," and the rating authority to whom the rates are due is a "creditor" who can petition, within the Bankruptcy Act, 1914, s. 4, the relevant provisions of which are:

"(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . (b) the debt is a liquidated sum, payable either immediately or at some certain future time . . ."

The rating authority here is the Benfleet Urban District Council, whom we will refer to as the council. Their petition sets out that the debtors, Mr. McGreavey and Mr. Rundle, who carried on business as partners, were justly and truly indebted to the council for £4,489 6s. 11d. for general rates, and that an act of bankruptcy had been committed—and this is not disputed—within three months by an assignment of their property to a trustee for the benefit of their creditors generally. The council were not a party to and have not assented to this deed. A receiving order was made on this petition by the registrar on Sept. 28, 1949. Mr. Rundle did not, but Mr. McGreavey did, appeal against that order to the Divisional Court. The issue which we have to decide was raised as an additional ground before the Divisional Court, consisting of **HARMAN and ROMER, JJ.**, who dismissed the appeal. From that decision Mr. McGreavey appeals to this court. We are told, and we accept, that there is no case of a petition based on rates to be found in the bankruptcy records.

The main argument was based on the fact that unpaid rates cannot be recovered by an ordinary action. It was submitted, therefore, that there was no "debt" within the Bankruptcy Act, 1914, s. 4 (1) (b). It is common ground that unpaid rates are not recoverable by action, but it is necessary at the outset to refer to the statutes with regard to rates and their recovery. By 43 and 44 Eliz., c. 2, which first created rates, the overseers, by s. 2, were authorised by warrant from two justices to levy the rates arrears "of everyone that shall refuse to contribute according as they shall be assessed" by distress and sale of the offender's goods. By the Distress for Rates Act, 1849, s. 2, it is provided that if no, or no sufficient, goods or chattels can be found on the execution of such a warrant, it shall be lawful for the justices to issue a warrant of commitment ordering the person on whom the rates have been assessed to be imprisoned for a period not exceeding three months, unless the sums therein mentioned shall be sooner paid. The general law as to the making of rates, appeals, and so on, is now contained in the Rating and Valuation Act, 1925. Section 1 (2) of that Act transferred the powers and duties of the overseers of the poor, in relation to the making, levying and collection of rates, to the rating authority. The Money Payments (Justices Procedure) Act, 1935, s. 10, modified s. 2 of the Act cited of 1849. If the justices are of opinion that the failure to pay the rates was not due either to wilful default or culpable neglect, they are not to issue the warrant. If no warrant is issued, the justices are given power

to remit the payment of part or all of the sums to which the application relates. It was decided by this court in *Liverpool Corpn. v. Hope* (1) that an action by a local authority to recover unpaid arrears of rates will not lie. Reference will have to be made to some observations in the judgment in that case later, but it clearly decided that unpaid rates are not an actionable debt.

We will now consider the relevant provisions of the Bankruptcy Act, 1914. Counsel for the debtor relied on the history of certain provisions, on *dicta* in various cases, and on the absence of any case in which a liability for rates has been made the basis of a petition. We have borne these matters in mind and will refer to them in detail later, but we prefer in the first place to state what seems to us the natural construction of the provisions of the Act which we have to construe and apply. Section 4 (1) (b) has already been read. There is an express reference to rates in the Act, to be found in s. 33 (1) which provides:

"In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—(a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax, assessed on the bankrupt up to Apr. 5 next before the date of the receiving order, and not exceeding in the whole one year's assessment."

The wording of para. (a) makes it clear that rates are regarded as becoming "due and payable." When a sum for rates is lawfully demanded it does, we would have thought in the ordinary meaning of words, become due and payable, although not actionable. The section also makes it clear that rates are provable. If a man has been made bankrupt, owing a sum for rates, it is not disputed that a rating authority has a "remedy" by proving for the sum due in the bankruptcy. It is, with assessed taxes, given a priority.

An argument for the council was based on the words "all other debts." This implies, it was said, that rates are a debt for all the purposes of this Act, including s. 4. This is not, in our opinion, a conclusive argument by reason of the provisions of s. 30. That section sets out what is and what is not provable in bankruptcy. It is necessary to read sub-ss. (1), (2), (3) and (8) of s. 30. It is clear from sub-s. (3) that the expression "all other debts" in s. 33 is given a special and extended meaning, and it would not necessarily follow that the word "debt" in s. 4 had this same extended meaning. Sub-section (8) of s. 30 shows that there are provable debts which would not support a petition, being outside the express provisions of s. 4. On the other hand, reading s. 30 and s. 33 together, we come to the conclusion that rates are within the word "debts" in s. 30 and are not brought in as a "liability," which is deemed to be a debt. In the first place, we think that the word "debt," apart from any indication from the context to the contrary, would in its natural meaning cover a liability for rates. It is, undoubtedly, a sum due. If a man were asked to make a list of his debts, he would clearly include it. In the second place, if the word "debt" is to be construed in its narrow procedural sense as meaning a sum for which an action can be brought, leaving rates to be brought in as a liability, we would have expected an express reference to rates in sub-s. (8), having regard to the express reference to rates in s. 33.

We will now consider the wording of s. 4 and the sections which precede it. Section 1, which sets out what constitutes acts of bankruptcy, provides as follows in sub-s. (1) (f):

"If he [a debtor] files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself:"

It seems to us plain that unpaid rates must be a "debt" to be taken into account when a debtor is considering whether he is in a position to file a declaration within the opening words of this paragraph. Section 3 provides:



"Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate."

A When one comes to s. 4, which has already been read, its wording, we think, tends to negative the view that "debt" is used in its pleading or procedural sense. If it were, it would be unnecessary to provide that the debt must be a liquidated sum.

B Whether or not "debts" extends in s. 1 to all provable debts, we find no grounds in the Act for construing the word "debt" in s. 4 as referring only to debts in the pleading or procedural sense. Considering the words in s. 4, having regard to the use of the word "debts" in s. 30, s. 33 and s. 1 (1) (f), we would come to the conclusion that the council is a creditor and the unpaid rates a debt within s. 4. We think considerable support for this construction is to be found in *Lloyd v. Heathcote* (2). The question there was whether the bankrupt had begun "to keep house with intent to delay creditors." A collector of rates had called and been told by the bankrupt's wife on his instruction that he (the bankrupt) was not at home. It was argued that this was not sufficient, as the C bankrupt could not be proceeded against immediately, but only by distress on a justices' warrant. In the course of his judgment DALLAS, C.J., said (5 Moore C.P. 137):

D "But it has been contended, that the collector was not a creditor, as he could not immediately sue the bankrupt for his debt. The argument, however, rests on fallacy, as it confounds the debt with the remedy, and assumes that the former cannot exist unless the debtor may be sued in the usual and ordinary manner. . . . The collector was in the nature of an agent duly entitled to demand and receive them, and when the assessment was made, the debt was created, and might be immediately demanded."

PARK, J., said (*ibid.* 139):

E "I am further of opinion, that the collector of the rates in question was in a situation to apply for them as a debt due at the time, and concur with the distinction as drawn by my Lord Chief Justice, as to the debt being due, and the effect the denial might have, in postponing the remedy of the collector."

BURROUGH, J., said (*ibid.* 140):

F "The rate is in the nature of a debt, and it is immaterial whether it be immediately suable or not, for if a remedy be given to recover the assessments due, they must stand in the same situation as debts which are usually suable."

G It is, we think, relevant that at that date, when the old forms of action existed, the word "debt" in relation to bankruptcy proceedings was regarded as apt to describe unpaid rates.

H Although in certain contexts the word "debt" means a liquidated sum which can be sued for, to treat the word as *prima facie* so restricted, is, we think, to confuse, as DALLAS, C.J., said, the debt with the remedy. This is well illustrated by the wording of the Infants Relief Act, 1874, s. 2, which was considered in *Rawley v. Rawley* (3):

"No action shall be brought . . . upon any promise made after full age to pay any debt contracted during infancy . . ."

We were referred to STROUD'S JUDICIAL DICTIONARY, 2nd ed., p. 471, where that case is cited as authority for the statement:

"A 'Debt' is a sum payable in respect of a liquidated money demand, recoverable by action."

We have quoted one of the statutes being construed, in which the word "debt" is used to cover what was plainly not recoverable. MELLISH, L.J., in dealing with the Statute of Set-off (2 Geo. II., c. 22, s. 13) on which the case turned, quoted (1 Q.B.D. 467) from a judgment of WILDE, C.J., in *Francis v. Dodsworth* (4) (4 C.B. 220):

"The judicial construction of this section has been, that no debts can be used by way of set-off except such as are recoverable by action; and it has accordingly been held that the Statute of Limitations may be replied to a plea of set-off."

The language implies that the word "debts" covers sums which are not recoverable by action. The statement in STROUD must be read in the context of the decision, which was, in substance, that, if no action can be maintained, a debt cannot be set off.

We will now deal with the argument based on the history of this legislation. Counsel for the debtor started with the Bankruptcy Act, 1869, but we think it is worth referring to the earlier Bankruptcy Act, 1861. That Act made provision in s. 89 for the amount of the petitioning creditor's debt, and in s. 97 provided a way in which secured debts were to be reckoned and expressly excluded debts barred by the Statute of Limitations. In the Act of 1869, s. 6 provided:

"... moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity ..."

It had been held that an equitable creditor could not petition: see, e.g., *Medlicot's Case* (5). We will assume for the moment, without deciding, that "due at law" in this context means recoverable by action. In the Act of 1883 the words "due at law or in equity" are omitted, and the relevant provisions of s. 6 are identical with those of s. 4 of the Act of 1914. It is suggested that the only reason for the omission was the passing of the Judicature Act, 1873, and that we must, therefore, read in the words "due at law." It would clearly not be sufficient to read in "due" as the words we have quoted from s. 33 make it clear that the rates are treated as "due." No doubt, in certain circumstances previous legislation is of legitimate assistance to construction. There can, however, be no presumption that Parliament has not intended to alter the law when words are changed or omitted. Suppose that when the Bill was under discussion it had been suggested that simply to omit these words might extend the scope of the section in certain directions, Parliament might have thought such an extension desirable. We have ourselves considerable doubt as to the premise of the argument. Once it appears that rates are treated as "due and payable" when assessed and demanded, we should have thought they were probably within the words "due at law." It was submitted that Parliament, having set up the procedure under which a defaulting ratepayer might, in certain circumstances, be imprisoned, and in certain circumstances have a remission of rates, would not allow a rating authority the further or alternative right of petitioning in bankruptcy in respect of the unpaid rates. We do not follow this argument. There seems to us no kind of inconsistency in having one procedure perhaps more appropriate for small sums due from individuals, and another, and in some cases an alternative, procedure more suitable for large sums due from individuals or limited companies.

Before coming to the *dicta* relied on by counsel for the debtor, we would like to make a general observation. An *obiter dictum*, though not binding, may be of great assistance in coming to a conclusion if it is clear that its author had in mind the issue which one has to decide. If not, it is of little, if any, help, and it is very often unfair to its author to seek to extend it to an area which he was clearly not considering. For example, counsel for the debtor, who was, if we may say so, right in drawing our attention to these *dicta*, referred to the observations ([1938] 1 All E.R. 494) by SLESSER, L.J., in *Liverpool Corpn.*

v. *Hope* (1), that the only remedy which is afforded to a local authority entitled to rates is the remedy of distress. We agree with what was said by the Divisional Court, that the lord justice was addressing his mind only to the question before him, namely, whether a remedy by action was available. He clearly had not in mind, and was not considering, the construction of the Bankruptcy Act as applicable to rates. Under that Act there is admittedly "a remedy" other than distress, namely, proof in the bankruptcy.

A We will deal next with *Ex p. Muirhead, Re Muirhead* (6). In that case a co-respondent in a divorce suit was ordered to pay £5,000 into the registry. As he was abroad, the order was altered and the sum was ordered to be paid to the husband, he undertaking to pay it into the registry. It was held this did not constitute a good petitioning creditor's debt. The *ratio decidendi* is stated by SIR WILFRID GREENE, M.R., in *Re A Debtor* (No. 975 of 1937) (7) where he says ([1938] 2 All E.R. 533):

"... the reason why it was held insufficient ... was that it merely put the petitioner into the position of a conduit pipe for bringing the money to the court, and gave him no rights of his own with regard to it."

C The decision does not, of course, assist us here. COCKBURN, C.J., in the course of his judgment in *Ex p. Muirhead* (6), says (2 Ch.D. 25):

"Now in order to constitute a good petitioning creditor's debt, you must have that which may be the immediate subject of an action at law or suit in equity."

D The law at that time was contained in s. 6 of the Act of 1869. As a general statement it is inaccurate now, in that a debt payable at a certain future date is a good petitioning creditor's debt. Quite plainly, however, the Lord Chief Justice had not in mind the question whether, on the construction of the 1869 Act as a whole, rates which are referred to as due and payable for the purpose of proof, in s. 32 of that Act, were "due at law" within s. 6.

E In *Seaman v. Burley* (8) this court had to consider the question whether proceedings before justices under a local Act for a warrant of distress in respect of unpaid rates with power to commit to prison if there was insufficient distress was a criminal cause or matter. It was argued that the power to imprison was not punishment, but a process for enforcement of a civil liability, like an order for commitment under the Debtors Act, 1869. It was in this context that LORD ESHER, M.R., said ([1896] 2 Q.B. 347):

F "Therefore, assuming the contention that the rate is a debt to be well founded, which I do not admit, nevertheless, if the legislature have enacted that it may be recovered or enforced by criminal procedure, there can be no appeal to this court. But I do not think it is true to say that the obligation to pay the rate is a debt. It is certainly not a debt in the ordinary sense of the term. No one can bring an action for it. It is a payment to be made in pursuance of a public duty, which cannot be enforced by action or in any other way than by proceedings before magistrates."

G The passage shows that a decision of this issue was not necessary for LORD ESHER's decision on the appeal. The words used show that LORD ESHER had not in mind bankruptcy proceedings where rates are admittedly provable priority "debts." With respect, we think a rate is a debt in the ordinary sense, though it may well not be so for the purposes of the argument which LORD ESHER was considering.

H We were also referred to a passage in a speech of VISCOUNT SIMON, L.C., in *Potts v. Hickman* (9) ([1940] 4 All E.R. 495, 496). The decision in that case is not relevant, but in the passage cited the Lord Chancellor confirmed the view that had been previously expressed that justices, when granting a distress warrant for rates, are proceeding judicially. This, no doubt, is an instance of



what is plain, that there is this special procedure for dealing with defaulting ratepayers. It does not, in our opinion, advance the argument. We were also referred to *Re Hunter* (10). That case turned on special powers given by statute to the Collector General of Rates in the city of Dublin and we do not think it assists. In *Re North Bucks Furniture Depositories, Ltd.* (11), the question was whether a rating authority, to whom rates were due from a limited company which had obtained a distress warrant, but found no goods and chattels on which to levy distress, was a "creditor" within the Companies Act, 1929, s. 170, and could present a petition to wind-up the company. CROSSMAN, J., decided that it was. The company did not appear, but counsel for the petitioners drew the attention of the learned judge to *Liverpool Corp'n. v. Hope* (1). In s. 264 (1) of the Act of 1929 there is a provision similar to that in s. 33 (1) (a) of the Bankruptcy Act, 1914, giving rates a preference in the winding-up, and referring to them inferentially as debts. Counsel for the debtor argued that that case could be distinguished as there was no section corresponding to s. 4. The Acts are, of course, different, but, as it seems to us, the reasoning of CROSSMAN, J., is, *mutatis mutandis*, on the same lines as our reasoning in the present case, and we agree with his conclusion. It is satisfactory that there should be uniformity and that in both cases a rating authority to whom rates are owed is a creditor who can present a petition. We have examined, but do not propose to set out, the relevant sections of the Companies Acts. It is sufficient to say that, if the conclusion to which we have come on the Bankruptcy Act is right, the decision of CROSSMAN, J., on the sections which he had to construe seems to us, *a fortiori*, right.

It was suggested in the course of the argument that the conclusion to which we have come is a surprising one. It does not surprise us. Rating authorities, in carrying out their duties, have not sought a decision of the courts as to whether unpaid rates would support a petition in bankruptcy. Since 1861, with the possible exception of the period 1869 to 1883, there was clearly an argument for this contention, having regard to the general meaning of words and the observations in *Lloyd v. Heathcote* (2). The point not having been raised, it would not have been surprising if one had found that the words used in the relevant Act excluded a rating authority from petitioning, but, considering the code as a whole, it seems to us sensible that the body which is given priority among those who can prove in the bankruptcy should have a right, if so minded, to petition. We agree with the Divisional Court, for substantially the same reasons, and, in our opinion, this appeal must be dismissed, and dismissed with costs.

*Appeal dismissed. The trustee in bankruptcy was refused his costs of the appeal on the ground that it was not the practice for the trustee to appear unless there were circumstances in which he could assist the court. As regards the remainder of the costs, the court ordered that a sum of £20 which had been paid into court should be paid out in part satisfaction of the costs, and that the balance of the costs should be added to the petitioning creditor's costs in the proceedings.*

Solicitors: Percy Haseldine & Co. (for the debtor); Zeffertt, Heard & Morley Lawson, agents for Heard & Coleman, Hadleigh, Essex (for the Benfleet Urban District Council); Zeffertt, Heard & Morley Lawson (for the trustee in bankruptcy).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

TURNER (otherwise ROBERTSON) v. METRO-GOLDWYN-MAYER PICTURES, LTD.

[HOUSE OF LORDS (Lord Porter, Lord Greene, Lord Normand, Lord Oaksey and Lord Morton of Henryton), October 24, 25, 26, 27, 31, November 1, 2, 3, 7, 8, 1949, February 6, 1950.]

A *Libel—Privilege—Qualified privilege—Malice—Evidence—Expression of opinion—Opinion actuated by financial considerations—Right of defence against written attack—Procedure at trial.*

On Sept. 22, 1946, the appellant, who was a film critic, under an agreement with the British Broadcasting Corporation broadcast a review of the previous week's films. The review included an adverse criticism of a film produced by the respondents who, on Sept. 27, 1946, wrote to the B.B.C. as follows: "We regret to inform you that, in our judgment, based upon a considerable number of talks given by Mrs. Arnot Robertson, that critic is completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners, and her criticisms are on the whole unnecessarily harmful to the film industry. In these circumstances we propose not to invite Mrs. Arnot Robertson to review Metro-Goldwyn-Mayer films in future, and we would ask your kind co-operation in restraining her from doing so in B.B.C. broadcasts." The appellant claimed damages for libel, alleging that the statements contained in the letter were defamatory in that they imputed to her incompetence in her professional capacity as a critic. It was admitted by the appellant that the letter was written on an occasion of qualified privilege, but it was contended that, in writing it, the respondents were actuated by malice. The judge, before ruling whether or not the words complained of were capable of a defamatory meaning, summed up to the jury and put to them the following questions, to which the answers of the jury are appended:—(Q.) "Was the letter in question a libel on the [appellant] (a) giving their words their natural and ordinary meaning? (A.)—Yes. (b) in the sense that it imputed to her incompetence as a film critic and broadcast reviewer of films? (A.)—Definitely. Yes."

HELD: (i) in considering whether the words complained of were malicious, the appellant was entitled to show any example of spite or indirect motive whether before or after publication of the letter, each piece of evidence being considered separately, and, even if there was a number of instances where a favourable attitude was shown, one case tending to establish malice was sufficient evidence on which a jury could find for the appellant.

(ii) the statements that the appellant was "out of touch" and that "her criticisms were ... unnecessarily harmful to the film industry" were expressions of opinion, and, therefore, the test was not whether that opinion was right, but whether it was genuine.

(iii) the fact that, in writing the letter the respondents were actuated by financial considerations, was not, in itself, evidence of malice since they had a right to protect their pecuniary interests.

(iv) in the circumstances and applying the test that it was the honesty of the respondents' views, and not their reasonableness, which decided whether or not they were malicious, there was no evidence of malice, and the communication was privileged.

Per LORD OAKSEY: "There is, it seems to me, an analogy between the criminal law of self defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence. That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words."

*Per curiam:* The practice in actions of libel for the judge to take the verdict of the jury before ruling whether the words are capable of being defamatory has serious disadvantages where more than one statement is said to constitute libel or where a number of disconnected circumstances, by which malice is said to be established, come in question.

[AS TO EFFECT OF MALICE OR QUALIFIED PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 499-506, paras. 612-618; and FOR CASES, see A DIGEST, Vol. 32, pp. 155-161, Nos. 1871-1948.]

Cases referred to:

- (1) *Nevill v. Fine Art and General Insurance Co.*, [1895] 2 Q.B. 156; 64 L.J.Q.B. 681; 72 L.T. 525; 59 J.P. 371; *affmd.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 32 Digest 154, 1868.
- (2) *Capital and Counties Bank v. Henty*, (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 32 Digest 21, 121. B
- (3) *Somerville v. Hawkins*, (1851), 10 C.B. 583; 20 L.J.C.P. 131; 16 L.T. O.S. 283; 32 Digest 112, 1437.
- (4) *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100; 72 L.J.K.B. 612; 88 L.T. 757; 32 Digest 151, 1826.
- (5) *Merivale v. Carson*, (1887), 20 Q.B.D. 275; 58 L.T. 331; 52 J.P. 261; 32 Digest 152, 1837. C
- (6) *Clark v. Molyneux*, (1877), 3 Q.B.D. 237; 47 L.J.Q.B. 230; 37 L.T. 694; 42 J.P. 277; 32 Digest 159, 1922.
- (7) *Toogood v. Spyring*, (1834), 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 32 Digest 117, 1489.

APPEAL from a decision of the Court of Appeal (SCOTT, ASQUITH and COHEN, L.JJ.), dated July 26, 1948, setting aside a verdict of a jury and an order of HILBERY, J., dated July 17, 1947, whereby he gave judgment for the appellant for £1,000 damages on a claim for libel and £500 damages for slander. The libel complained of was contained in a letter addressed by the respondents, a film company, to the British Broadcasting Corporation, by whom the appellant was employed as a critic of films, in which the respondents suggested that the appellant was "out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners, and her criticisms are on the whole unnecessarily harmful to the film industry." The House of Lords now held that the words were written without malice and dismissed the appeal. D

*Pritt, K.C., Shelley, K.C., and Harold Brown* for the appellant.

*Scott Cairns, K.C., and Megaw* for the respondents. E

The House took time for consideration. F

Feb. 6. The following opinions were read.

**LORD PORTER:** My Lords, this is an appeal from a judgment of the Court of Appeal dated July 26, 1948, by which a verdict and judgment on behalf of the appellant was set aside and judgment entered for the respondents. The jury had awarded her £1,000 for libel and £500 for slander, and the learned judge held that the evidence adduced entitled them to do so. G

The appellant is a writer and critic of films who uses her maiden name of Arnot Robertson for the purposes of her profession. She was at one time film critic for the "Daily Mail" and had broadcast on various subjects for the British Broadcasting Corporation. One feature of this broadcasting is a ten-minutes criticism of the week's films on Sunday morning. This feature is not conducted solely by one person, but different critics are engaged from time to time for a specified number of talks. The appellant was thus engaged in September, 1946, and on Sept. 22 she reviewed a number of films, among which was the film produced by the respondents and entitled "The Green Years." H  
The review was an adverse one and the respondents, who had been previously



dissatisfied with her references to their films, wrote to the Director of Talks of the B.B.C. a letter dated Sept. 27, 1946, in the following terms:—

A "We regret to inform you that in our judgment, based upon a considerable number of talks given by Mrs. Arnot Robertson, that critic is completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners, and her criticisms are on the whole unnecessarily harmful to the film industry. In these circumstances we propose not to invite Mrs. Arnot Robertson to review Metro-Goldwyn-Mayer films in future, and we would ask your kind co-operation in restraining her from doing so in B.B.C. broadcasts."

B At the same time the respondents sent a copy of this letter to the appellant, but they addressed it to her at the B.B.C. offices, with the result that it did not reach her till Oct. 3, 1946. The letter did not influence the B.B.C. in any way, but by some means or other it appears that the fact that it had been written became common knowledge to members of the Press, and on Oct. 2 two reporters, one of whom was a Mr. Moynihan connected with the "News-Chronicle," interviewed the appellant in the matter. She, as she informed them, had not seen the letter, and Mr. Moynihan thereupon first telephoned to the C B.B.C., who said that they had no statement to make, and then rang up the respondents, where he got into communication with a Mr. McPherson, the respondents' publicity manager. Some differences as to what then occurred are to be found in the evidence of these two witnesses, Mr. Moynihan saying that the letter was read over to him twice, Mr. McPherson stating that the gist alone had been communicated. In accordance with the terms of their letter, D the respondents, who at the request of the B.B.C. had previously sent an invitation to the appellant for the pre-view of their films at their private theatre, withdrew that invitation. On Oct. 3 the appellant received a copy of the letter and, thereupon, herself wrote to "The Times," setting out the letter in full and adding:

E "How far should an American film company be allowed to interfere with the public's right to an unbiased opinion? I find it hard to believe that, had I praised "The Green Years" (of which few of my colleagues took a favourable view), M-G-M's sense of my unfitness for my job would have been quite so keen, or taken this rather remarkable form."

F After writing this letter the appellant asked for an apology for the wrong which she alleged had been done her, and for reasonable compensation. On the respondents declining to comply with her request, she brought the action now the subject of your Lordships' consideration. For her cause of action she relied on the statements contained in the letter of Sept. 27, 1946, and on their repetition by Mr. McPherson as being defamatory in their natural and ordinary meaning and as bearing the innuendo that they imputed to her incompetence as a critic. G To this claim the respondents answered in their defence that the words were incapable of the meaning alleged or any defamatory meaning and denied any malice on their part in writing the letter or speaking the words.

When the case came on for trial certain admissions were made on either side. It is common ground that the respondents were entitled to withdraw their permission from the appellant to visit their theatre and to be present at their H Press shows which precede the general release of their films, and even precede the pre-release at their own theatre. It was also admitted that, if the respondents intended to exclude the appellant from attending these shows, it was proper that they should inform the B.B.C. of this intention, as the original invitation to the appellant had been given at the B.B.C.'s request. Accordingly, there was a common interest between the respondents and the B.B.C., creating a qualified privilege. It was, therefore, necessary for the appellant to establish malice in fact on the part of the respondents if she was to succeed in her action.

On the other hand, it was conceded that the words, if defamatory at all, were defamatory of the appellant in her professional capacity and were actionable in slander without proof of special damage. Both courts held that the expressions used were capable of a defamatory meaning and the learned judge left it to the jury to decide whether there was malice or not. The jury decided that there was. The majority of the Court of Appeal (SCOTT and ASQUITH, L.J.J.) held that there was no evidence of malice fit to be left to the jury, but COHEN, L.J., agreed with the ruling of HILBERY, J., that there was evidence of malice. The issues which came before the court of first instance were summed up in certain questions put to the jury and their answers thereto. These questions were submitted to and accepted by counsel for each of the parties and except for some immaterial alterations were submitted to the jury in the form which had been agreed. The questions and answers were:

- (1) (Q.)—Was the letter a libel on the plaintiff [appellant]—  
(a) giving the words their natural and ordinary meaning?  
(A.)—Yes.  
(b) in the sense that it imputed to her incompetence as a film critic and broadcast reviewer of films?  
(A.)—Definitely, yes.
- (2) (Q.)—Was the letter comment or statement of fact?  
(A.)—Statement of fact.
- (3) (Q.) In writing the letter were the defendants [respondents] actuated by malice?  
(A.)—Yes.
- (4) (Q.)—Did the defendants speak over the telephone to the witness Moynihan the contents of the letter complained of or the part of it which Moynihan said he took down?  
(A.)—Yes.
- (5) (Q.)—If the defendants did state the whole or part of the contents of the letter to Moynihan, did the words slander the plaintiff in the way of her profession of film critic?  
(A.)—Yes.
- (6) (Q.)—If the defendants read the letter over the telephone to Moynihan were they actuated by malice when they so read it?  
(A.)—Yes.
- (7) (Q.)—If you find for the plaintiff that the plaintiff was (a) libelled or (b) slandered, what damages for (a) libel or (b) slander?  
(A.)—£1,000 for libel, £500 for slander.

My Lords, as I have said, the majority of the Court of Appeal took the view that there was no evidence of malice, but a further question was argued both in the court of first instance, in the Court of Appeal, and before your Lordships, namely, that the words in question do not constitute a libel on the appellant in that, taken in their ordinary meaning, they are not defamatory nor are they capable of bearing the sense ascribed to them in the innuendo, *viz.*, that they impute to her incompetence in her work as a critic. If they are incapable of the alleged or any defamatory meaning, the appellant must fail. If, however, any defamatory meaning can be found in them, a number of further questions require determination, the first and most important of which is whether there was any evidence of malice fit to be left for the consideration of the jury, and the second, whether the learned judge misdirected the jury on the question of malice. Besides these two main matters certain additional questions as to the claim for slander and as to damages might require discussion if the appellant were to succeed in her action. Both courts below held that the words did not bear the innuendo suggested. The learned judge so decided on the ground that the appellant, though completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners, might

still be a perfectly competent critic, and, though highly skilled in the technique of the art which the critic was called on to deal with and having an acknowledged taste and a trained taste in that art, might still be out of touch with millions of people who flock to those theatres where that particular art was the attraction. Nor, in his view, did the words "unnecessarily harmful" reflect on her competence of a critic though they might otherwise be defamatory in their natural meaning. In the Court of Appeal COHEN, L.J., thought that "out of touch with" might either mean "ignorant of" or "out of contact with," but in either event the words, in his view, were incapable of the innuendo alleged. "A critic," he says, "may lack one qualification which he could usefully have, but it does not follow that he is incompetent," and, accordingly, he agreed with the learned judge in the observations quoted above. I also agree with these observations, and, indeed, all the members of the Court of Appeal took the same view. It still, however, remains to be determined whether the words can bear a libellous meaning in their natural and ordinary sense. The learned judge left the questions quoted above to the jury before dealing with the submissions made on behalf of the respondents, viz:—(i) that the words were incapable of bearing any defamatory meaning; and (ii) that there was no evidence of malice fit for the consideration of the jury. When the submission was renewed after the jury's verdict had been given he held that the earlier words were incapable of a defamatory meaning, but that the statement that the "criticisms are on the whole unnecessarily harmful" was defamatory because of the use of the word "unnecessarily." COHEN, L.J., on the other hand, in the Court of Appeal appears to have formed the view that the words were capable of a libellous meaning as a result of the opinion which he, on an analysis of the meaning of the wording, entertained that "out of touch" might bear one of the two meanings set out above. If the first meaning were adopted, he thought that the words could not be defamatory. If the latter, they were, he held, capable of being defamatory of a film critic. "She is not bound to agree," he says, "with the tastes of the millions, but it might be thought that she should know what these tastes are." The other lords justices confined their observations to the question of malice or no malice, and do not seem to have dealt with the question of libel or no libel, except that SCOTT, L.J., on this issue does say—

"On the whole I come to the same conclusion as the learned judge, but I think it [the letter] only just over the boundary line and that, had there been no plea of qualified privilege, the justifiable figure for damages could not possibly be more than a small fraction of the figure of £1,000 awarded by the jury for the libel whether the innuendo was established or not."

My Lords, having regard to the view I have formed on the question of malice, I do not think it necessary to come to a final determination on this matter. I would only say that I agree with the opinion of SCOTT, L.J., that the allegations in the letter, if libellous at all, are only just over the border-line, and I can, perhaps, best express my view by quoting from the words of LORD ESHER, M.R., in *Nevill v. Fine Arts and General Insurance Co.* (1) where he says ([1895] 2 Q.B. 168):

"It seems to me that the terms of that circular come as nearly as possible to being incapable of a defamatory meaning; but it is not necessary, I think, to go the length of deciding that they are so."

One more observation I desire to make on this matter. The modern practice in actions of libel is for the judge to take the opinion of a jury first and after their verdict has been recorded to rule whether the words are capable of being defamatory. No doubt this course has great advantages in that it avoids the necessity of a second trial if the judge rules there is no case to go to the jury but the Court of Appeal take a different view. Nevertheless, in a case of any complication such as exists in the present instance, where there are at least



two statements, either of which may or may not be libellous in the view of the tribunal which tries the case, the course adopted presents considerable difficulty. The case was left to a jury uninstructed whether either or both of the statements (i) that the appellant was out of touch with her listeners and (ii) that her talks were unnecessarily harmful, could be libellous or not, and it is impossible to say whether they relied for their verdict on one or both. Consequently, an appellate court is left in uncertainty as to what the grounds of their verdict were. It will later be necessary to consider whether there was any evidence of malice to go to the jury. Here, again, the same difficulty arises. Some ten or twelve matters were put before your Lordships' House as being evidence of malice. So far as I am able to see, the learned judge gave little if any direction to the jury as to what they might regard as evidence of malice, and, consequently, it is impossible to say on what they relied to support their verdict. The court might think that some or one only of the circumstances relied on were evidence from which malice could be derived, but the jury may have relied, not on that or those matters, but on others which, in the view of the court, could not be evidence of malice. Whatever the advantage of the present practice may be, I cannot help feeling that it has grave disadvantages where more than one separate statement is said to constitute libel or where a number of disconnected circumstances, by which malice is said to be established, come in question.

Some argument was presented to your Lordships as to the attitude which the judge should adopt where, in his view, the only inference which can be drawn from the words complained of is that they lie on the border-line, and it is impossible to say whether, when properly considered, they are capable of a libellous meaning or not. It is, of course, the duty of a judge in the first instance to put an accurate interpretation on the words used, and, having done so, to make up his mind whether they are capable of a defamatory meaning or not. Theoretically, if he is left in doubt, he should rule them incapable of a defamatory meaning, but this, I think, is a theoretical and not a practical difficulty. It is the judge's duty to make up his mind and, save in very exceptional cases, he can decide on which side of the line the words complained of are to be placed. If he comes to the conclusion that a reasonable jury would be justified in finding that they had a libellous tendency, he must leave it to them even though the words might also bear an innocent interpretation, or, to put it from the point of view of an appellate court, the question of libel or no libel should have been left to the jury if it cannot be said that twelve men could not reasonably have come to the conclusion that the words were defamatory. This, I think, is what LORD BLACKBURN means in his observations in *Capital and Counties Bank v. Henty* (2) when he says, quoting BRETT, L.J. (7 App. Cas. 786):

"... it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document."

It is in accordance with the test put by LORD SELBORNE, L.C., when he says (*ibid.*, 745) :

"The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense."

In the present case both the court of first instance and the Court of Appeal, though for different reasons, found the letter capable of a defamatory meaning, and I proceed to consider the second question whether there is any evidence of malice on the part of the respondents on this footing.

It is common ground, as I have indicated, that qualified privilege is rightly claimed by the respondents, but, it is said that any reliance on it is ruled out by the existence of express malice on their part. Where such an allegation is

A made it is the duty of the plaintiff to establish the existence of malice and, unless he does so, the defendant succeeds. If, however, the plaintiff can show any example of spite or indirect motive, whether before or after the publication, he would establish his case provided that the examples given are so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date when the libel was published. No doubt, the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given and the question left to, or withdrawn from, the jury by ascertaining which way the scale is tipped when they are weighed in the balance one against the other. On the contrary, each piece of evidence must be regarded separately, and, even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff. Nevertheless, each particular instance of alleged malice must be carefully analysed, and, if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances. MAULE, J., delivering the judgment of the court in *Somerville v. Hawkins* (3) and referring to the facts in that case, said (10 C.B. 590):

D "... the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury ... It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence."

E In the light of these observations I turn to the instances adduced from which it is said that a jury were entitled in the present case to find that the respondents were malicious. The circumstances relied on by the appellant for this purpose were conveniently tabulated by her counsel.

F First, it is said that the words themselves are evidence of malice. It is true that grossly exaggerated language may be evidence of malice, but I find nothing gross or exaggerated in the words used in the letter complained of. Indeed, having regard to my views as to the extent to which they can be held defamatory at all, it would be difficult to do so. I can see nothing in them which a film manager and film producer might not genuinely believe. After all, the success of their films is of vital importance to them from what has been called the "box-office" point of view, and they might well feel that a seriously adverse criticism was unjustified. Secondly, it is said that the mere exclusion of the lady from the pre-views was itself evidence of malice. I do not follow this argument. G Admittedly, the respondents were entitled to withhold their invitation. It is true that they had at an earlier time withheld an invitation from Miss Dilys Powell on the ground that they did not approve of her reviews, but I cannot see how the repetition of the exercise of a right can be evidence of malice, and, even accepting the view that the respondents were wrong in their attitude, H their action is still no evidence of malice. Thirdly, it is said that malice can be inferred from the evidence given on behalf of the respondents at the trial by Mr. Eckman, who was chairman and managing director of the respondent company, and by Mr. McPherson. In criticism of their evidence it was said that they were not concerned with the mere protection of their company's interests, nor entertained a general belief that the appellant's criticisms were unjustified, but desired to stifle all adverse criticism and, if possible, to hound the appellant out of her position as film critic. Certain matters, which, in the evidence they

gave, were relied on as justifying their statement that she was "out of touch" with the public and doing "unnecessary harm" to the industry, were said to be mere excuses and not honestly held. The first of these was their complaint of self-exhibitionism on the part of the appellant, and it is suggested that such a view could not genuinely be held. Obviously intimate criticism such as these talks contained is apt to call attention to the personality of the critic. Whether it calls undue attention is, in the end, a matter of opinion. The question is not whether it is a right opinion, but whether it is a genuine one, and in the present instance there is, I think, no ground for inferring that the respondents, as producers of films, did not genuinely feel that more space ought to be devoted to the film itself and less to the personal views and what they might regard as idiosyncracies of the critic. I cannot derive evidence of malice from such an attitude. The expressions "flippancy" or "exhibitionism" or "self-advertisement" which were also employed and the allegation that the appellant was more interested in "wisecracking" than in reviewing films appear to be used with the same general meaning, *viz.*, that she was accustomed to utter clever witticisms rather than engage in a genuine exercise of the critical faculty. Examples may be found in her criticisms of "Bathing Beauty," "Sally O'Rourke," "To Have and Have Not" and "The Green Years." I am prepared to assume, without affirming, that every word of those criticisms is justified, and I have not forgotten that serious criticism is to be found at the end of her talk on the first-named film, but the general treatment consists in poking a good deal of fun at each of those pictures, and I can well imagine the producers of a film thinking that such criticism was not only flippant, but failed to convey to filmgoers the substance of the film under review. Moreover, the witnesses are being asked for their genuine opinion—it matters not whether in examination in chief or in cross-examination. In either case they are obliged to express their real belief, be it hostile or not. The mere stating of it in these circumstances cannot of itself be evidence of malice, and I can find no ground for supposing it was not their genuine opinion. Nor is this view disposed of by putting forward a number of favourable reviews of the respondents' works. The respondents are still entitled to complain of what they regard as a general air of flippancy though it be tempered with some more favourable and serious criticism. Again, when the witnesses for the respondents complained that the appellant was out of touch with the film-going public, it was suggested that they could not be expressing their genuine opinion of the general tone of her talks. To this charge Mr. McPherson, when asked in cross-examination what he considered objectionable, mentioned, in addition to flippancy, the complete lack of relation in the talks to any knowledge of the kind of thing that the general cinema-going public wants and gave three specific examples, *viz.*, hatred of anything with "heart" in it, a prejudice against the introduction of religion, and a dislike of musical films.

I cannot find any evidence to suggest that he did not actually hold such an opinion. The charge is not that she was ignorant of that public's wants, but that she disregarded those wants in her talks. So far as "heart" is concerned, it may be that the appellant regards, and, perhaps, rightly regards, much of the script of the films as full of false sentiment, and I am prepared to accept the contention that some of her talks showed deep and genuine feeling, but the question is not whether she is right or wrong, but whether Mr. McPherson genuinely thought she disliked emotion. What he is complaining of is lack of sympathy with, and a failure to take account of, public taste, and the film-going public's taste may differ from that of the critic, though it may be the critic's duty to do what she can to improve it. He gives examples of films which some critics, and among them the appellant, have criticised harshly, but which, nevertheless, have been welcomed by the public. Whether or not these instances are to be regarded as establishing a want of heart in the abstract is irrelevant.



It is enough if the witnesses believed that they did, and I find nothing in their answers to indicate that they were dishonest in the view they expressed. Similar observations apply to his assertion that the appellant hated "musicals." The witness again gave a number of examples, but, perhaps, it is enough to quote from a talk given on Oct. 1, 1944, where, after praising "Greenwich Village" for its entertainment value, the appellant says that for a technicolour musical it has exceptionally little plot and adds:

"Rarely, if ever, am I more frantically bored than by the plot of the average musical when this is allowed to take up the time when dancers might have been dancing and the funny men ought to be funny."

No doubt this is a criticism of the plot of musicals and not of their incidental qualities, but a witness is not to be accused of malice merely because he fails to distinguish between the two. With that and other examples in mind, I cannot see any evidence of malice in Mr. McPherson's attitude even though there are instances where the appellant has given some degree of praise to musical films which, as in the quotation given above, he regarded as somewhat contemptuous.

The third matter is the statement that the appellant was prejudiced against the introduction of any form of religion. Much stress was laid in argument on behalf of the appellant that Mr. McPherson said in evidence that he could not support this allegation with a number of examples from her film talks and was thinking largely of her written criticisms in the "Daily Mail." It was suggested in cross-examination that he had withdrawn this charge. In fact, he did not do so, but gave some instances from her talks which, in his view, supported his opinion though he said that his evidence had not been prepared in advance and he could have given better instances from her criticisms in the "Daily Mail," which for some reason he thought himself precluded from adducing. Again, the evidence may have been less full, and the view may have been mistaken, but, in itself, it was not unnatural for an honest man to hold it and beyond the contention that no honest man could hold it there was no evidence of malice. I might sum up Mr. McPherson's attitude in his answer, when asked what he meant by saying the lady was "completely out of touch":

"I meant that the great majority of the people who listen to her, the type of people who listen to broadcasting at 12.50 p.m. on a Sunday, would disagree with her on a generality of her criticisms."

I see no evidence in that answer of a malicious state of mind at the time of the alleged libel.

Next it was said that the motive in the mind of the respondents was to stifle criticism generally. The only evidence relied on to support this suggestion was the statement made in the box that they desired criticisms of the productions of other film companies besides their own to be more reasonable. It is difficult to see why such a complaint is justified. It might have force if they were not concerned at all with the result of the talks on the productions of other film companies, but criticism which deals adversely with a large number of films may well affect the whole trade and not only diminish the number of theatres in which films, including the respondents' films, can be shown, but may be thought to lessen the numbers which frequent cinema theatres in general. Another circumstance from which it was suggested that malice could be deduced was to be found in the conflict of evidence between Mr. McPherson and Mr. Moynihan. Mr. McPherson stated in the box that he had only given Mr. Moynihan the gist of the letter of Sept. 27. Mr. Moynihan, on the other hand, asserted that it had been read to him twice. From these facts it was suggested that the jury were entitled to consider that Mr. McPherson must have been deliberately lying, and to find him malicious accordingly. I do not think this allegation is open to the appellant. In the first place, it was never suggested to Mr. McPherson that he was telling a deliberate untruth. All that was put

to him was that his memory was at fault. Moreover, what advantage he could have expected to gain or what his motive could have been is difficult to see. Once he admitted that he had repeated the gist of the letter, he had said enough to establish the appellant's claim if she had a claim at all. Moreover, the very question put by the judge to the jury and answered by them indicates, as I think, that no distinction was made either between reading part of the letter and reading the whole, or between the gist and the exact words. A further proof of malice was sought to be derived from Mr. Moynihan's testimony that Mr. McPherson described the appellant as "anti-film." I do not remember Mr. McPherson being asked in cross-examination whether he had in fact made this statement as he ought to have been if it was to be relied on. In any case it is a small matter and there is nothing to suggest that Mr. McPherson did not genuinely believe it, more especially when it is remembered that the appellant said in one of her broadcasts: "When will Hollywood learn that to make everything larger, louder and lumpier than life is simply to diminish the effect," and added in an interview that the refusal by the respondents to issue her a pass to the previews will save her from seeing some of the silliest of the American films. After all the respondents are makers of American films and might be expected to consider that such an attitude was anti-film. At any rate, the holding of this view is not evidence of malice even if it be assumed that a judge or jury or appellate court might think that her criticism had substance. As showing that Mr. McPherson was malicious, reliance was also placed on the fact that, when giving evidence in support of his suggestion that the appellant hated "heart," he quoted from her criticism of the film "Lermontov," but omitted a portion of the words used. He read:

"Lermontov is a big Russian picture on the life of the nineteenth century Russian poet of that name. It has very considerable merits; there is no pandering anywhere to the lower standards of cinema taste—no fudging in of a love-affair."

He omitted, however, to continue to the end of the sentence, which, after the words "no fudging in of a love-affair," contained the further words "for which history gives no warrant." When the omission was pointed out to the witness he at once apologised and admitted his mistake. Moreover, it must be remembered that the script of the talks was in the hands of the appellant's counsel and of the judge. The witness in these circumstances could not hope to deceive the court and, in my opinion, no reasonable jury could draw the inference from the omission that he was displaying malice.

Some ground for imputing malice seems to have been sought in the fact that the respondents' attitude was, perhaps wholly, or, at any rate, to some extent, influenced by what was called the "box-office" motive. No doubt, a critic should not be guided in her estimate of the merits of a film by its money-making capacity, but, however desirable it is to improve the public taste and not to pander to false art, a film producing and exhibiting company cannot disregard the question of finance, and it is no evidence of malice that their motive in withdrawing their invitations to the appellant and requesting the B.B.C. not to employ her to review their films was influenced by their financial interests. As LOPES, L.J., said ([1895] 2 Q.B. 171) in *Nevill v. Fine Arts & General Insurance Co.* (1) with reference to the defendants' secretary,

"... it seems to me that the true view of that evidence [*i.e.*, that given in that case] is that it does not indicate any malice on the part of the secretary towards the plaintiff, but only a desire to preserve and protect the interests of his employers by keeping for them the business which he conceived to be theirs."

I do not refer to that language on the ground that there is any analogy between the facts of that case and this, but because it recognises the right of defendants to protect their interests even when they are only pecuniary ones.

Further evidence of malice towards the appellant was said to be found in three documents emanating from the respondents. First, a draft letter written about Oct. 3 for transmission to the "News Chronicle, 1946"; secondly, an internal memorandum dated Oct. 7; and thirdly, an article contributed by Mr. McPherson to the "Cinematograph Weekly" of Sept. 26 under the heading of the "The Lion's Roar." As regards the last-named, it was written before the letter complained of in this action, and is no more than a statement containing the same criticisms, not of the appellant, but of a *coterie* of critics who, apparently, took the same view as she did. Of course, if that publication could be shown to contain a dishonest attack on critics holding the same views as the appellant, it might furnish some evidence of malice, but the fact that Mr. McPherson expressed the same opinion with regard to other publications on a previous occasion would only be evidence of malice if he did not believe in their truth and yet repeated them in writing to the B.B.C. In neither case do I think it shown that they were not his genuine opinions. The gravamen of the charge in respect of the letter and memorandum, the former of which was not sent, and the latter of which was merely an internal communication, is that the letter exaggerates the position by saying:

"If all the films, both British and American, vehemently condemned on the radio by Miss Robertson, had been boycotted by the public, and only those very rare specimens proposed by her had been patronised, the British film industry would have ceased to exist, because ninety-five per cent. of the cinemas would have had no pictures to show endorsed by her and, therefore, acceptable to the public . . . Which is absurd; but not more absurd than to suggest that free speech includes the right of a critic to do, or try to do, grave harm to one of this country's greatest industries."

So far as the complaint is concerned with the suggestion that ninety-five per cent. of the cinemas would have had no pictures to show, obviously the proportion is meant to be, and would be, taken to be a rough guess at the effect of her criticism, and is no more accurate than the appellant's statement in her broadcast of Jan. 21, 1946, when she says:

"This may not seem so welcome to you, but then you do not have to see so many films as I do, about ninety-five per cent. of which counting the world well lost for love."

With regard to the expression "to do, or try to do, grave harm," it is to be remembered that the letter was never sent, that Mr. McPherson withdrew the words in the box when it was pointed out to him that they might be unfair, and at most, it seems to me to be but a *scintilla* of evidence of malice, and not such as should be left to a jury.

As to the internal memorandum, the evidence relied on is that contained in the paragraph reading:

"Nevertheless it seems intolerable that Mrs. Robertson and her cell of critics can say more or less what they like, without reply from us, and I wonder if it would give grounds for a writ to be put in to her quickly, if only to show that M-G-M mean business, and are not going to tolerate a campaign (a) to advertise Mrs. Robertson; (b) to prove that critics are themselves above criticism; (c) further to increase the power of the little group of people inside the Critics' Circle, who are already trying to eliminate the 'old-fashioned' critic (who seeks to be fair even to entertainment films) and who habitually do the maximum amount of harm they can to the sort of pictures, whether British or American, likely to be popular with the general public."

This is a private memorandum passed from one director of the respondents to another, suggesting a method of protecting themselves against what they might



honestly consider to be unfair criticism, and complaining of harm done to pictures which, in their experience, the public liked, even though they were such as a *coterie* of critics might regard as bad art. Moreover, both these documents were written after the appellant's interview had been reported in the "News Chronicle." After all, critics are not exempt from criticism and if they attack the products of a business, whether rightly or wrongly, they must not complain if the proprietors seek means to protect themselves from their animadversions. A

A further reason for the jury's finding might, it was suggested, be in the demeanour of the witnesses at the trial. This is a dangerous line of argument. Except for two instances which, to my mind, are both neutral and unsubstantial, there is no indication in the evidence that the attitude of the respondents' witnesses was deserving of any criticism. Some more solid ground is required on which to base the existence of a hostile demeanour. If it were not so, every finding of malice by a jury where the defendants called witnesses might be supported on the sole ground that those witnesses might have exhibited malice by their demeanour in the box. Some point was sought to be made of the allegation that the respondents' witnesses had expressed one view of the appellant's unfairness in the letter of Sept. 27, and a different one in the box. My Lords, I do not read the letter and the evidence as containing anything contradictory the one of the other. The testimony, it is true, expands and amplifies the assertions in the letter, but says nothing which contradicts them. I know of no reason compelling a defendant to set out every ground on which he acted, nor is there anything to show that Mr. McPherson was not speaking the truth in his reply to the question: B

"(Q.)—Why did you not say to the B.B.C.: 'We much regret to inform you that in our opinion Miss Arnot Robertson is abusing her position as a broadcaster and is self-advertising rather than giving favourable criticisms'?" D

(A.)—The main part of our objection to Miss Arnot Robertson as a broadcaster of film criticisms was that she was out of touch with public taste. That we honestly and quite frankly said in our letter to the B.B.C. Having done that it was not necessary for us to enter into any further details." E

Finally, some imputation of unfairness was put on Mr. McPherson because he stated that the appellant, as she felt her feet, became more bitter and flippant and wisecracking, whereas it was suggested that the talks showed just the reverse behaviour. My Lords, in a matter so full of the possibility of divergent views and personal prejudices, it seems to me impossible to establish the existence of malice or to find any evidence of it from a comparison of the tone of one talk with another, or a consideration of the hostility shown or welcome afforded, from time to time, to the films criticised. The effect they produce and any appreciation of their quality is a matter dependent on the personal opinion of each individual hearer or reader, and I know of no standard by which it can be exactly measured. An opinion expressed in answer to questions put in the box as to the comparative merits or demerits or as to the exact amount of praise or blame of the films dealt with in the several broadcasts is, to my mind, too slender a source from which to derive an indication of malice. F

These are, I believe, all the matters which were submitted to your Lordships as evidence of malice, and for the reasons I have given I find them both individually and collectively insufficient for the purpose. On the claim for libel, therefore, the appellant must, in my opinion, fail, but she can still rely on the claim for slander. This issue, however, is, in my opinion, disposed of by considerations which are the same as or similar to those applicable to libel. It is not disputed that the communication to Mr. Moynihan was a matter of public interest and, therefore, a plea of fair comment can be relied on, but it is said on behalf of the appellant that the communication is neither comment nor fair. G H

Of course, if the communication were a statement of facts, and the facts were untrue, a plea of fair comment would not avail and it is for the jury in a proper case to determine what is comment and what is fact, but a pre-requisite to their right is that the words are capable of being a statement of a fact or facts. It is for the judge alone to decide whether they are so capable, and whether his ruling is right or wrong is a matter of law for the decision of an appellate tribunal.

A I believe that all your Lordships agree with the Court of Appeal that the words are not statements of fact nor are they capable of being so considered. It is not only that the whole of the letter is prefaced with the words, "in our opinion," but, to my mind, "out of touch" in its normal and natural signification means "out of sympathy with" and this interpretation is strengthened when one finds that it is the tastes and entertainment requirements with which the appellant is said to be out of touch. Moreover, so far as I have been able to ascertain from the record of the trial the contention that the words meant "ignorant of" was never put forward, and, indeed, only emerged in the judgment of COHEN, L.J. I doubt, indeed, whether, even if the words could and should be construed as meaning "ignorant of," the language, having regard to its preface and subject-matter, could be regarded as fact. In common with C the rest of your Lordships, I think they express opinion only and, therefore, are comment. Here again, as in the case of malice, the question is not whether the comment is justified in the eyes of judge or jury, but whether it is the honest expression of the commentator's real view and not mere abuse or invective under the guise of criticism: see *McQuire v. Western Morning News Co.* (4) where COLLINS, M.R., speaking of a case in which fair comment was pleaded, says D ([1903] 2 K.B. 111) :

"It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to show that it is a libel . . . and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury, and it would be competent for him to give judgment for the defendant."

E To a similar effect were the words of LORD ESHER, M.R. (20 Q.B.D. 281), in *Merivale v. Carson* (5) which are so often quoted:

"... would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have [written] this criticism . . . ?"

F I should adopt them except that I would substitute "honest" for "fair" lest some suggestion of reasonableness instead of honesty should be read in.

G The only foundation in the present case for the assertion that the comment is unfair, lies in the suggestion that it does not represent the real view of the speaker, but was uttered with a dishonest object of injuring the appellant and driving her from the occupation of film critic. I have already dealt with this question in considering whether there is any evidence of malice which would defeat the qualified privilege enjoyed in respect of the letter. Having regard to the opinion there expressed, it is plain that I see no evidence from which unfairness could be derived. In alleging unfairness the plaintiff takes on him or herself the onus, also taken by an allegation of malice, to prove that the criticism H is unfair either from the language used or from some extraneous circumstance. In the present case there is no extraneous circumstance and the language itself does not warrant such a judgment. Nevertheless, the appellant maintains that in order to succeed the respondents must have obtained a verdict from the jury to the effect that the comment was fair, and they have not done so. I agree that, if the language itself warranted an inference of unfairness or if there were any other evidence from which a finding of unfairness could be derived, the matter must be left to the jury, but when, as here, if the matter had been left

to the jury, an appellate court must have set aside their verdict, there is no material on which a finding hostile to the respondents could be based.

Once the questions of malice or no malice and fair or unfair comment are decided in favour of the respondents, the case is at an end. I, therefore, propose to say nothing on the question of damages, as affected either by the circumstance that the jury found their verdict before the question whether the words were capable of supporting the innuendo relied on had been decided, or by the fact that no reference was made in the summing-up to the fact that the appellant herself published the letter in "The Times." The question whether the jury may have been misled by the summing-up and may have thought that the respondents must be fair-minded as well as honest has, however, been strenuously argued, and should, I think, receive some consideration from your Lordships' House.

The task of a judge called on immediately after the conclusion of a trial to sum up to a jury is always a difficult one. As BRAMWELL, L.J., pointed out ([1887] 3 Q.B.D. 243) in *Clark v. Molyneux* (6):

"... a summing-up is not to be rigorously criticised; and it would not be right to set aside the verdict of a jury, because in the course of a long and elaborate summing-up the judge has used inaccurate language; the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury..."

My Lords, in the course of his summing-up in the present case the learned judge undoubtedly in places used language which accurately states the law as I conceive it to be, and, indeed, as it is accepted to be by both parties, *viz.*, that it is the honesty of the witnesses' views, not their reasonableness, which decides whether they are malicious or not. I am not sure whether the learned judge always makes a clear distinction between words which go beyond the privilege which the occasion affords and those from which malice is to be inferred, neither am I sure that the authorities themselves are always careful to make such a distinction. Indeed, in the majority of cases it is not a matter of moment to do so, since the two considerations merge one into another, so that language which is alleged to go beyond the privilege claimed frequently justifies a finding of malice. I do not think, therefore, that any complaint can be made of the summing-up on this ground. Its early words on this part of the case express exactly what the authorities convey. "Fair comment" (in effect the learned judge says) "has to be an honest expression of the real opinion of the defendants when they wrote it..." "Did they honestly and really think that she" (the appellant) "was completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners and that her criticisms are on the whole unnecessarily harmful to the film industry? Did they honestly hold that opinion and really believe it? If they did—then they were not abusing the occasion." Such a direction is, I think, entirely accurate and could not be attacked, and similar language is to be found in other parts of the summing-up. On the other hand, language of this kind is frequently interspersed with words which suggest that the criterion is whether fair-minded men could hold that view. Let me take one example only. It runs:

"First of all... do you think that a fair-minded man capable of impartial judgment of the plaintiff's [appellant's] talks... could come to that conclusion. Was there anything in them or in her conduct which would lead a fair man honestly to entertain the opinion that the defendants expressed in this letter?"

Similar observations appear throughout the summing-up and, undoubtedly, if they were found alone there would have been clear misdirection. It is said, however, in the first place, that, in his cross-examination and address, leading counsel for the respondents used the phrase and accepted the burden that fair-



mindfulness was required. I do not think that the record justifies this allegation, but if it did I should think it immaterial. Secondly, it is argued with more force that, when the summing-up is regarded as a whole, a jury would not be misled, but would rightly apprehend that honesty, not reasonableness, was the state of mind required. My Lords, I cannot take this view. I have read the summing-up as a whole more than once and I think a jury might well have come to the conclusion that both honesty and reasonableness were necessary and that the defendants were unreasonable and therefore malicious. It is, I think, difficult for the uninstructed mind to guard against such a misconception, and to my mind the clearest direction is necessary to the effect that irrationality, stupidity or obstinacy do not constitute malice, though in an extreme case they may be some evidence of it. The defendant, indeed, must honestly hold the opinion he expresses but no more is required of him. All the lords justices took this view of the summing-up and I agree with them. Therefore, had I come to the conclusion that the words were defamatory and the respondents malicious, I should still have thought with COHEN, L.J., that it would be necessary to submit the issue to another jury. As it is, I think the appeal should be dismissed with costs.

**LORD GREENE:** My Lords, the letter which the appellant asserts to be defamatory is variously described, by herself as a "flagrant commercial effort to stifle free, unbiased criticism", and by her counsel as "a malicious attempt to destroy a critic." Your Lordships will be neither assisted nor misled by such rhetorical misdescriptions. A criticism is a literary work which is itself a fair object of criticism, as much so as the work which it criticises, and a professional critic holds no privileged position in that respect. In the arguments presented to your Lordships a number of matters have been canvassed. I do not find it necessary to discuss more than two of them at any length. Either of these, if decided adversely to the appellant, is sufficient to dispose of this appeal. They are, first, the question of libel or no libel, and, secondly, the question whether there was evidence of malice proper to be submitted to the jury. I have formed the clear opinion that in both these respects the appeal fails and should be dismissed.

It is necessary to keep the essential factors in the case in their true perspective. The appellant is a professional critic specialising in criticisms of films. She held an engagement with the B.B.C. under which she gave a series of critical talks on films of the week. Among the films which from time to time it fell to her to criticise in these talks were films produced by the respondents, and it was their practice to provide for her use free tickets of admission to their trade shows. The style and substance of her critical talks, particularly those which dealt with certain of the films produced by the respondents, caused them growing annoyance until at last they wrote the letter which has given rise to this litigation and is alleged to be defamatory. The reasons for the respondents' annoyance, as stated in the letter and in the evidence of their witnesses, were numerous. I need only give two examples. One was that she would often discuss a film which she disliked without giving any such description of it as to enable the film-going public to decide for themselves whether it was worth seeing or not. The other was that she indulged in facetious remarks or "wisecracks" at the expense of films which she thought were bad. While not (so they claimed in evidence) objecting to adverse criticism as such, the respondents formed the opinion that the appellant's style of criticism went beyond what adverse criticism required, and was unnecessarily harmful to the industry. That they honestly held these views, that for persons having occasion to criticise a critic, particularly if they happen to be producers engaged in a commercial venture, they were intelligible views, I see no reason whatever to doubt. There is scope for a wide latitude of opinion as to both the subject-matter and the style of a literary work, no less so where that work is itself a work of criticism than where it is an original

work. When we move in the sphere of taste, opinion, aesthetic sense or whatever we may choose to call it, we may have our preferences, our likes and our dislikes, but, in the very nature of things, the free expression of them, untainted by misstatements of fact, can seldom be defamatory, and an amateur critic has as much freedom in that respect as a professional.

In the circumstances that I have described, the respondents took such steps as were available to them to protect themselves against a type of criticism, in the publication of which, they were not legally or morally bound to co-operate. Many of the appellant's criticisms were unquestionably severe and often contemptuous. She frequently employed what is a common, and often the most destructive, weapon of a critic, namely, ridicule, and to certain subjects, such as that described as "heart" by the respondents, but treated by her as something no better than sentimentality, she obviously had a strong, and, maybe, commendable, objection which she did not hesitate to express. That her criticisms were legitimate expressions of a trained judgment, I cannot venture to doubt, but the respondents were just as much entitled to dislike them and to express their dislike as she was entitled to dislike and express her dislike of their films.

The letter of which complaint is made was addressed to the Director of Talks at the B.B.C. It has been read, but I make no apology for reading it again

"We regret to inform you that in our judgment, based upon a considerable number of talks given by Mrs. Arnot Robertson, that critic is completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners, and her criticisms are on the whole unnecessarily harmful to the film industry. In these circumstances we propose not to invite Mrs. Arnot Robertson to review Metro-Goldwyn-Mayer films in future; and we would ask your kind co-operation in restraining her from doing so in B.B.C. broadcasts."

This letter falls into four parts. It contains two statements of opinion giving reasons for writing as they did, one statement of the respondents' intention and one request to the addressee. I will deal with these in the first instance one by one, not forgetting that the question of libel or no libel is to be answered by a consideration of the letter as a whole when interpreted in connection with the relevant surrounding circumstances—a matter of which I shall say something later.

Neither the statement of intention nor the request, if the letter had contained nothing more, could, as it appears to me, have conveyed any defamatory signification whatever. The respondents had a perfect right to discontinue the grant to the appellant of facilities for giving criticisms of their films which they considered damaging to their interests, and to inform the B.B.C. of their intentions in that behalf. They were also perfectly entitled (no question of procuring breach of contract being involved) to request the B.B.C., who were the employers of the appellant, not to continue to permit her to review their films. Whatever may be the meaning of the proposition of counsel for the appellant that "it is a social duty to submit to criticism," there is certainly no legal duty on anyone to give free facilities to a critic who attacks him, nor is there any legal duty to abstain from requesting an employer not to allow such attacks to be made by his employee. What the B.B.C., in fact, thought of the request is shown by their action in refusing to comply with it. To interpret the announcement that facilities will be suspended, or the request to the B.B.C. as anything more than legitimate self-defence is, in my judgment, quite fantastic. The respondents, however, gave reasons to explain their actions, and these form the core of the appellant's contention on this part of the case. The first reason given is that the appellant was, in the respondents' judgment, "out of touch, etc."; the second is that, in their judgment, "her criticisms are on the whole unnecessarily harmful to the film industry." **HILBERY, J.**, in his judgment,

ruled that the words in which the first reason is expressed were incapable of bearing a defamatory meaning. He held, however, that the words of reason number two were capable of a defamatory meaning. No reference to this latter view appears in the judgment of any member of the Court of Appeal and I understand them as not agreeing with it since, as will presently appear, it is only in the first reason as interpreted by them that they find a possible defamatory meaning.

A Following what is now the usual practice, HILBERY, J., summed up to the jury and took their answers before he had heard the respondents' argument whether the words complained of were capable of a defamatory meaning, either in their natural and ordinary sense, or in the sense of the innuendo alleged. Certain inconveniences which may flow from this practice are well exemplified in the present case. The following among others were the questions left by B HILBERY, J., to the jury and the jury's answers:—

“(Q.)—(1) Was the letter in question a libel on the plaintiff—

(a) giving the words their natural and ordinary meaning?—

(A.)—Yes.

(b) in the sense that it imputed to her incompetence as a film critic and broadcast reviewer of films? [the sense pleaded in the innuendo]—

C (A.)—Definitely, yes.”

After hearing the arguments of counsel, the learned judge in his judgment rightly said:

D “As to the question whether the letter was capable of being a libel, I must divest my mind of the answers given by the jury, and put myself back into the position in which I should have been had the matter been submitted to me at the close of the plaintiff's case.”

He held that the letter was not capable of conveying the only innuendo pleaded (*i.e.*, that of incompetence). This disposed of the jury's answer to question (1) (b).

E In this I agree with him. He next considered the question whether the words in their natural and ordinary signification were capable of conveying a libellous meaning and he examined separately the two reasons given in the letter as above mentioned. Now, in his charge to the jury, he had not instructed them as

to what the meaning of either of these two reasons, in their natural and ordinary signification, must be taken to be—a matter for him and not for the jury—but as he had not yet heard argument on that matter he could not very well have

F done so. Consequently, so far as any direction was concerned, the jury were left free to decide for themselves what that significance was, subject, of course, to the right of the respondents to argue at a later stage that in that significance (whatever it might be held to be) the words were incapable of bearing a defamatory meaning. HILBERY, J., nowhere in terms states what the words “out of touch with”—and those are the words on which the controversy as

G to reason number one turns—mean in their natural and ordinary signification, but it seems to me perfectly clear what his opinion on that matter was. The question being: What is that signification?, a careful examination of the material to be found in the record and the appendix makes it abundantly clear, to my mind, that the only meaning put forward for these words by either party was “out of sympathy with.” That the learned judge in his judgment was interpreting H them in this sense appears to me beyond question. After quoting the sentence in question he says:

“I am unable to see that that is a libellous reflection upon a critic in the way of her profession as a critic. She may be out of touch with the millions. I hope I shall not seem in any way to be saying anything which is offensive, but persons who are competent to be critics on matters like the arts will necessarily be, to some extent, upon Olympus, while the millions who go to the theatres will necessarily be upon the common earth. There will of



necessity to some extent be a lack of contact between the two, and certainly they are not likely to share many tastes in common."

These sentences and, in particular, the reference to "sharing tastes" make it clear, to my mind, that the judge was not merely interpreting the words as bearing the only natural and ordinary meaning which had been suggested by anyone, *i.e.*, "out of sympathy with," but was interpreting the answer of the jury as given in reference to that meaning and that meaning only. When the words "out of touch" are read in that sense, they are, in my opinion, quite incapable of a defamatory meaning. Some people may think that it is desirable for a critic to be in sympathy with the millions, others may well think that it is not and that a good critic ought to disregard their tastes. *Quot homines, tot sententiae*, but to express the opinion that a particular critic is or is not out of sympathy with the millions cannot, in my view, possibly be defamatory. For the same reason, the suggestion made in argument that the words construed in the sense of "out of sympathy with" could support the innuendo of incompetence is even more unacceptable if, indeed, that be possible.

Here arises a curious point which has led to a great deal of discussion during the hearing before your Lordships. In the course of the argument before the Court of Appeal one of the lords justices threw out the suggestion that the words "out of touch with" might mean "ignorant of." In his judgment COHEN, L.J., accepted this suggestion and he regarded that possibility as being a sufficient ground for upholding the answers of the jury. Now this view as to "ignorant of" being a possible meaning for the words appears to me to involve the following assumptions:—(i) the words are capable of meaning "ignorant of"; (ii) on the footing that they do not mean "out of sympathy with" the jury must be assumed to have interpreted them in the only sense which would make their answer acceptable in law (the sense of "out of sympathy with" being *ex hypothesi* incapable of bearing a defamatory meaning) *i.e.*, "ignorant of"; (iii) interpreted in that sense, they are capable of a defamatory meaning; (iv) it is for the jury to decide whether words capable of bearing a defamatory meaning do, in fact, bear that meaning; (v) the answer of the jury to the question (1) (a) is, therefore, unassailable. On the assumptions made in propositions (i) and (ii), assumptions (iii), (iv) and (v) would, I imagine, follow, but, accepting for the moment the correctness of assumption (i), assumption (ii) appears to me to present insuperable difficulties. It was, in my opinion, a matter for the judge, not the jury, to decide whether the words "out of touch with" could in their context bear as their natural and ordinary meaning the sense of "ignorant of." Subject to an argument on a point in the evidence with which I will deal later, no such meaning was submitted either to the jury or to the judge at any stage in the case. Before your Lordships it was argued that there were two "ordinary and natural" meanings of the phrase, and that the jury were entitled to choose and must have chosen that which they considered was defamatory, which happened to be the only meaning capable of bearing a defamatory signification. I see no ground whatever for assuming that the jury made any such choice. Not only did the learned judge not leave any such choice to the jury—and I will assume that in law he would have been entitled to do so—but it was never suggested that the words were capable of bearing any meaning except that of "out of sympathy with." The questions which were framed for the jury were in the usual manner submitted to and approved by counsel for the parties. The form of question (1) (a) makes it, to my mind, impossible to suppose that what was being submitted to the jury was a phrase having more than the one "natural and ordinary meaning," *i.e.*, the only one which throughout the trial has been put before them. I, therefore, construe the answer to question (1) (a), in so far as it refers to reason number one, as meaning that in its natural and ordinary meaning, *viz.*, "out of sympathy with," the letter was a libel on the appellant, but, as in that sense the reason is, in my opinion, incapable of being

defamatory, the answer cannot stand so far as it is based on reason number one.

I must here mention the point of evidence to which I referred earlier. It was submitted on behalf of the appellant that the meaning "ignorant of" was in fact before the jury. What is relied on in support of this submission is an answer given by one of the respondents' witnesses, Mr. McPherson. When asked what, in his view, was objectionable about the criticisms of the appellant, he began a long answer with the following words:

"First and foremost they are intolerable flippancies—their complete unrelation to any knowledge of the kind of things that the general cinema-going public wants, for example . . ."

This, of course, is not an interpretation of the words of the letter, but, leaving that aside, the words of the witness cannot, in my view, be interpreted as imputing to the appellant a lack of knowledge of what the public wants. What the witness complains of is that the appellant's criticisms were not, as he considered they should have been, related to such knowledge—a quite different thing. His view was clearly not that she had not the knowledge, but that she did not make use of it. If it had entered anybody's head that this answer ought to be regarded as suggesting that the words in reason number one meant "ignorant of" in their natural and ordinary sense it is incredible to my mind either that the fact would not have been referred to at least in the judgment of the learned judge or that the question should have been framed as it was. SCOTT and ASQUITH, L.JJ., held that the appeal should be dismissed on the ground that there was no evidence of malice to go to the jury, but they agreed with COHEN, L.J., that "ignorant of" was a possible meaning. No one of the learned lords justices appears to have considered the question whether the jury could properly be taken to have had any such meaning in its mind in view of the fact that no one had ever suggested it. The danger of the argument is obvious. If it were to be accepted it would mean that a jury could properly be left, without a word of guidance from the judge, to discover by itself some "natural and ordinary" meaning for the words which no one had ever suggested, leaving it to the appellate court to guess what that meaning was. Holding as I do the opinion that the jury's answer cannot be interpreted as relating to any such alleged meaning, even if it be a possible meaning, it is not strictly necessary for me to express an opinion as to that possibility, but as it was argued I feel bound to state that, in my opinion, and with all respect to the learned lords justices, the words are not in their natural and ordinary meaning in their context capable of meaning "ignorant of."

I now turn to the second of the two reasons given in the letter, *viz.*, "and her criticisms are on the whole unnecessarily harmful to the film industry." As to this the learned judge said in his judgment:

"I have finally come to the conclusion that the inclusion of these words makes it (*i.e.*, the letter) capable of a defamatory meaning because these words in their natural and ordinary signification seem to me to say that she puts into her criticisms that which it is not at all necessary for them to contain as criticisms, and that she is making unnecessary statements in her criticism which are harmful. It seems to me that to allege that a person goes out of her way, when she has the position of a critic to do harm to the industry in which the subject-matters of her criticisms are displayed, and which sustains the performance of those matters which she is called upon to criticise is capable of being understood in a way which is libellous."

With respect, I cannot agree with this. In the first place, the second reason, like the first, is a mere expression of opinion, although that, of course, does not necessarily mean that it is not capable of being libellous. It follows without a break the statement that she is "out of touch." The two reasons when read together appear to me incapable of meaning more than that the method of

criticism used by the appellant is, in the opinion of the writer, calculated to do more harm to the industry than is necessary for the purpose even of an adverse criticism. An adverse criticism is probably, and even necessarily, harmful to the proprietors of the films criticised. To say that a particular type of adverse criticism is in the opinion of the writer unnecessarily harmful can surely mean no more than that, *e.g.*, in order to express criticism, however adverse, it is not necessary to be, *e.g.*, facetious or to omit to tell the public what a critic sympathetic to the tastes of the public would tell them. The learned judge in his reasoning seems to me to have lost sight of the fact that opinions may differ widely as to what it is "necessary" for a criticism to contain in order to be a criticism. There is no measure by which such "necessity" can be judged, and, as it seems to me, an expression of the writer's opinion on such a matter is a legitimate expression of opinion on what is a matter of taste and literary judgment, and nothing more. His opinion may well be, and can scarcely avoid being, coloured by his own tastes, prejudices or interests, but he is entitled to hold it. As I have said, I do not ignore the necessity of interpreting the letter as a whole for the purpose of deciding whether or not the language used is capable of being defamatory. This I have not failed to do, but the process, although in theory a perfectly proper and indeed an obligatory one, does not help me in this case. Nought plus nought still equals nought and no paraphrase of the words complained of must be allowed to obscure that fact. The interpretation put on the letter on behalf of the appellant was summed up by counsel in the following manner:

"The appellant is not fit to be invited to review our films. She is not fit to be put on to review films by you, the B.B.C. She knows nothing of the public taste and is guilty of sabotage."

I hope that I shall not be considered wanting in respect if I say that it passes my comprehension how anything remotely approaching this can be extracted from the letter.

I now turn to the question whether there was any sufficient evidence of malice to be put to the jury. Here, again, the practice of taking the opinion of the jury before the arguments have been heard made it impossible for the judge adequately to instruct the jury or to rule for its guidance what it might and what it might not take into account. The result inevitably was that a mass of unsorted material was put to it for its consideration. In his judgment HILBERY, J., did no more than state his opinion that there was evidence of malice to go to the jury. In the Court of Appeal, COHEN, L.J., in his dissenting judgment, thought that there was such evidence in at least three matters:— (a) the allegations as to "self-exhibitionism" made by the respondents' witnesses, McPherson and Eckman, in the witness box; (b) the answers given by Mr. McPherson on the subject of the Russian film "Lermontov"; and (c) his answer that he could not support, by example, his allegation about the appellant's aversion from the introduction of religion into films. SCOTT and ASQUITH, L.J.J., thought that there was no evidence of malice to go to the jury. Before your Lordships, counsel for the appellant relied on various matters in addition to those mentioned by COHEN, L.J. Thus they argued that the opinions expressed as to the appellant's broadcasts, both in the letter and by the respondents' witnesses in the witness box, were so unreasonable that they could not have been honestly held and that their statements that they did hold them were, accordingly, false and, as such, evidence of malice. I feel bound to say that, in my judgment, the argument is quite inadmissible, and I do not propose to say more about it except that those opinions, however much one may disagree with them, are both legitimate and understandable. Another suggestion was that the jury may have found something in the demeanour of the respondents' witnesses which led them to think that they were lying witnesses, and that this would have been evidence of malice. Here again I do not see how such an



argument can be supported. There is no suggestion in the summing-up to the effect that there was anything in the demeanour of the witnesses which the jury might, or ought, to take into account in considering whether or not there was malice. As lying in the witness box is, or may, in appropriate cases, be evidence of malice, some reference to it ought to be made by a judge in summing-up if he considers that there has been anything in the demeanour of a witness on which a reasonable jury would be justified in concluding that he was telling lies.

A In the present case, the appellant endeavours to fall back on the view that the finding of malice by the jury ought to be supported on the basis that the jury may have disliked the demeanour of the witnesses, and come to the conclusion that they were telling lies. A more dangerous doctrine to be applied in a libel action I find it difficult to imagine. If it were accepted, it would be possible

B to argue that a finding of malice could always be successfully supported on the ground that, although there was no substantive evidence to go to the jury, the jury may have thought that the defendant's witnesses were lying in the witness box. In any case the grounds on which it was suggested (and in this I include the "Lermontov" matter referred to by COHEN, L.J.), that the jury might have formed the opinion that the respondents' witnesses were telling

C deliberate untruths were, in my judgment, so tenuous as to be incapable of supporting any such conclusion. The repetition of the letter, or its substance, on the telephone was strongly relied on as being evidence of malice. In my opinion, having regard to the circumstances, it is quite impossible so to regard it. As to the two items of evidence, other than the "Lermontov" answers, which COHEN, L.J., thought were proper to be submitted to the jury, I am unable

D to see how the description of the appellant's style as amounting to "self-exhibitionism" can be regarded as evidence of malice. It was nothing but an expression of opinion, exaggerated, perhaps, and founded on what, I venture to think, runs right through the evidence of the respondents' witnesses, *viz.*, a complete misunderstanding of what criticism means, of what forms it may take, and of what language it may use in order to express most effectively the critical

E judgment which the critic desires to put before his readers or hearers. Thus, they were unable to understand that a witticism is as permissible as a pedestrian, and, perhaps, dull, examination of the subject-matter of the criticism. What they regarded as "self-exhibitionism" appears to me to be no more than the sort of conversational style which may well be appropriate to the comparatively new technique of broadcasting. The fact that they used the word "self-exhibitionism"

F may indicate a lack of linguistic sense, but how it can be evidence of malice, with all respect to COHEN, L.J., I fail to see. The suggestion of COHEN, L.J., that Mr. McPherson's answer "that he could not support, by example, his allegations about the plaintiff's aversion to the introduction of religion into films" with respect appears to me to be based on a misreading of the evidence. Mr. McPherson's first answer, when asked by counsel for the appellant in cross-

G examination to deal with the allegations, was:

"Yes, I should like to say that I cannot support this with a number of examples and to say in defence, if I may, that I was perhaps wrongly thinking largely of Miss Robertson's written criticisms in the "Daily Mail" which of course I am not allowed to introduce here."

H Why the witness thought that he was "not allowed" does not appear. A paragraph from his evidence-in-chief was read to him, ending with the statement:

"She also had a particular prejudice against the introduction of any form of religion into a film."

Counsel for the appellant then asked him,

"(Q.)—And you now say there was no justification for that—is that right?

(A.)—I have said nothing of the sort, sir, nothing whatever of the kind—

and I repeat that that evidence was not prepared in advance. I had no idea that I was going to be asked that question by *Sir Patrick Hastings*.

(Q.)—So now you want to withdraw ?

(A.)—I do not withdraw it. I am quite prepared to give you examples from these film criticisms, but I could give you better examples from her written criticisms."

The witness, having twice refused to accept the suggestions of counsel for the appellant that he meant something which he had not said, was then asked to give examples from the appellant's broadcasts. He proceeded to give three, after which counsel did not pursue the point. I cannot agree that this evidence, rightly understood, could properly be regarded as evidence of malice. The statement of the witness appears to me to have been nothing but a perfectly *bona fide* expression of an opinion legitimately held by him. I have dealt with the principal matters relied on as being evidence of malice. I do not propose to deal in detail with any of the others that are relied on as they appear to me to have even less substance than those which I have discussed.

I will add a few words on the subject of the alleged slander. It is argued that the question of fair comment was not put to the jury in terms. This, however, in my opinion, does not prevent the defence succeeding. The letter was clearly comment, and the finding of the jury that it was fact cannot stand. There only remains the question of "fairness." On the facts, the allegation of fairness was bound to succeed once the charge of malice was decided in favour of the respondents. That charge being negatived, it would not, in my opinion, have been open to the jury to find that the allegation of "fairness" had not been proved. That this was the position accepted by everyone at the trial is I think manifest from the form of the questions put in which no suggestion of unfairness appears save such as might result from a finding of malice. I would dismiss the appeal.

**LORD NORMAND:** My Lords, It is unnecessary for me to detain your Lordships by delivering an opinion of my own, because I agree in all respects with my noble and learned friend LORD GREENE on the question of libel or no libel, and with my noble and learned friend on the Woolsack on the other questions dealt with in his opinion.

**LORD OAKSEY:** My Lords, I agree that this appeal should be dismissed. The main question argued was whether there was any evidence of malice fit to be submitted to the jury, that is to say: Did the appellant prove that it was more probable than not that the respondents were actuated by malice? That it was a privileged occasion was conceded by the appellant at the trial, and the privilege is founded not on any duty resting on the respondents, but on the fact that the words were written by the respondents "... in the conduct of [their] own affairs, in matters where [their] interest is concerned" to use the words of PARKE, B. (1 Cr. M. & R. 193), in *Toogood v. Spyring* (7) and "in such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications..." What, then, was the interest of the respondents which they were concerned to protect? Clearly, as their witnesses said, it was to protect themselves against the appellant's criticisms on the B.B.C. wireless. There was nothing indirect in that interest or motive. It was direct and acknowledged, and yet the very interest which made the occasion privileged, which, as PARKE, B., said, prevents the inference of malice, is said to be evidence of malice.

There is, it seems to me, an analogy between the criminal law of self defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond defence and proceeds to offence. That is to say, the circumstances in which he defends himself, either by acts or

by words, negative the malice which the law draws from violent acts or defamatory words. If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life. The law does not concern itself with niceties in such matters. If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your defence. The "Lion's Roar" was probably not as far-reaching as the appellant's voice on the B.B.C. wireless, nor could the respondents, so far as the evidence shows, command so pointed a pen as that of the appellant. They had, therefore, to adopt other means of defence, but provided that they were means of defence and not of offence or attack, they are not evidence of malice, but merely the adoption of the most effective method of defence available: (cf., the cases cited in GATLEY ON LIBEL AND SLANDER, 3rd ed., pp. 290-299).

A It appears to have been conceded at the trial, and, in my opinion, it is clear, that the respondents were entitled to refuse to have the appellant at their previews, and were entitled to ask the B.B.C. not to allow her to broadcast on their films, but it was and is said that, in giving the B.B.C. two reasons why they objected to her broadcasts, they showed evidence of actual malice, and that the conduct and evidence of their witnesses at the trial, ten months later, were further evidence of malice. In the alleged libel the respondents wrote that in their judgment the appellant was completely out of touch with the tastes and entertainment requirements of the picture-going millions and that her criticisms were unnecessarily harmful to the film industry. In order to achieve one of their avowed objects, namely, to induce the B.B.C. to prevent the appellant broadcasting on the respondents' films, it was probably necessary for the respondents to give some reasons for their request, and I am entirely unable to understand the contention that no fair-minded man could take the view either that the appellant was out of sympathy with the picture-going public or that her criticisms were unnecessarily harmful to the industry. It was proved at the trial that films on which the appellant in her broadcast poured ridicule and contempt had earned very large profits for their producers and it seems to me that a film producer would naturally consider that such success is the best, if not the only, test of the taste of "the picture-going millions." Cinema producers are not educationalists. They are business men who invest enormous sums of money in the production of films, and unless their productions draw the public they will very soon be out of business. They are concerned primarily with business and not with the education of public taste. As to criticism being harmful or beneficial to the film industry it is a question on which different views may obviously be held. Criticism may be harmful or helpful. It may be necessarily harmful for a time, but do good afterwards. Equally, it may be so harmful as to stop the industry altogether, which even persons of the most exacting taste would probably acknowledge to have been unnecessary in the year 1946. In my opinion, therefore, no inference of malice can be drawn from the words used in the letter.

G It is said, however, that the evidence and demeanour of the respondents' witnesses at the trial ten months later are evidence of malice. They complained that the appellant was a "self-exhibitionist" in her criticisms, that she was flippant and did not describe the subject of the films, that she loathed "heart" in films, and disliked musicals and the introduction of religion. The appellant's counsel also relied as evidence of malice (i) on a quotation made by Mr. McPherson of the appellant's broadcast on the film "Lermontov"; (ii) on the "Lion's Roar," an article written by Mr. McPherson in the "Cinematograph Weekly" dated Sept. 26, 1946; (iii) on the draft letter composed by Mr. McPherson and an internal memorandum from the respondents' office dated Oct. 7, 1946; (iv) the fact that, whereas Mr. Moynihan, a newspaper reporter, called for the appellant, said that Mr. McPherson had read the alleged libel over twice to him on Oct. 2, 1946, Mr. McPherson



said he did not read the letter, but gave the substance of what had happened; (v) the alleged fact that Mr. McPherson was not telling the truth in that he might have been disbelieved by the jury and may have known that the appellant had pleaded that the whole letter was read over to Mr. Moynihan; (vi) the evidence of Mr. Moynihan that Mr. McPherson said the appellant was "anti-film," and (vii) the demeanour of the respondents' witnesses. In my opinion, there is abundant evidence from the broadcasts themselves to show that the statements of the respondents' witnesses about them were not irrational and might have been honestly made. Mr. McPherson's evidence on the "Lermontov" broadcast was perfectly consistent with his honesty, and the words omitted by him were really irrelevant to the point he was making. The "Lion's Roar" was a fair presentation of the respondents' point of view about the sort of criticism in which the appellant indulged. The draft letter and the internal memorandum were not published, and Mr. McPherson withdrew in the box the words in the latter document "or try to do grave harm." Moreover, it may be that the letter was not published because Mr. Eckman or Mr. McPherson disapproved of it. As to the Moynihan conversation on the telephone, it was not suggested to Mr. McPherson that he was not telling the truth, and in such circumstances it is, in my opinion, not open to counsel for the appellant to argue before a Court of Appeal that he was not to be believed and, therefore, malicious. As to the evidence that Mr. McPherson used the word "anti-film" about the appellant, such an expression might, I think, honestly be used by the respondents, and could not in any event be considered in all the circumstances as more than a scintilla of evidence. The learned judge made no criticism of the respondents' witnesses either as to their credibility or their demeanour. It is, therefore, impossible for a Court of Appeal to speculate on such a subject. For these reasons I am of opinion that the issue of malice ought to have been withdrawn from the jury and judgment entered for the respondents on the alleged libel.

As to fair comment, I am of opinion that the words repeated from the letter were comment and not statements of fact, and that they were fair in the circumstances. It was the appellant and not the respondents who had taken the controversy to the public press, and it was, in my view, not in any sense unfair to tell a Press correspondent the actual words or the substance of the letter to the B.B.C. It is argued that the respondents cannot succeed on this issue without getting a verdict of the jury that the comment was fair, but it is, in my view, evident from the summing-up and the form of the questions to the jury agreed on by counsel that it was assumed by all parties that, if the words were comment and there was no malice, the comment was fair.

On the question whether the words were capable of a defamatory meaning, I agree with the noble lord on the Woolsack. On the question of misdirection, although the learned judge put the question correctly to the jury on certain occasions, other passages in his summing-up may have led the jury to think that, unless the words were such that a fair-minded man would have thought them true, their verdict ought to be for the appellant, although the respondents had honestly believed the words to be true. On the whole, therefore, I am of opinion that, apart from the issue of malice, the verdict could not stand.

**LORD MORTON OF HENRYTON:** My Lords, counsel for the appellant suggested, in the course of his argument, that if the respondents succeeded in this appeal they would have established a right to "obliterate" a critic who had ventured to criticise their films. It would indeed be regrettable if your Lordships' decision had any such result, or even were thought to have any such result. I shall spend a short time in considering what the respondents did, what was the position of the appellant immediately before she issued her writ against the respondents, and what is the real nature of this action. I hope that by so doing I may dispose of this suggestion, and may also lay the foundation

for the views which I shall later express in regard to the issues arising on this appeal.

The act of the respondents whereof complaint is made in the action was the sending of a letter of Sept. 27, 1946, which has already been read, to the British Broadcasting Corporation, hereafter referred to as the B.B.C. For the moment I disregard the subsequent telephone conversation between Mr. McPherson and Mr. Moynihan. It is obvious that this letter was written because Mr. Eckman, Mr. McPherson and their colleagues disliked the appellant's criticisms of M-G-M films in her series of broadcasts. The appellant was, of course, entitled to express her own opinions of each week's films, and I do not doubt that she honestly held the views that she expressed week by week, but I can well imagine that some of her criticisms of M-G-M films might cause a good deal of irritation to M-G-M officials and that the matter might well be brought to a head by her criticism of "The Green Years" on Sept. 22, 1946. That criticism is quite short and I shall set it out in full, as the setting out of one of the appellant's criticisms may help to explain the views which I express hereafter.

"No flesh and blood at all appears in 'The Green Years': nothing but whimsy: pseudo-Scottish whimsy at that. The picture was made in Hollywood, and there's something about the Californian sunshine which makes tossing the caber, by extras put into kilts, appear an even less probable form of sport than it has always seemed to me in Scotland. (I know I shall be howled at by my fellow-countrymen for this remark). To my fascinated eye, some of the participants in the reconstituted Highland Games we are shown look to be dressed in their combinations, which certainly adds novelty to the scene. This quality, however, doesn't extend to other parts of the film. Echoes of 'The Bells of St. Mary's' and 'The Hoodlum Saint'—'The Green Years' has a strongly Catholic theme: the poor boy from Dublin comes to live with unbelievably dour Scots relatives, fights for his faith, loses it, and finds it again at the end, reinforced with love and success thrown in. Echoes of innumerable pictures about lovable vagabonds who would be merely tiresome in real life—unfortunate Charles Coburn, a good actor, is required to caricature a naughty old grandpa with a vast red nose, round which the whimsy clusters thickset. Echoes of 'The Corn is Green,' we have again the brilliant student in the dirty-faced job working and sitting for the all important scholarship exam, spurred on by the devoted teacher. There isn't an episode in this long film, running over two hours, which doesn't strike a familiar note. A familiar note of cinema-going, I mean, not of human experience. When for the sake of the plot, the little boy must be sent to school in a suit which will cause derision, his grandmother—our dear Gladys Cooper, being wasted again—makes it out of one of her petticoats. We are whimsically shown that she is wearing three plain ones, in addition to the one she sacrifices, but she chooses the bright green one with the flower pattern all over it. And, of course, one's sympathy with the boy dies with one's belief in the whole situation. When will Hollywood learn that to make everything larger, louder and lumpier than life is simply to diminish its effect?"

Following on this criticism, there took place a meeting between certain officials of the respondent company and other persons interested in M-G-M films, and as a result of that meeting the letter of Sept. 27 was written. Although that letter must, of course, be read as a whole, it falls into three parts. The first part expresses an opinion of the appellant as a critic and of her criticism. To this part I shall return later. The second part contains a statement of intention. "In these circumstances we propose not to invite Mrs. Robertson to review M-G-M films in future." The third part contains a request: "we would ask your kind co-operation in restraining her from doing so" (*i.e.*, from reviewing

M-G-M- films) "in B.B.C. broadcasts." This letter was given considerable publicity, partly because, by some means, the substance of it became known to certain journalists who, thereupon, interviewed the appellant; partly because Mr. McPherson either read the letter or quoted part of it to a journalist, Mr. Moynihan, and partly because the appellant herself set it out in full in a letter from herself to the editor of "The Times," which was printed in "The Times" of Oct. 4, 1946.

What was the position immediately before the appellant issued her writ? As to the first part of the letter, the B.B.C. had replied on Oct. 4,

"We wish to make it clear that we do not share your view of the criticism of Miss Arnot Robertson, in whose ability and integrity as a critic we feel confident."

As to the second part, the respondents were, of course, entitled, if they chose, to refrain from sending an invitation to the appellant and she was equally entitled, if she chose, to see their films in the same way as any other member of the public and to comment on them in her weekly broadcasts. As to the third part, the B.B.C.'s reply was:

"Nor can we agree to your proposal that we should 'co-operate' with you in placing restraint on Miss Robertson's freedom to review particular films in future broadcasts."

The appellant did in fact complete the series of broadcasts which she had agreed to give and there is no evidence that the respondents' letter in any way affected the appellant's employment from time to time by the B.B.C. On the contrary, there is very emphatic evidence to the opposite effect which was given by Mr. Rendall, the Controller of Talks at the B.B.C. Thus, after the letter had been written, the appellant continued to be perfectly free to broadcast criticisms of any films, while the respondents were equally free to refrain from inviting the appellant to their Press shows. Their right to do so was never questioned in this action. They were also free to invite the B.B.C. to co-operate with them in the manner stated in the letter of Sept. 27, but they were aware that such an invitation would meet with a chilly response. In these circumstances, it would be a misuse of language to describe this action as one brought to establish the right of free criticism. It is in fact an action brought by a lady, who objects to certain criticisms of herself and her broadcasts, to recover damages in respect of those criticisms and an injunction to restrain their repetition.

My Lords, I now come to consider the questions arising on this appeal, and I can do so briefly, as they have already been so fully discussed. I shall confine my observations to the first sentence in the letter of Sept. 27, 1946, as, in my view, the second sentence is quite incapable of a defamatory meaning. I start by observing that, in my opinion, the first sentence consists of two statements of opinion which cannot properly be construed as statements of fact. It is true, as counsel for the appellant pointed out, that a statement which is plainly one of fact cannot be transformed into a statement of opinion merely by prefacing it with the words "in our judgment"; but the statements "that critic is completely out of touch, etc." and "her criticisms are on the whole unnecessarily harmful to the film industry" are in their very nature statements of opinion, and if there were any doubt as to their nature it would be removed by the words "in our judgment, based upon a considerable number of talks by Mrs. Arnot Robertson." In my view, the question of "fact or opinion" should not have been left to the jury. Were these two statements of opinion capable of conveying the libellous innuendo that the appellant was an incompetent film critic? HILBERRY, J., and all the members of the Court of Appeal have held that they were not. I agree with them and I need not add anything on this point. Were the words used, in their natural and ordinary signification, capable of having a defamatory meaning? My Lords, I incline to think that they were not. The



learned judge thought that the latter part of the sentence was capable of meaning that the appellant "went out of her way to do harm to the industry in which the subject-matter of her criticisms were displayed." The Court of Appeal did not, I think, attach such importance to that part of the sentence but thought that the words "out of touch with" were capable of bearing the meaning "ignorant of." To my mind, the natural meaning of the first part of the sentence is simply that the appellant's taste in films was completely different from the "tastes and entertainment requirements of the picture-going millions who are also radio listeners." So construed, the words are not, in my view, defamatory. It might well be expected of a film critic that her standards would be different from those of the "picture-going millions." As to the words "her criticisms are on the whole unnecessarily harmful," I do not think that these words, in their natural and ordinary meaning, impute to the appellant an intention deliberately to injure the film industry. I think they mean that the appellant's criticisms were so worded as to do more harm than an adverse criticism need do to the film industry. It may well be that the respondents had in mind the fact that the appellant launched shafts of ridicule against films instead of merely pointing out their shortcomings. They may have thought, rightly or wrongly, that the appellant's criticism of "The Green Years," already quoted, was an example of this.

My Lords, although I have formed the view just expressed, I feel reluctant to decide this appeal on this ground, having regard to the views expressed by the learned judge and the Court of Appeal. I shall assume, therefore, that the sentence in question is capable of bearing a defamatory meaning and the jury found that it was in fact defamatory. As the occasion of writing the letter is admitted to be one of qualified privilege, the next question is: Was there evidence of malice fit to be left to the jury? My Lords, in my judgment there was not. It is, of course, plain that the intention which the respondents had in writing the letter was to ensure, so far as they could, that the appellant should no longer review M-G-M films, but, as ASQUITH, L.J., pointed out, the existence of this intention is no evidence of malice. There is, I think, no evidence that the respondents did not honestly hold the opinions expressed in the first sentence of the letter, however misguided these opinions may have been. I do not think it necessary to discuss the various matters relied on by counsel for the appellant as being evidence on which the jury were entitled to find malice. These matters have already been discussed by your Lordships, and I am content merely to say that I agree with the views already expressed.

As to the claim for damages for slander, I do not think it matters whether Mr. McPherson read the whole of the letter on the telephone to Mr. Moynihan or only part of it. The protection of qualified privilege does not extend to the telephone conversation, but, in my view, the comments contained in the letter and repeated to Mr. Moynihan were statements of opinion on a matter which was obviously a matter of public interest. The jury might not agree with the opinions thus expressed, but they would have no right to substitute their own opinion of the appellant's criticisms for that of the respondents, or to try the fairness of the respondents' comments by this standard. In the absence of any evidence that the respondents did not honestly hold the opinions expressed in their letter, I see no grounds on which they could be held to have exceeded the limits of fair comment. My Lords, on the views which I have expressed, no further question arises on this appeal. I agree that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors: Woodham Smith, Borradaile & Martin (for the appellant); Slaughter & May (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

PROLE *v.* ALLEN AND OTHERS.

[SOMERSET WINTER ASSIZES (Pritchard, J.), January 27, 1950.]

*Club—Negligence—Unincorporated members' club—Member injured by fall down unlighted steps—Liability of committee—Liability of steward.*

The plaintiff, a married woman, was a member of an unincorporated members' club, the management of which was carried on by a committee. The defendants were all members of the committee and included the secretary and steward of the club. The steward was responsible for seeing that the club premises were generally in a fit condition for use by the members and, *inter alia*, that lights were switched on and off when and where necessary. In the early part of December, 1946, on the authority of the secretary and steward, certain alterations were carried out to the position of some steps leading from the men's quarters of the club. On Dec. 31, 1946, the plaintiff attended a social function at the club and remained there until 10.30 p.m. when she left with others by the exit normally used by the male members. When the plaintiff arrived outside the building she found that the place was in darkness, and, being unaware of the newly constructed steps, she fell down them and was injured. In a claim by the plaintiff against the defendants for damages for negligence it was proved that there was a light suspended near the steps, but that this had been switched off by the steward at 10.10 p.m. on the night in question.

**Held:** the fact that the defendants were all members of the committee and one of them the secretary of the club imposed no duty on them towards the plaintiff, but the steward, having been appointed as such by the members, was the agent of each member to do with reasonable care all those things which he had been appointed to do and owed a duty to each of the members to carry out his functions without negligence; on the facts, the plaintiff was entitled to use the exit from the club which she did use; and the steward, in switching off the light when he did, was guilty of negligence and was liable in damages to the plaintiff.

[AS TO LIABILITY OF MEMBERS OF A CLUB FOR TORTS OF COMMITTEE OR SERVANTS, see HALSBURY, Hailsham Edn., Vol. 4, p. 503, para. 931; and FOR CASES, see DIGEST, Vol. 8, pp. 518, 519, Nos. 89-91.]

Cases referred to:

- (1) *Lewis v. Ronald*, (1909), 101 L.T. 534; 31 Digest 101, 2387.
- (2) *Brown v. Lewis*, (1896), 12 T.L.R. 455; 8 Digest 518, 89.

**ACTION** for damages for negligence.

The plaintiff, Mrs. Hilda May Prole, was a member of an unincorporated members' club known as the Quantock Club and Institute. The defendants, Allen, Andress, Short and Norman, were members of the committee of the club, Allen being also the secretary and Andress the steward. The club premises consisted of a converted railway station building, and access from the men's quarters of the club was by means of a doorway opening on a platform which extended round the corner of the building to the street where there were steps leading down from the platform. In December, 1946, on the authority of the defendants Allen and Andress, an alteration was made in the position of the steps by shortening the platform and building new steps up to the shortened platform. At night the steps were lighted by a lamp suspended over the platform. On Dec. 31, 1946, the plaintiff attended a New Year's Eve party at the club. She entered the premises by the women's entrance. At 10.10 p.m. the defendant Andress extinguished the light over the steps leading from the platform. At 10.30 p.m. the plaintiff left the club, and, the women's entrance being locked, she went out by the door leading to the platform. On arriving outside she found the place in darkness and, being unaware of the altered position of the steps, she

fell down them and suffered injury. The plaintiff claimed damages against the defendants in that they, as members of the committee of the club, failed in their duty either to warn her of the alterations or to light the steps so that she could see that the alterations had been made. PRITCHARD, J., held that the only duty owed to the plaintiff was by the defendant, Andress, in his capacity of steward, and against him the judge awarded £350 damages.

**A** *Raymond Stock* for the plaintiff.

*Michael Hoare* and *H. E. Park* for the defendants.

**PRITCHARD, J.**, stated the facts and continued: The basis on which the plaintiff puts her case in the statement of claim is that the defendants, who were all members of the committee, knew that alterations had been made to the steps, failed to warn her of those alterations, and failed to light the steps from the platform in a way which would enable her to see for herself that the alterations had been made. The defence raises three points. First, that the management of this club and its affairs was conducted by all the members operating through their committee, and that in those circumstances there was no duty which any individual member of the club or of the committee owed to the plaintiff, and, therefore, that she has no cause of action against any one of them. Secondly, that the plaintiff had no right, and knew that she had no right, to leave the club premises by the particular exit which she used. The defence asked a number of the plaintiff's witnesses about that matter, it being their case that ladies were strictly forbidden to enter or leave the club by any means other than the ladies' entrance, and that, therefore, the plaintiff at the time of her accident was somewhere where she had no right to be. Thirdly, the defendants say that the plaintiff was guilty of contributory negligence. They allege that she was with her husband who was the chairman of the club, and, therefore, that she must have known the position of the new steps, that she failed to use the hand-rail provided, and that she failed to switch on the light. Counsel for the defendants referred to *Lewis v. Ronald* (1) which decides, in effect, that darkness in itself ought to be regarded as a warning, and argued that, therefore, the plaintiff has nobody to blame for her accident but herself.

With regard to the first defence—that the defendants owed no duty to the plaintiff—I think that that defence is well-founded in so far as it is raised on behalf of the defendants Allen, Short and Norman. They were members of the club as was the plaintiff, and, as such, they owed her no duties. It was argued by counsel for the plaintiff that, as members of the committee, they owed her a duty, but I do not agree that their membership of the committee made any difference. Counsel quoted to me *Brown v. Lewis* (2), but I do not find assistance in his favour from that case for several reasons, one of which is that there the plaintiff was a stranger to the club and not a member, nor does it appear that there was there any distinction between a member of the committee and an ordinary member of the club, and I do not think that there is. Therefore, in the present case the defendants, Allen, Short and Norman, are entitled to succeed because the only way in which it is alleged that they could be liable to the plaintiff is that they were members of the committee, and in the case of Mr. Allen that he was secretary. I find no facts produced which imposes any other relationship between them and the plaintiff than their joint membership of the club, and, therefore, I come to the conclusion that they did not owe a duty to her, and they are entitled to judgment.

In the case of the defendant, Andress, I think that the position is different. He, in addition to being a member of the club, a member of the committee, and one of the freeholders of the building, was the steward of the club, and I think that that relationship places him in a different position towards the plaintiff from that in which the other defendants are found. He was appointed by all the members, operating through the committee, and, in my judgment, he there-



upon became the agent of each member to do reasonably carefully all those things which he was appointed to do, and in that way he came to owe a duty to each of the members to take reasonable care and to carry out his duties without negligence. In evidence he said:

"It was my duty to open the club and to close it, to remain on the premises until everybody had left, and to put the lights on and to turn the lights off when and where necessary. It was my duty to obey the directions of the committee, to receive the instructions of the secretary, and to see that the premises were in as good order as they could be, and in a fit condition for use by members of the club. It was also my duty to notify the committee of any defects which would render the club not so fit."

Those being the duties which he had himself admitted were his, I find that on Dec. 31 the platform was in complete darkness, that Mr. Address was negligent in failing to light it, although he knew that there had been recent alterations made to it, and that he ought to have realised that, for the safety of members who, perhaps, had not visited the club regularly some kind of warning, by lighting or otherwise, ought to have been given of the change which had been made. It is obvious that there must have been some necessity for that light to be on, and, therefore, by switching it off, Mr. Address created a different situation—one which, I think, was created negligently. It is admitted that no notice was put up, as it might have been, in the club warning members that the position of the platform had been drastically altered within the previous fortnight, and, knowing, as he did, that those recent alterations had been made, knowing that there was a New Year's Eve party going on till midnight at least, and knowing, as I think he ought to have done, that some of the members might be people who had used the club infrequently during the preceding two or three months, I am driven to the conclusion that Mr. Address did not take reasonable care to see on that night that the premises were in as good order as they could be for the user of the members who might be expected to go out that way. In those circumstances I find that he was negligent and in breach of the duty which he admitted he owed to the members of the club.

Mr. Address is entitled to rely on either of the other two defences which were put forward and, therefore, I must deal with them. [His LORDSHIP referred to the evidence and continued:] I have come to the conclusion that on occasions when the men and women members mixed for some evening's entertainment such as this New Year's party it was a recognised thing that, when people wanted to leave the entertainment, they were not prevented from leaving by the platform entrance, and that the plaintiff, in leaving this club by that entrance on the occasion in question, was making no improper use of the club premises, and was doing that which she was entitled to do. Therefore, I think that the second defence fails. The third defence is that the plaintiff was guilty of contributory negligence. On that aspect of the case I have in mind the decision in *Lewis v. Ronald* (1). I am satisfied that in the circumstances the plaintiff was not negligent. I, therefore, come to the conclusion that, as against the defendant Address, all the defences fail, the plaintiff having established a breach of duty on his part which, in my judgment, caused her to fall, and she is entitled to recover damages against him.

*Judgment for the plaintiff for £350 and four-fifths of the taxed costs.*

Solicitors: *Risdon, Weston & Witham*, Taunton (for the plaintiff); *J. W. Davies* (for the defendants).

[Reported by CONRAD OLDHAM, ESQ., Barrister-at-Law.]

**Re WESTBY'S SETTLEMENT. WESTBY v. WESTBY  
AND OTHERS.**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.J.J.), February 8, 1950.]

*Settlement—Forfeiture clause—Receiver in lunacy of life tenant's property appointed—Percentage charged on estate of lunatic—Lunacy Act, 1890 (c. 5), s. 148 (3).*

Under a settlement L.W. was entitled to the income of the trust fund thereby settled for her life “provided nevertheless that if whilst the said [L.W.] shall be discovert any act or event shall happen whereby the income of the trust fund would if belonging absolutely to her become vested in or charged in favour of or payable to some other person or persons or a corporation then” her life interest was to be forfeited. L.W. was discovert at all material times. On Oct. 11, 1935, an order was made under the Lunacy Act, 1890, appointing the Official Solicitor receiver of L.W.'s property. Section 148 (3) of the Act provides that the percentage payable in proceedings relating to lunatics “shall be charged upon the estate of a lunatic, and be payable thereout.”

HELD: assuming that s. 148 (3) created a charge or incumbrance on the income payable to L.W., it was a charge analogous to a provision for the prior payment out of income of management expenses or management remuneration and was not such an incumbrance as was contemplated by the forfeiture clause, and L.W. did not, therefore, forfeit her interest under the settlement.

*Re Custance's Settlements* ([1945] 2 All E.R. 441), overruled.

*Dictum* of FARWELL, J., in *Re Greenwood* ([1901] 1 Ch. 891), applied.

[AS TO PROTECTED LIFE INTEREST, see HALSBURY, Hailsham Edn., Vol. 29, pp. 597-600, para. 870, and Vol. 34, pp. 421-423, paras. 468, 469; and FOR CASES, see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.]

Cases referred to:

- (1) *Re Custance's Settlements*, [1945] 2 All E.R. 441; [1946] Ch. 42; 114 L.J.Ch. 293; 173 L.T. 195; 2nd Digest Supp.
- (2) *Re Greenwood*, [1901] 1 Ch. 887; 70 L.J.Ch. 326; 84 L.T. 118; 44 Digest 1234, 10665.
- (3) *Re Marshall*, [1920] 1 Ch. 284; 89 L.J.Ch. 204; 122 L.T. 673; 39 Digest 50, 618.
- (4) *Re Tancred's Settlement*, [1903] 1 Ch. 715; 72 L.J.Ch. 324; 88 L.T. 164; 40 Digest 561, 1005.

APPEAL by the Official Solicitor, as receiver in lunacy of a life tenant's property, against an order of DANCKWERTS, J., dated Nov. 24, 1949, answering in the affirmative a question, raised on an originating summons, whether, on the true construction of a settlement and in the events which had happened—in particular, an order made on Oct. 11, 1935, under the Lunacy Act, 1890—any event had occurred whereby the income of a trust fund would, if belonging absolutely to the life tenant, become vested in or charged in favour of or payable to some other person or persons. The Court of Appeal now allowed the appeal, and answered the question in the negative. The facts appear in the judgment of

SIR RAYMOND EVERSLED, M.R.

*W. F. Waite* for the Official Solicitor.

*A. F. M. Berkeley* for the settlor.

*D. A. Zeigler* for the trustees of the settlement.

**SIR RAYMOND EVERSLED, M.R.:** This is in form an appeal from a judgment of DANCKWERTS, J., dated Nov. 24, 1949, but it is in substance an appeal against a decision of COHEN, J. (as he then was), in *Re Custance's Settlements* (1). The

point which arose in *Re Custance's Settlements* (1) and arises in this case may be briefly put thus. Under a settlement the tenant for life was entitled to the income of the trust property subject to a forfeiture clause in substantially common form, *i.e.*, to the effect that her interest would be forfeited in the event, among other things, of the income to which she was entitled becoming charged in favour of some other person or persons. In the present case, as in *Re Custance* (1), an order was made under the Lunacy Act, 1890, appointing a receiver of the property of the tenant for life. In both the present case and *Custance's* case (1) the point is, therefore, whether the fees which become leviable—to use for the moment a neutral word—and are ascertained as a percentage of the patients' income are, by reason of the language of s. 148 (3) of the Lunacy Act, 1890, "charged" on the income to which the life tenant is entitled so as to create a forfeiture within the forfeiture clause.

Before I proceed to deal with the reasoning of the learned judge in *Re Custance's Settlements* (1), it is necessary to refer to the position which arises when orders of this kind are made. Section 148 provides:

"(1) The Lord Chancellor, with the concurrence of the Treasury, may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid. (2) Save as otherwise provided by the Rules in Lunacy the percentage and fees in lunacy shall be subject to the rules contained in s. 26 of the Supreme Court of Judicature Act, 1875."

That last mentioned section has been replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 213, which, as amended, provides, in brief, for the fixing and collection of all court fees by order of the Lord Chancellor with the advice and consent of the judges and of the Treasury. Therefore, s. 148 (2) is saying no more than that, subject as otherwise provided by the Rules in Lunacy, these fees are to be dealt with in the same way as court fees. Then comes the vital sub-s. 3:

"The percentage, or a proper proportionate part thereof (as the case may require), shall be charged upon the estate of a lunatic, and be payable thereout, although before payment thereof he die, or the inhibition be superseded, or be vacated and discharged on a traverse; but in either of the two last-mentioned cases the judge in lunacy may, if he thinks fit, remit or reduce the amount of the sum to be paid."

Various rules have been made, and those which affect the ascertainment and payment—to borrow the words from s. 148 (1)—of fees of this kind are now contained in a section of the Management of Patients Estates Rules, 1934, beginning with r. 148. I do not propose to take up time by reading the whole of those rules from r. 148 to r. 160. Suffice it to say that, under those rules there is no reference anywhere to a "charge" or to the coming into existence of any kind of incumbrance. That, of itself, is not, perhaps, of great importance—plainly, if a charge is created by the Act, it could not be taken away by the rules. It is to be noted, however, that the rules proceed, apparently, in oblivion of the circumstance that the section imposed a charge. The rules provide that the percentage is calculated on what is called the "clear annual income." They provide (by r. 152) that from time to time the master in lunacy shall certify the amount which has to be paid, and who is to pay it. In the ordinary course it would be the receiver, and he would pay the amount out of such funds as the master directs. The clear annual income of a patient on which the percentage falls to be calculated is a sum which is arrived at as the result of some elaborate calculations. The method of calculation is to be found set out in HAYWARD AND MASSEY'S LUNACY PRACTICE, 6th ed., pp. 132, 133. It is plain, to take any particular year, that it cannot be discovered until the end of the year what is the clear annual income of the lunatic, and it is to be noted that obligations



for surtax and other obligations to which the lunatic may be liable, (*e.g.* bank charges), are matters which have to be taken into account before the clear annual income is ascertained in respect of which the percentage is then calculated. I may say the percentage, so far as is relevant to this case, is three per cent.

A In the present case the trustees of the settlement continued to receive the annual income from the invested funds. The Official Solicitor is now, and I think always was, the receiver of the patient's estate. There is here no fund in court. The trustees from time to time pay over the income they receive to the Official Solicitor who then deals with it for the patient's benefit, but since there is no fund in court the fees which are payable as the result of s. 148 are paid by way of judicature stamps impressed on demand notes sent from time to time to the Official Solicitor as receiver. Two affidavits are before the court in addition B to that sworn by the Official Solicitor—an affidavit of the chief clerk of the Court of Protection, and an affidavit of Mr. Vickery, of the same department. Mr. Vickery is able to describe exactly what happens in this case because it is within the scope of his duties to deal with this particular matter. He says:

C "Demand forms for payment of such Supreme Court percentage are issued by the Court of Protection annually and are paid by way of judicature fee stamps impressed upon the said demand forms."

D The payments are made by the Official Solicitor out of moneys in his hands on behalf of the patient. The next question is what happens to those moneys which the Official Solicitor pays when he gets the stamps and impresses them on the demand notes? The answer is that those moneys are carried over to the credit of the Accountant-General to an account in the Pay Office book entitled E "Percentage Account under 53 Victoria, c. 5, and Amending Acts." From time to time there is a transfer to the Paymaster-General Cash Account for the credit and debit of the Supreme Court of Judicature, or otherwise, if there has been a direction (as there has not), as the Treasury may direct. The effect, therefore, is that these fees go as part of the revenue which is brought into account in the annual accounts relative to the costs of the Supreme Court of Judicature, and become in substance part of the general revenue of the State.

F It has been necessary to go thus fully into the matter, partly because of the nature of the argument addressed to us and partly because in some respects the material I have related is additional to anything which was before COHEN, J., in *Re Custance's Settlements* (1). The arguments which counsel for the tenant for life has put forward are two, and they are distinct. First, he says, when the truth is ascertained as to the method of assessment of these fees, their collection, and so forth, it cannot be said that, in any proper sense of the term "charge," these fees were "charged" on any income or other property of the patient. Secondly, he says, even if you can treat these fees as "charged" on the estate or income of the patient, nevertheless the charge is one for a purpose and of a character foreign to the scope and intention of a forfeiture clause, and ought G not to be, and cannot properly be, treated, therefore, as being within its ambit so as to work forfeiture at all. Both those arguments were put in *Re Custance's Settlements* (1) to COHEN, J., and both were rejected by him. In fact, they were put in the reverse order, and as regards the second of them (whether strictly speaking these fees were a charge at all) the learned judge, as appears from his H judgment, himself put in the course of the argument this point: If they are a charge who is the chargee? That was, I think, a somewhat formidable question, but the learned counsel who was concerned to argue against the forfeiture in that case appears to have conceded (and I quote from the judgment) ([1945] 2 All E.R. 444):

"... that he thought the government officer entitled to receive the money must be either a person or a corporation within the meaning of the clauses under consideration."

It seems to me that on the facts now ascertained there is at least a strong argument for saying, as counsel for the life tenant has said, that you cannot define or identify any officer entitled to receive this money. Who is the chargee? Who would be entitled to come, as chargees would be normally entitled to do, to ask the Court in Chancery to enforce the charge? Counsel says there is no such person, and, therefore, since the essential characteristic of any charge, namely, the presence of a chargee, is absent, there is no charge at all. He further observes with some justice that the language of s. 148 is capable of sensible interpretation without reading "charged upon" as importing the existence of an incumbrance. In other words, he asks the court to say that the words "shall be charged upon the estate of the lunatic" mean really "shall be assessed upon" just as income tax is said to be "charged"—not on, but in respect of, certain profits or gains. I have indicated that it seems to me there is in the circumstances great force in that argument.

Another event has, however, occurred which may have an important bearing on this part of the case and that is the passing and coming into operation on Dec. 16, 1949, of the Law Reform (Miscellaneous Provisions) Act, 1949. Section 8 of that Act provides:

"The following proviso shall be inserted at the end of sub-s. (3) of s. 148 of the Lunacy Act, 1890 (which provides that the percentage payable in proceedings relating to a patient and his estate shall be charged upon his estate and be payable thereout) that is to say, Provided that neither the charge created by this sub-section nor any payment made by virtue thereof shall cause any interest of the patient in any property to fail or determine or to be prevented from recommencing."

The Act of 1949 had not come into operation when DANCKWERTS, J., gave his judgment in the present case, and, according to well-recognised principles, in the absence—and I do not think it is suggested that there is here the presence—of any language indicating retro-active effect, it would not be proper in the determination of this case to apply the proviso. We must decide this case according to the law as it was before this Act had been passed. But that does not necessarily answer the question put by SOMERVELL, L.J., in the course of the argument. True, we apply the law as it stood when the proceedings began, but does it follow that, in construing s. 148 of the Act of 1890, you may not be entitled to look at any parliamentary affirmation of any view of construction even though such affirmation is contained in a statute passed since the proceedings began? That again, I think, is a point of some substance, for the language of s. 8 appears to emphasise that s. 148 in the view of Parliament did create, and was intended to create, a charge.

I have come to the conclusion that it is unnecessary to express a decision on either of these points which I have so far stated. I do not decide, therefore, whether there was or was not in this case a charge of some kind on the estate of the patient or her income, and I do not decide whether we can in this case take note of the language of Parliament in 1949 in construing the language of the legislators of 1890. For, in my judgment, the answer to this case is to be found in the second of the arguments of counsel for the life tenant. In my opinion, assuming there is here created a charge of a kind understood by lawyers, something in the nature of an incumbrance on the income, still it is not such an incumbrance as is contemplated by the forfeiture clause in this case, and it does not, and did not in this case, work a forfeiture.

In approaching the question whether there has been a forfeiture it is proper to refer to the language of FARWELL, J., as a judge of first instance in *Re Greenwood* (2). That was a case in which a creditor had served garnishee proceedings on the trustee of a life tenant, and the suggestion was made that the effect was to work a forfeiture. But, as the learned judge pointed out, those who preferred that claim were in a difficulty. If the money which the creditor

sought to garnishee had not become absolutely due and payable to the life tenant, then the garnishee proceedings were wholly ineffective. On the other hand, if the moneys had become absolutely due and payable to the life tenant then it would appear that no question of forfeiture could arise within the language of the forfeiture clause. By way of expansion of the last point, the learned judge said ([1901] 1 Ch. 891):

A "In my opinion, the true meaning of these words . . . 'or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof,' is 'if he were deprived of the right to receive the same or any part thereof on the day it becomes due'."

B That gloss is justified by the view he had earlier expressed in these terms (*ibid.*):

"First of all, we must bear in mind that the courts do not construe gifts on forfeitures so as to extend their limits beyond the fair meaning of the words unless they are actually driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of a forfeiture clause to a gift such as the present."

C With that guide to my application of the section to the present case, I ask myself what is, in truth, the nature of this charge which I am construing, what is its purpose, and is it such a charge as the forfeiture clause here can be taken fairly to have contemplated?

The forfeiture clause is as follows:

D "Provided nevertheless that if whilst the said Lilian Westby shall be discovert any act or event shall happen whereby the income of the trust fund would if belonging absolutely to her become vested in or charged in favour of or payable to some other person or persons or a corporation then . . ."

E The said Lilian Westby, the patient, at all material times was, and is now, discovert. Nobody has contended that the act or event of the appointment of the Official Solicitor as receiver has resulted in the income being payable to some other person or persons within the meaning of the clause. Of course, in a very strict sense you might say it has, for, as I have stated, the trustees, instead of paying the income when they receive it into the hands of the patient, have sent it to the Official Solicitor, who, as receiver, gives them a receipt for it. But EVE, J., stated in *Re Marshall* (3) that the Official Solicitor is really a statutory agent for the patient who is not capable of managing her own affairs. So much is accepted. There remains the "charge." In *Re Custance's Settlements* (1), counsel based his argument (accepting, as he did, that there was a charge of some sort created) on an analogy to the decision in *Re Tancred's Settlement* (4). In that case there was again a life tenancy determinable on similar happenings to those relevant to the present case. The life tenant made a marriage settlement and assigned his life interest to the marriage settlement trustees, but on terms that he should continue to receive it, subject, however, to the condition that the trustees were entitled to pay out of the income before the balance was handed over to him their management expenses. It was suggested that that involved a "disposition" by the tenant for life which worked a forfeiture, but BUCKLEY, J., said ([1903] 1 Ch. 724):

H "The [forfeiture] clause is intended to provide that, if a tenant for life disposes or attempts to dispose of his interest so as to lose the enjoyment of it himself, or if he should become bankrupt, his life estate should cease and be given over to others. This has not happened. Seymour Mitford Tancred remained after the settlement the only person entitled to the income. The mere fact that the trustees may be entitled to have their expenses recouped to them out of the income does not make it a disposition within the clause. It is parallel to the case of a person who is going abroad and appoints some-



body to collect his rents on the terms that he should be paid by deducting a commission. Neither is the appointment of the trustees to be his attorneys to recover the income an assignment. He only appointed them to act as his agents, retaining the beneficial interest himself."

It is fair to observe that the emphasis in that case was on whether the tenant for life had himself disposed or purported to dispose of the income so as to effect a forfeiture, and that is a somewhat different problem, strictly speaking, from the present case, but the analogy I think is not far to seek.

Mr. Cross suggested in *Custance's* case (1) that the fees payable under s. 148 were really *in pari materia* with remuneration to an agent. The learned judge, who appears to have felt doubt on the whole of the case, eventually came to the conclusion that he could not accept that argument. He said ([1945] 2 All E.R. 444):

"Had the charge been for the remuneration of the receiver the argument might have been well founded, but I think I should be straining the law too far if I were to hold that fees payable to the percentage account and applicable as part of the vote for the Supreme Court of Judicature were analogous to remuneration to an agent appointed by act of party or by statute."

With very great respect to so learned a judge, I part company from him in not treating the percentage as fairly analogous. It seems to me that once you concede that some kind of a charge to provide for remuneration for the trustee does not work a forfeiture, then it must proceed on the view that really what the forfeiture clause is directed to protect is the net income which the tenant for life can enjoy when the necessary and proper expenses of collecting it have been discharged. There may be in many cases expenses of that kind which have to be discharged. One was put by SOMERVELL, L.J., in the course of the argument. It may be that as a result of proceedings trustees are directed to pay out of income certain costs. True they do not in normal circumstances become the subject of a charge, but the result is, of course, that the income, or a part of it, has to go in discharging some obligation before there is rendered available the sum of income which beneficially the tenant for life may enjoy.

In the present case the charge for fees is not by way of remuneration of the Official Solicitor. He is an officer of the court whose remuneration does not depend on the amount of income from the various persons whose affairs he looks after. But, the patient having become a lunatic and the powers and duties of the Court of Protection having been invoked, certain expenses are necessarily incurred as a result, by way of administration of her affairs. The patient is subject to the jurisdiction of a branch of the Supreme Court. The purpose of these fees is, obviously, to go some way towards discharging the general costs of this branch of the administration of the Supreme Court of Judicature, and those costs, or those contributions to the costs, are levied by way of charge on the estates of patients who come within the ambit of the Act. To say that is a charge such as the forfeiture clause contemplated I venture to think offends against good sense. I think there is a true analogy between the sort of charge envisaged by COHEN, J., and designed to provide for the prior payment of management expenses or management remuneration, and this charge designed for securing the contribution which patients have to make to court costs as a result of resorting to the Court of Protection. I hope I have been able to express the way in which I have felt impelled to conclude, notwithstanding the contrary view of COHEN, J., that in this case there is no forfeiture and that *Re Custance's Settlements* (1) was not correctly decided. The result, in my judgment, is that the plaintiff is entitled in this case to the declaration, which by her originating summons is sought, that on the true construction of the settlement in the events which have happened, in particular an order made on Oct. 11, 1935, under the

Lunacy Act, 1890, and amending Acts, no act or event has happened whereby the income of the trust fund would, if belonging absolutely to the plaintiff, become vested in or charged in favour of or payable to some other person or persons.

**SOMERVELL, L.J.:** I agree with the Master of the Rolls that it is unnecessary to decide in this case the question whether s. 148 imposed a charge in all or any circumstances. I also agree that the appeal succeeds on the second point for the reasons given by the Master of the Rolls, to which I do not wish to add anything.

**JENKINS, L.J.:** I also agree.

*Appeal allowed. Costs of all parties to be raised and paid out of the fund.*

Solicitors: *Official Solicitor to the Supreme Court* (for the life tenant); *Collyer-Bristow & Co.* (for all other parties).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

### *Re* HOWLETT (deceased). *HOWLETT v. HOWLETT.*

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Ormerod, J.), January 27, 1950.]

*Probate—Costs—Administrator pending suit—Costs of administration and remuneration of administrator—Possible benefit of administration to estate—Apportionment between estate and party bringing proceedings.*

An action to prove the testator's will was brought by the executrix as a result of the defendant's contentions that the execution of the will was forged, or, alternatively, obtained by undue influence. Those contentions were abandoned before the hearing and probate of the will in solemn form was granted to the plaintiff, with costs against the defendant. While the action was pending an accountant was appointed administrator pending suit to preserve the estate. After the action had been disposed of the administrator presented his bill for the costs of the administration and his own remuneration which was fixed by the registrar at £525. When the plaintiff's bill of costs in the action was taxed the costs of the administration and the remuneration of the administrator were included in full and were allowed by the registrar.

**HELD:** an unsuccessful defendant in an action of this kind must bear any additional cost falling on the estate by reason of his conduct in bringing, or being responsible for, the proceedings, and the costs of the administration and the remuneration of the administrator were part of that additional cost, except that, if in the course of his duties the administrator did work which must have been done in any event to wind-up the estate, and so the estate was benefited, there must be an apportionment of the costs and remuneration between the estate and the defendant.

*Fisher v. Fisher* (1878) (4 P.D. 231), *applied*.

[AS TO THE ACCOUNTS AND REMUNERATION OF AN ADMINISTRATOR PENDING SUIT, see *HALSBURY*, Hailsham Edn., Vol. 14, p. 272, para. 481; and FOR CASES, see *DIGEST*, Vol. 23, pp. 274, 275, Nos. 3376-3385.]

Case referred to:

(1) *Fisher v. Fisher*, (1878), 4 P.D. 231; 48 L.J.P. 69; 23 Digest 274, 3379.

#### SUMMONS.

After an action for probate of a will the unsuccessful defendant was ordered to pay the costs. In this bill of costs the plaintiff contended that costs of

administering the estate incurred by an accountant who was appointed administrator pending suit and £525 for his remuneration should be included, and on taxation these sums were allowed. ORMEROD, J., held that any additional cost to the estate occasioned by the defendant in commencing or being responsible for the proceedings should fall on him, but that there should be an apportionment of the expenses and remuneration of the administrator if any general benefit had resulted to the estate as a result of the work of the administrator. The matter was remitted to the registrar so that effect could be given to this expression of opinion. A

*Hollins* for the plaintiff.

*Bruce Campbell* and *Ian Warren* for the defendant.

**ORMEROD, J.:** This summons arises as a result of an action brought to prove the will of William Henry Howlett deceased. The defendant is the son of the testator, the plaintiff (the executrix appointed by the testator) was his second wife, and the action to prove the will in solemn form was occasioned by reason of the defendant's contention that the execution of the will was forged, or, alternatively, was obtained by undue influence. Those contentions were abandoned shortly before the hearing of the action and probate of the will in solemn form was granted to the plaintiff, the defendant being ordered to pay the costs of the action. When the action was pending it became necessary to appoint an administrator *pendente lite* and an accountant was appointed for the purpose of preserving the assets. The administrator, having been appointed, proceeded to deal with the estate. (I am using, so far as possible, a neutral term). It is contended by counsel for the defendant that substantially he wound-up the estate. It is clear that he did everything that was necessary to preserve the estate when the suit was pending, and when the action was disposed of, some two years or more after the death of the testator, he presented his bill for the costs of the administration and for his remuneration, and that remuneration was fixed by the registrar at the sum of £525. That sum, together with the various other costs, was properly retained by the administrator from the funds in his hands before he handed the balance over to the plaintiff. The plaintiff's bill of costs against the defendant in the action was taxed by Mr. REGISTRAR FORBES and the costs and remuneration of the administrator which the estate had had to bear were added to that bill of costs and were allowed by the registrar, although objection was taken on taxation by the defendant's advisers to the whole of these amounts being included. B C D E F

Counsel for the defendant now submits that the work done by the administrator was not merely rendered necessary by reason of the action, but was necessary to be done in the winding-up of the estate in any event, and that, had it not been done by the administrator, the plaintiff would have been obliged to employ professional assistance in order that the estate could be properly wound-up. Whether that be so or not I do not propose to decide. G

Counsel for the defendant says that, if that be the position, it is unreasonable that the additional costs of the winding-up of the estate (other than the costs which were rendered necessary by the action of the defendant) should be borne by the defendant because it would mean that the estate would get from him the benefit of work done by the administrator, the expense of which would otherwise have been payable by the estate. He goes further than that and contends that no part of that remuneration should be borne by the defendant, and he bases this contention on the wording of s. 163 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that the court may, out of the estate of the deceased, assign to an administrator appointed under sub-s. (1) of the section such reasonable remuneration as the court thinks fit. Counsel for the defendant argued that, if it were not for that section, this administrator would not be able to obtain any remuneration at all as the power H



of recovering that remuneration cannot be wider than is expressed in the section. I do not agree with that contention. I think the position in this case is that the remuneration of the administrator has been paid out of the estate of the deceased and the only question that arises now is whether the estate can recover from the defendant that additional cost to which the estate has been put by reason of the action of the defendant. I am satisfied that in the proper circumstances either the whole or part of this administration can be recovered by the plaintiff from the defendant.

Counsel for the plaintiff argued that the whole of the administrator's costs and the whole of the administrator's remuneration should be paid by the defendant, because, if it had not been for the action of the defendant, it would not have been necessary to appoint an administrator, and he said that, if the administrator has done (in the course of his duty of protecting the estate) some work which would otherwise have had to be done by professional advisers, it is so much the better for the estate. Counsel for the plaintiff went much further by saying that the contention which he puts forward reflects the established practice of this Division. The only authority on the point which appears to affect the present case at all is *Fisher v. Fisher* (1) where an order was made that the unsuccessful party should bear the additional costs thrown on the estate by the appointment of an administrator *pendente lite*. That appears to be a sound proposition of law. It is clear that the unsuccessful defendant in an action of this kind must bear any additional cost which has been thrown on the estate by his conduct in commencing the proceedings or being responsible for the proceedings. A part of that additional cost is clearly the remuneration of the administrator, or a proportion of it. If, however, in the course of his work the administrator does work in the winding-up of the estate which, to be done efficiently, must be done by a professional man, I fail to see why the defendant should bear the burden of that and the estate receive the benefit of it because of the defendant's action. If the portion of the work for which the administrator has been remunerated is work which must have been done in any event in order to wind-up the estate, there should, I am satisfied, be an apportionment of the remuneration so that the estate may bear its proper portion of the cost of winding-up. Whether that is the position here or whether the whole of this remuneration was occasioned by the action and would not have been occasioned if no administrator had been appointed is a matter for the registrar to decide when the whole of the facts are placed before him, but in principle I am satisfied that there should be an apportionment of both the costs of the administration and of the remuneration of the administrator if, indeed, the facts warrant it on the lines which I have set out. It follows that there must be an order that the bill goes back to the registrar for him to determine whether or not there should be an apportionment of the remuneration and costs.

*Order accordingly. Defendant to have costs of proceedings on appeal and below.*  
Solicitors: Keene, Marsland & Co. (for the plaintiff); Warren & Warren (for the defendant).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

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CORFIELD *v.* GROVES AND ANOTHER.

[KING'S BENCH DIVISION (Hilbery, J.), February 1, 2, 1950.]

*Street Traffic—Driving uninsured motor vehicle—Driver without means—Liability of owner of vehicle to satisfy judgment against driver—Effect on owner's liability of independent contract of insurance—Road Traffic Act, 1930 (c. 43), s. 35 (1).*

In an action by the plaintiff against the first and second defendants, as respectively driver and owner of a motor vehicle, it was proved that the first defendant had negligently knocked down and fatally injured the plaintiff's husband. At the time of the accident there was not in force in relation to the user of the vehicle by the first defendant a policy of insurance against third-party risks as required by the Road Traffic Act, 1930, s. 35 (1), and the owner of the vehicle was, therefore, in breach of that sub-section, and the first defendant had no means to meet the judgment which was given against him for his tortious act. Under a contract made with the Minister of Transport an incorporated body called the Motor Insurers Bureau undertook to pay any sum due under a judgment obtained by a person in respect of a liability required to be covered by a policy of insurance under the Act of 1930 which was not satisfied within seven days.

HELD: (i) rights against both defendants accrued to the plaintiff immediately on her husband's death, and, therefore, it could not be said that she had suffered no damage by reason of her inability to recover against the first defendant merely because the Bureau would pay to her any damages which she was awarded against him.

(ii) the second defendant was liable to the plaintiff for the amount of damages awarded against the first defendant by reason of her (the second defendant's) breach of statutory duty in permitting an uninsured person to drive the car.

*Monk v. Warbey* ([1935] 1 K.B. 75), *applied*.

[AS TO COMPULSORY INSURANCE AGAINST THIRD-PARTY RISKS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 560-566, paras. 907-917; and FOR CASES, see Digest Supp.]

FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Case referred to:

- (1) *Monk v. Warbey*, [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.

ACTION for damages against both defendants for negligence under the Fatal Accidents Acts, 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, and, further, against the second defendant for breach of statutory duty.

The plaintiff's husband, while crossing a road, was knocked down and fatally injured through the negligent driving by the first defendant of a motor vehicle, the property of the second defendant. The first defendant, who was a person without means, was found not to be the agent or servant of the second defendant so as to make the latter liable for his negligence, but it was contended that the second defendant was, nevertheless, liable to pay to the plaintiff the damages recovered against the first defendant because she (the second defendant) had permitted the vehicle to be on the road without there being in force in relation to its user a policy of insurance, contrary to the Road Traffic Act, 1930, s. 35 (1). The second defendant maintained that the plaintiff had suffered no damage because the latter would be compensated by virtue of a contract between the Minister of Transport and the Motor Insurers Bureau whereby the Bureau

undertook to satisfy any unsatisfied judgment arising from any liability required to be covered by a policy of insurance under the Act of 1930. HILBERY, J., gave judgment for the plaintiff against both defendants.

*Ruttle and M. G. Polson* for the plaintiff.

*Wallis-Jones* for the first defendant.

*Bickford Smith* for the second defendant.

A HILBERY, J., reviewed the evidence, found that the accident happened through the negligence of the first defendant, that there was no contributory negligence on the part of the deceased, and that, when the accident occurred, the first defendant was not driving the car as agent or servant of the second defendant, and he continued: Lastly, there is a claim against the second defendant for damages for an alleged breach of statutory duty. The Road Traffic Act, 1930, s. 35 (1), provides:

B “Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.”

C The first defendant had no policy of insurance in respect of third-party risks which covered him on this occasion. The second defendant had no policy of insurance against third-party risks covering the driving of the car by the first defendant, but she permitted the first defendant to drive the car without there being in existence such a policy and has been convicted before a magistrate of that offence. She was, therefore, in breach of her statutory duty. In *Monk v. Warbey* (1) it was decided that, where there has been a breach of this statutory duty and injury has been caused to a third party, the latter may, where the person primarily liable is in such a financial position that nothing is obtainable from him, proceed directly against the person responsible for the breach. It has been argued by counsel for the second defendant that, although the first defendant is in this financial position, nevertheless, the plaintiff has not suffered any damage by reason of this breach of the requirements of s. 35 (1) because there is in existence a contract between an incorporated body called the Motor Insurers Bureau and the Minister of Transport by which the Motor Insurers Bureau has agreed with the Minister as follows:

F “If judgment in respect of any liability which is required to be covered by a policy of insurance or a security, hereinafter called a contract of insurance, under Part II of the Road Traffic Act, 1930, is obtained against any person or persons in any court in Great Britain, whether or not such person or persons be in fact covered by a contract of insurance, and any such judgment is not satisfied in full within seven days from the date upon which the person or persons in whose favour the judgment was given became entitled to enforce it, then Motor Insurers Bureau will, subject to the provisions of cl. 5 and 6 of these presents, pay or satisfy or cause to be paid or satisfied to or to the satisfaction of the person or persons in whose favour the judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability, including taxed costs, (or such proportion thereof as is attributable to the aforesaid liability) whatever may be the cause of the failure of the judgment debtor to satisfy the judgment.”

H There, says counsel for the second defendant, is a contractual obligation on the Motor Insurers Bureau to satisfy any judgment which this court may give against the first defendant, and, therefore, the plaintiff has not suffered any damage.



I do not think that that argument is well founded for these reasons. The breach of the statutory duty was a continuing breach operative at the time of the accident (the time of the tortious act), and the moment the tortious act occurred the deceased man had his cause of action for the tort. At the date of his death and before she ever issued her writ, there immediately accrued to the widow a right to claim under the Fatal Accidents Acts against the tortfeasor for negligently causing her husband's death, and an enforceable claim against the second defendant under the decision in *Monk v. Warbey* (1) for any damages which she then sustained by reason of the breach by the second defendant of her statutory duty, which existed at the time of the tortious act, to fulfil the requirements of the Road Traffic Act, 1930. The damage had, in fact, accrued to her inasmuch as at the time of the tortious act the first defendant was an uninsured person and in such a financial position that nothing was obtainable from him, even by bankruptcy proceedings. She had a complete cause of action, and GREER, L.J., in *Monk v. Warbey* (1) has pointed out ([1935] 1 K.B. 83) that it does not matter, even if it were the fact, that at the time of the tort her damages could not be quantified. In theory, of course, her damages are quantified as on the day of the accruing of her complete cause of action.

I have come to the conclusion that there must be judgment against the second defendant for the amount of the damages which I assess against the first defendant for his tortious act by reason of the second defendant's breach of statutory duty in allowing an uninsured person to drive her car contrary to the Road Traffic Act, 1930. A witness from the Motor Insurers Bureau expressed the opinion that under the agreement with the Minister the Bureau would satisfy any judgment that I might give against the first defendant. If they do, no difficulty arises, because those damages cannot be taken twice by the plaintiff. She cannot have double satisfaction for the tortious act which resulted in her husband's death. Therefore, there seems to me no practical difficulty in my giving judgment against the first defendant for damages due to the tortious act and against the second defendant for damages for the breach of her statutory duty resulting in the damage to the plaintiff in accordance with the decision in *Monk v. Warbey* (1).

[HIS LORDSHIP then assessed the damages at £5,250 and gave judgment for £5,249 under the Fatal Accidents Acts and £1 under the Law Reform (Miscellaneous Provisions) Act, 1934, with costs.]

*Judgment for the plaintiff against both defendants with costs.*

Solicitors: *G. F. Wallace & Co.* (for the plaintiff); *Simmons & Simmons* (for the first defendant); *Rowe & Maw* (for the second defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

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Re HARVEY (*deceased*). BANISTER v. THIRTLE  
AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), February 9, 10, 1950.]

*Power of Appointment—General or special power—“In trust for such persons or person not being her husband” as daughter should appoint—Purported exercise of power by spinster daughter in favour of charity—Validity.*

By his will, dated Nov. 22, 1907, a testator, who died on Jan. 10, 1913, gave all his real estate and his residuary personal estate to his trustees on trust for sale and investment and directed that (in the events which happened) the proceeds of sale and the investments thereof should be divided into three equal shares one of which was to be held on trust to pay the income thereof to each of his three daughters, A., E. and F., during her life and on the death of each daughter the capital and income of her share was directed to be held in trust for such one or more of her children or remoter issue as she should by deed or will appoint. The testator further provided: “And if there shall be no child who shall take a vested interest hereunder the share of each daughter shall be in trust for such persons or person not being her husband as she shall by deed or will whether covert or sole appoint.” On Mar. 21, 1931, A. died a spinster and by her will she purported to give, devise, bequeath, and appoint all her real and personal estate not thereby otherwise disposed of, including the share and interest bequeathed to her by the will of the testator and all the moneys, stocks, funds, and securities for the time being representing such share, to her trustees on trust for sale, and directed her said trustees to stand possessed of her residuary trust fund on trust to pay the income to E. for life and thereafter to hold her trust fund on certain trusts for the establishment of a home for poor and aged persons of genteel birth. On Sept. 19, 1936, E. died a spinster, and by her will she purported to give, devise, bequeath and appoint all her real and personal estate not thereby otherwise disposed of, including the share and interest bequeathed to her by the will of the testator, to her trustee on trust for sale and directed her trustee to stand possessed of her residuary trust fund so constituted on trusts for the purposes of the home for needy persons closely similar to, but not identical with, the trusts in that behalf contained in the will of A.

HELD: (i) the power of appointment given to A. and E. was effectively exercised although the will referred only to “such persons or person” and the power was exercised in favour of a charity.

*Re Dilke* ([1921] 1 Ch. 34), *applied*.

*Per VAISEY, J.*: If there is a power to appoint generally to persons, that involves necessarily that the persons who are the recipients of the bounty of the creator of the power can themselves be made the instruments to effect particular purposes.

(ii) the reference to the husband in each case did not indicate that the class from which he was excluded must be a class of individual persons and not corporations or such a general conception of an appointee as is involved in a charitable trust.

*Re Jones* ([1945] Ch. 105), *distinguished*.

(iii) a power to appoint to the whole world with a particular exception is not a general power properly so-called, but, if the excepted individual does not, and cannot, exist, the power can be treated for all purposes as a general power; A. and E. were both unmarried at the time of their deaths; and, therefore, the exception of their husbands could be disregarded and the powers treated as general powers. ✓

*Dictum of KEKEWICH, J.*, in *Re Byron's Settlement* ([1891] 3 Ch. 480), *applied*.

[As to GENERAL OR SPECIAL POWERS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 511, 512, para. 926; and FOR CASES, see DIGEST, Vol. 37, pp. 384-386, Nos. 1-13, Vol. 44, pp. 518, 519, Nos. 3367-3375.]

Cases referred to:

- (1) *Re Dilke*, [1921] 1 Ch. 34; 90 L.J.Ch. 89; 124 L.T. 229; 37 Digest 416, 256.
- (2) *Re Jones*, [1945] Ch. 105; 115 L.J.Ch. 33; 173 L.T. 357; 2nd Digest Supp.
- (3) *Re Byron's Settlement*, [1891] 3 Ch. 474; *sub. nom.*, *Re Reynolds*, 60 L.J.Ch. 807; 65 L.T. 218; 37 Digest 437, 429.

#### PRELIMINARY POINT OF LAW.

By an order of WYNN-PARRY, J., dated Oct. 13, 1949, it was ordered that the question whether certain appointments, which purported to have been made by the wills of Edith and Alice Harvey under a power conferred on them by the will of their father, Robert Harvey, deceased, and which were mentioned in the statement of claim delivered in the action *Re Harvey, deceased, Banister v. Thirtle and Others*, were valid and effectual, should be set down as a preliminary point of law to be argued before the court. VAISEY, J., now answered the question in the affirmative. The facts appear in the judgment.

*Christie, K.C.*, and *E. I. Goulding* for the plaintiff, sole executor of Fanny Banister, a daughter of Robert Harvey, deceased, who claimed to be entitled to the shares of the testator's residuary estate settled on Alice Harvey and Edith Harvey.

*R. E. Megarry* for the first defendant, the sole surviving executor and trustee of Robert Harvey.

*R. W. Goff* for the Westminster Bank, Ltd., the executor and trustee of the wills of Alice Harvey and Edith Harvey.

*Denys Buckley* for the Attorney-General.

VAISEY, J.: The point which I have to decide is whether the wills of two spinster ladies, who died in 1931 and 1936 respectively, operated to exercise the powers of appointment conferred on them by the will of their father who died in 1913. By that will, a one-third share in the testator's estate was settled on trust for each of those ladies for her life, followed by trusts in favour of her children. Then come the relevant words, which are:

"And if there shall be no child who shall take a vested interest hereunder the share of each daughter shall be in trust for such persons or person not being her husband as she shall by deed or will whether covert or sole appoint."

The daughter, Alice, who died in 1931, made a will by which she appointed the Westminster Bank, Ltd., and her sister, Edith, the other daughter, to be the executors and trustees thereof. She gave certain legacies and then purported to give, bequeath, and appoint the whole of her estate, including specifically the share and interest bequeathed to her by the will of the testator and all the moneys, stocks, funds, and securities for the time being representing such share unto her trustees on trust for sale. The residuary trust fund so constituted was to be held on trust to pay the income thereof to her sister Edith during her life, and after the sister's death the testatrix (Alice) directed that her trustees should hold the residuary trust fund on certain trusts for establishing a charitable institution. The testatrix died on Mar. 21, 1931, a spinster, and her will was duly proved on July 6, 1931, by the Westminster Bank, Ltd., the sister Edith having renounced probate. Edith made a will in very similar terms to those of Alice's will. She appointed the Westminster Bank, Ltd., to be the sole executor and trustee, and she gave, devised, bequeathed, and appointed the whole of her estate, including,



as in the other case, the share and interest bequeathed to her by her father's will, and directed her trustee to stand possessed of the resulting fund on trusts similar in character to those in the will of Alice, *i.e.*, on certain trusts defined to endow or assist in the foundation and endowment of a charitable institution. Edith died on Sept. 19, 1936, a spinster. Her will was proved on Dec. 24, 1936, and now the question arises how far, if at all, those two wills executed the power conferred on these two ladies by their father's will.

The suggestions which are made as to the invalidity of the appointments may, I think, be thus summarised. First, it is said that, there being reference only to persons or person and no reference to purposes or purpose, it was necessary, in order that the power might be effectively exercised, that it should be exercised in favour of specified individuals or a specified individual, and that those individuals or that individual must take beneficially, the only limit placed on the selection of the individuals being that the husband of the appointor was excluded. Then it is said (again, I think, because of the absence of any reference to purposes or purpose) that the creation of charitable trusts was outside the purview of the power. Finally, it is said that the objects of the power must be individual persons and not a corporation. It is not, I think, seriously contended that the nomination of the Westminster Bank as the primary appointee under the power is something which would vitiate the whole appointment, nor do I think it is seriously suggested that any objection could be taken to the bequest in the will of Alice of a life interest in favour of her sister Edith, but the other points require a little more consideration.

The absence of any reference to purposes in the creation of a power, whether it be a general power or a special power or one of those intermediate kinds of power which undoubtedly exist, cannot, I think, now be urged as a relevant consideration. I think that the point is concluded, so far as this court is concerned, by the decision of the Court of Appeal, affirming the decision of PETERSON, J., in *Re Dilke* (1). I do not think I need refer to any particular passages in the judgments as reported, but I regard that case as making it clear that a general power, or a power comparable to a general power, is none the less general because persons only and not purposes are referred to. The reason for that, I suppose, is that it is only through the instrumentality of persons that purposes can be effected. If there is power to appoint generally to persons, that involves necessarily that the persons who are the recipients of the bounty of the creator of the power can themselves be made the instruments to effect particular purposes. Then it is said, as I understand it, that the reference to the exclusion of the husband indicates in some way that the class from which he is excluded must be a class of individual persons and not corporations or such a general conception of an appointee as is involved in the creation of a charitable trust. In my judgment, there is nothing in that point. True it is that in *Re Jones* (2), I held that the class of appointee must necessarily be limited to individual persons, but I did so on a very different ground. There the direction was that the fund should be held for persons living at a particular time. There is no doubt that that indicated that the appointees must necessarily be persons who were alive, which, of course, was something which could not be predicated, in ordinary language, of anyone except an individual person.

The further question is raised whether this is a general power. There is no doubt that the wills of the two ladies are framed on the assumption that it is a general power. Each of the ladies purports to create a fund out of her own property and out of the property of which she has power to dispose under her father's will. That, I think, is rather an interesting point, but, in my judgment, it is, on the facts of this case, covered by the decision of KEKEWICH, J., in *Re Byron's Settlement* (3). I agree that a power to appoint to the whole world with a particular exception is not, within the meaning of the Wills Act, 1837, or otherwise, a general power properly so called, but if the excepted individual

does not, and cannot, exist, I think that the power may become a general power<sup>~</sup> and can be so treated for all purposes. In *Re Byron's Settlement* (3) there was a power conferred on a married woman to appoint to or for such person or persons (not being her present husband, or any friend or relative of his) as she might select. The lady's husband died and she made a will in which she treated the power as being a general power. KEKEWICH, J., refused to treat the reference to the husband's friend or relative as being inoperative by reason of its uncertainty, but he said that, apart from those words, he thought that the removal from the scene of the excepted person, *i.e.*, the husband, would have had the result of converting the power, which was originally of a different character, into a general power. He said ([1891] 3 Ch. 480):

"But supposing these words [the reference to the friend or relative] were out of the way it is argued that the words 'not being her present husband' would have no force in this particular instance, because the power was exercised after the death of the husband, when the lady was a widow, and, therefore, it had no effect upon the execution of the power; that at the date at which the power was exercised, it was a power to appoint in favour of any person in the world except one, who was a non-existent person, and that therefore the exception did not in fact have reference to any person at all. That was the argument; and, as at present advised, I think the argument is a sound one. I see no reason why a general power originally limited by exception may not become a general power free from exception by subsequent events. I do not see why a power to appoint to all the world except A., B., and C., may not be a power to appoint to all the world if, when the power comes to be exercised, A., B., and C. are dead."

In the present case each of these ladies executed the power, or purported to do so, by a document which took effect on her own death. At, or immediately<sup>✓</sup> before, her death, it was, of course, an impossibility that there should be any husband who would come within the words of exception. Therefore, I take the view that in the case of each of these ladies the power, at the relevant moment, *i.e.*, at the time when she exercised it by her will, she never having been married, was for all purposes a general power of appointment. In so deciding, I think that I am following what may be possibly only a *dictum* of KEKEWICH, J., in *Re Byron's Settlement* (3). It seems to me that there is no difference in principle between the case of the excepted person being dead, and the case of the excepted person being non-existent and, indeed, incapable of coming into existence, at the relevant moment when the power is exercised. I follow *Re Byron's Settlement* (3), and that decision, together with *Re Dilke* (1), seems to me to govern the present case, and there is nothing in *Re Jones* (2) which causes me the least hesitation in coming to the conclusion to which I do. It is, I think, plain, and I so held in *Re Jones* (2), that there are powers which are neither special powers nor general powers of appointment. It seems to me impossible for anyone to say that this power which I am considering in the present case was in any respect fiduciary. It possesses many of the characteristics of a general power, and at the relevant time I think it fell exactly within the definition of "general power" in the Wills Act, but, however that may be, I feel no doubt that in the present case each of these ladies, dying a spinster, exercising the power in the way that she did in her will, has exercised it effectively, and I will so declare.

The question whether the word "person" includes "corporation" does not, in my judgment, arise in the present case, but if and so far as it does, I personally feel no doubt that the Westminster Bank's position as executor qualifies that corporation to be the appointee under the wills of the two ladies, and it seems to me that it would be a technicality undeserving of the slightest sympathy if any attention were paid to the fact that these ladies, instead of appointing

individuals as representatives of their estates, had chosen to appoint a trust corporation.

*Declaration accordingly. Costs to be costs in the action. His Lordship's decision in fact disposed of the action which was therefore set down pro forma and dismissed with costs.*

Solicitors: *Hilder, Thompson & Dunn* (for the plaintiff); *Lipton & Jefferies* (for the first defendant); *Warden Gowing & De La Cour* (for the second defendant); *Treasury Solicitor* (for the Attorney-General).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

## CORCORAN v. CORCORAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 8, 1950.]

*Contempt of Court—Divorce—Child—Custody—Failure to obey order—Child sent out of jurisdiction—Proceedings for custody by petitioner in Eire—Waiver—Need to purge contempt.*

On the petition of the applicant's wife a decree absolute for divorce was made against him and he was ordered to deliver the child of the marriage to her custody. He, having previously sent the child out of the jurisdiction to his mother in Eire, failed to comply with the order, and in February, 1949, he was committed to gaol for his contempt of court by FINNEMORE, J. Proceedings were instituted in Eire by the wife, but the High Court in Eire refused to make an order granting her custody and the child remained in Eire. In support of the applicant's application for discharge it was contended that he had suffered sufficiently by remaining in prison for a year and that his wife, at whose instance he was attached, had waived her rights by taking proceedings in the Eire court.

HELD: (i) although there might be cases of contempt by failure to pay money in which waiver by the person to whom the money was owed gave a right to release to the party in contempt, there could be no question of waiver where there was failure to obey an order of the court relating to a child, and the fact that the wife had taken proceedings in Eire could not constitute a waiver.

*Best v. Gompertz* (1837) (2 Y. & C. Ex. 582), *distinguished*.

(ii) the only ground on which the court would be justified in releasing the applicant would be on condition that he carried out the terms of the order of FINNEMORE, J., and that he refused to do.

[AS TO DISCHARGE FROM CUSTODY AFTER COMMITTAL FOR CONTEMPT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 56-58, paras. 78-82; and FOR CASES, see DIGEST, Vol. 16, pp. 84-87, Nos. 1030-1071.]

Cases referred to:

- (1) *Best v. Gompertz*, (1837), 2 Y. & C. Ex. 582; 160 E.R. 528; 16 Digest 92, 1156.
- (2) *Re Davies*, (1888), 21 Q.B.D. 236; 16 Digest 16, 98.
- (3) *Barlee v. Barlee*, (1822), 1 Add. 301; 162 E.R. 105; 16 Digest 82, 1010.

### SUMMONS.

The applicant, Denis James Corcoran, applied for an order of release from custody under a committal order made by FINNEMORE, J. In 1947 a decree absolute for the dissolution of his marriage on the ground of his cruelty was made against the applicant who was then ordered to deliver the child of the marriage,



a daughter aged nine, to his wife. Instead of complying he sent his daughter to reside with his mother in Dundrum, co. Tipperary, Eire, where she still remained. In February, 1949, as a consequence of this contempt the applicant was committed to Winchester gaol under the order of FINNEMORE, J., until the child was brought within the jurisdiction of the court and delivered to her mother and an apology was made to the court. As the applicant refused to carry out these terms and to purge his contempt, Mrs. Corcoran began proceedings in the High Court in Eire, but a Divisional Court sitting in Dublin refused to order the child's removal from the grandmother's care on the ground that it was not in the best interests of the child so to do. The main grounds now urged in support of the applicant's application for release were that he had suffered sufficiently for his conduct and that his wife had herself waived the contempt by seeking an order for the child's custody from the High Court in Eire.

*Robert Hughes* for the applicant.

**WILLMER, J.:** In this case counsel for the applicant has said everything that can possibly be said, but I am none the less persuaded that this application fails. As has been frankly conceded, there has been no attempt whatsoever on the part of the applicant to purge his contempt. It seems to me it would be a most dangerous and damaging thing for this court to allow his release.

Two points have been taken in argument. In the first place, it is contended that the applicant has a right to his release on the ground that the wife, at whose instance he was attached for contempt, has waived her rights by taking Irish proceedings. *Best v. Gompertz* (1) is cited in support of that contention. Assuming that there are cases such as that in which waiver by some party may give rise to an absolute right of release in favour of the party in contempt, I do not think that those considerations necessarily apply to this case. *Best v. Gompertz* (1) was a case of a contempt by failure to pay money, and it may very well be that the person to whom money is owed may be in a position to waive his or her rights, but in the present case the contempt in respect of which the applicant was attached had nothing to do with a failure to pay money, but was the result of a much more serious matter, *viz.*, failure to obey the order of the court in relation to a child. I do not think that anybody can possibly do anything in regard to waiving the rights of a child in such circumstances as those of this case. In my view, there can be no question of waiver here on the ground of the wife's taking proceedings in Ireland.

Secondly, it is said that this man has suffered enough and that after a lapse of a year this court can now afford, without any loss of dignity, to be compassionate and release him. In support of that proposition *Re Maria Annie Davies* (2) was cited. In that case the court did order the release of a person attached for contempt, but under certain conditions. It was conceded by counsel for the applicant that if I were to release the applicant it would be appropriate in this case also to attach conditions to the release. *Re Maria Annie Davies* (2) was a case in one of the courts of common law. My attention was also drawn to the old case of *Barlee v. Barlee* (3) which arose in the ecclesiastical courts. In that case it was held that the court had no power to release in the absence of any attempt to purge the contempt. I do not think it is necessary to decide whether it would be right at this period of time to follow the older decision or the more modern view expressed in *Re Maria Annie Davies* (2). It may be a matter for consideration at some time whether, in exercising its jurisdiction, this court ought to follow the ecclesiastical law and practice or whether it ought to follow the practice in the courts of common law. I do not think that question arises here because the only condition on which I feel this court would be justified in releasing the applicant would be that he carried out the terms of the order made by FINNEMORE, J. That, he has said himself, and repeated to me through his counsel today, he does not propose to

do. It seems to me that so long as he is in that frame of mind the only course is to let him remain where he is in the hope that in due course reason will prevail and he will one day be persuaded to purge his contempt by obeying the order.

In the course of the argument, I put forward certain suggestions to his counsel on which, I think, the applicant would be wise to act. The first suggestion was that he should comply with the order, because by doing so he does not in the least prejudice his position or the position of the child. I do not know whether it has been adequately explained to him that, if he were to do that, there would be nothing (questions of custody being always open for consideration) to prevent him from issuing a fresh summons on the basis that circumstances have changed since the time of the order of FINNEMORE, J. If he can be persuaded to bring the child back to this country and to hand her over in accordance with the order, at the same time taking out a fresh summons to consider again the future of the child, his position would not be prejudiced and he would be assured a full and patient hearing of any such new application. It seems to me, however, that it is for him to take the first step. During the course of the argument I made various other suggestions by which the applicant might give some evidence of change of heart. I do not propose to repeat them now in this judgment, but his counsel could take steps to advise him of what has been said in this court today. For the moment all I can do is to say that I refuse this application.

*Application refused.*

Solicitors: *Mawby, Barrie & Letts*, agents for *Bell, Pope & Bridgwater*, Southampton (for the applicant).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

## MacDARMAID v ATTORNEY-GENERAL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), January 30, February 10, 1950.]

*Legitimation—Legitimation per subsequens matrimonium—Marriage to third person at date of birth of illegitimate person—Onus of proof—Presumption as to continuance of life—Legitimacy Act, 1926 (c. 60), s. 1 (2).*

Section 1 (1) of the Legitimacy Act, 1926, provides for the legitimation of an illegitimate person by the subsequent marriage of his parents. By s. 1 (2): "Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

The petitioner, who was born on March 14, 1894, claimed a declaration under the Legitimacy Act, 1926, s. 1 (1), that she had become legitimated as from Jan. 1, 1927, the date of the commencement of the Act, her parents having married on Mar. 10, 1925. Her father had been married on Jan. 24, 1886, but he never lived with his first wife. There was evidence that she was last seen alive in 1891 or 1893 and that a year or two before his death in 1931 the petitioner's father stated that he had not seen or heard of her since that time, but that he never said that she had died.

HELD: (i) once the marriage of the petitioner's father in 1886 had been proved the onus was on the petitioner to prove that that marriage had ceased before she was born, or, at least, to prove facts from which the cessation of the first marriage could be inferred.

(ii) there was no presumption of law as to the continuance of life, but each case must be determined on its own facts; in view of the evidence that the first wife of the petitioner's father had been seen alive in 1891 or 1893 and that nothing abnormal about her health or circumstances was then

observed, the proper inference to be drawn on the probabilities of the case was that she was still alive in 1894; and the petitioner, therefore, had failed to discharge the onus which was on her and her petition must be dismissed.

[AS TO CONTINUANCE OF LIFE OR PRESUMPTION OF DEATH ON A GIVEN DATE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 629-634, para. 701; and FOR CASES, see DIGEST, Vol. 22, pp. 163-169, Nos. 1395-1444.

FOR THE PROVISIONS OF THE LEGITIMACY ACT, 1926, see HALSBURY'S A STATUTES, Vol. 2, pp. 493-500.

Cases referred to:

- (1) *Doe d. Knight v. Nepean*, (1833), 5 B. & Ad. 86; 22 Digest 165, 1412.
- (2) *Nepean v. Doe d. Knight*, (1837), 2 M. & W. 894; 7 L.J. (Ex.) 335, 22 Digest 165, 1412.
- (3) *R. v. Harborne (Inhabitants)*, (1835), 2 Ad. & El. 540; 4 L.J.M.C. 49; B 111 E.R. 209; 22 Digest 164, 1399.
- (4) *R. v. Twynning, Gloucestershire (Inhabitants)*, (1819), 2 B. & Ald. 386; 15 Digest 740, 7992.
- (5) *Re Phene's Trusts*, (1870), 5 Ch. App. 139; 39 L.J.Ch. 316; 22 L.T. 111; 22 Digest 164, 1402.
- (6) *Mason v. Mason*, (1816), 1 Mer. 308; 35 E.R. 688; 44 Digest 222, 469. C

#### PETITION FOR DECLARATION OF LEGITIMACY.

The petitioner, Ellen Elizabeth MacDarmaid, claimed a declaration under the Legitimacy Act, 1926, s. 1, that, by reason of the lawful marriage of her parents on Mar. 10, 1925, she became legitimated as from Jan. 1, 1927. She was born on Mar. 14, 1894, and when her parents married, her mother described herself as a spinster and her father as a widower, he having previously been married on June 24, 1886, to Rosa Johnstone. The evidence showed that Rosa Johnstone had not been seen or heard of since 1891 or 1893, and it was argued for the petitioner that s. 1 (2) of the Legitimacy Act, 1926, cast no onus on her to prove that the woman was dead. For the Attorney-General it was contended that the petitioner must discharge that onus or prove circumstances from which the court could presume the death. His Lordship accepted this proposition of law and dismissed the petition. D E

*Ifor Lloyd* for the petitioner.

*Stockdale* for the Attorney-General.

*Cur. adv. vult.*

Feb. 10. **HODSON, J.:** The petitioner, Ellen Elizabeth MacDarmaid, F claims a declaration under the Legitimacy Act, 1926, that her parents, Cadogan Thomas and Elizabeth Ann Thomas, were lawfully married on Mar. 10, 1925, and that by such marriage she became legitimated as from Jan. 1, 1927, the date of the commencement of the Legitimacy Act, 1926. A question of liability for succession duty depends on the result of the petition.

The petitioner was born on Mar. 14, 1894, and her birth certificate shows G that her father was described as a widower and her mother as a spinster. Both parents are dead, the father having died on May 9, 1931, and the mother on Jan. 25, 1940. Section 1 (1) of the Legitimacy Act, 1926, says:

"Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before H or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate as from the commencement of this Act, or from the date of the marriage, whichever last happens."

It is admitted that the petitioner has satisfied the burden of proof imposed on her by this sub-section. Section 1 (2), however, provides :



“ Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.”

The question which has to be determined is whether the father was married to a third person when the petitioner was born.

A The petitioner's father was married to Rosa Johnstone on June 24, 1886—that is to say, eight years before the birth of the petitioner. His younger brother, Vivian Thomas, proved that after the marriage the petitioner's father never lived with his wife, but continued to reside at his parents' home with the other members of his family in Drury Lane, London; that Rosa Thomas never lived there; and that she had a child which died almost immediately. He also proved that he and the petitioner's father saw Rosa at the roller skating rink at Olympia in 1891 or 1893, when she would be some twenty-seven years of age and that she appeared to have aged somewhat, and that a year or two before he died the petitioner's father said to his brother (the witness, Vivian) that he had not seen or heard of Rosa since the Olympia meeting, but that he never said anything about her having died.

B It is argued on behalf of the petitioner that there is no onus cast on her by s. 1 (2) to prove that her father's first wife was dead, but that, as the matter is left in doubt by the evidence, she is entitled to succeed. On behalf of the Attorney-General it is argued that sub-s. (1) does not come into operation in the case of a person whose father was married before the date of her birth unless there is evidence on which, despite the marriage, a declaration of legitimacy can be made. In these circumstances, it is contended that the onus is on the petitioner to prove that the death of Rosa occurred on or before Mar. 14, 1894, or to prove circumstances or facts which the court should accept as *prima facie* evidence that such death occurred. In my judgment, the proposition contended for by the Attorney-General is correct, and once the fact of the previous marriage is proved the petitioner must at least prove facts from which the cessation of the first marriage can properly be inferred before she can succeed.

D Where a person has not been heard of by persons who would naturally have heard of him, if alive, he will be presumed to be dead after a lapse of seven years: *Doe d. Knight v. Nepean* (1), confirmed by the Court of Exchequer Chamber in *Nepean v. Doe d. Knight* (2). The present petitioner cannot rely on this presumption since the first wife was seen alive in 1891 or 1893—within seven years of the birth of the petitioner. Moreover, in view of her age and the circumstances in which she was last seen, there are no facts proved from which the inference can properly be drawn that she died within the seven years. Even if the matter F be approached from another direction, namely, that it is for the Attorney-General to establish that the first marriage existed at the time of the birth of the petitioner, the same conclusion is reached.

There is no presumption of law as to continuance of life, but each case must be determined on its own facts. This is established by the authority of LORD DENMAN, C.J., who delivered the judgments in *Doe d. Knight v. Nepean* (1) and in *Nepean v. Doe d. Knight* (2) and thus expressed himself in *R. v. Harborne (Inhabitants)* (3) (2 Ad. & El. 544):

G “ I must take this opportunity of saying, that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe d. Knight v. Nepean* (1) the question arose much as in *R. v. Twynning* (4). The claimant was not barred, if the party was presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption, there was nothing to be submitted to the jury. But this court held, that no legal presumption H

existed, and set the verdict aside. That is quite consistent with the view which we take in the present case; and *R. v. Twynning* (4) may be explained in the same way. I am aware that, in this latter case, BAYLEY, J., founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it. It may be said, suppose a party were shewn to be alive within a few hours of the second marriage, is there no presumption then?"

The judgment of BAYLEY, J., is to be found in *R. v. Twynning, Gloucestershire (Inhabitants)* (4), and his observations to the effect that the presumption of the continuance of life was offset by the presumption of innocence of crime were not accepted by LORD DENMAN, C.J.

Before citing the passage from the *Harborne* case (3), SIR G. M. GIFFARD, L.J., in *Re Phene's Trusts* (5) made the following observations (5 Ch. App. 150):

"The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury."

After citing the passage from the judgment of LORD DENMAN, C.J., which I have just read, he added (*ibid.*, 151):

"The notion of a legal presumption in favour of life originated, I believe, with the civil law; and we have SIR WILLIAM GRANT'S opinion in *Mason v. Mason* (6) as to adopting presumptions of fact from that law."

Applying the law as laid down in those decisions to the facts of this case, without reliance on any presumption, I find that the first wife of the petitioner's father, Rosa Johnstone, having been seen alive in 1891 or 1893 at Olympia at the age of twenty-seven, when nothing abnormal about her health or circumstances was observed save that she had aged somewhat, the proper inference to draw on the probabilities of the case is that she was still alive in 1894 when the petitioner was born. In my judgment, therefore, the petition fails.

*Petition dismissed with costs.*

Solicitors: *Evill & Coleman* (for the petitioner); *Treasury Solicitor*.

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

*Re FISON'S WILL TRUSTS. FISON v. FISON AND OTHERS.*

[CHANCERY DIVISION (Romer, J.), February 1, 2, 1950.]

*Will—Option—Shares—Options to sons to purchase shares after death of tenant for life—“At par value”—Changes in regard to shares during tenancy of tenant for life—Amalgamation of company and substitution of increased number of shares in new company for those of old company—Substantial increase in value of holding—Liquidation of another company—Large sum paid by liquidator in respect of shares—Right of sons to exercise options.*

By his will, dated May 11, 1918, the testator gave his shares in J.F. and Co., Ltd. and C.U., Ltd. “which I die possessed of” to his trustees on trust to pay the income of one fourth part thereof to his wife during her life, and after her death the trustees were to offer to sell that fourth part of the shares to his sons, F. and J., “at par value in equal shares.” He directed that, if either son should decline the offer made to him, his share of the fourth part of the shares should be offered at the same price to the other son, and, if only one son should be then living, the whole of the fourth part of the shares should be offered to him at par value. Any of these shares not sold to the sons were to be otherwise sold and the proceeds of sale were to form part of the testator's residuary estate, which was to be divided in equal shares among all his children who should survive him. The testator died in 1920 and the widow died on Jan. 24, 1949. The fourth part of the shares in the two companies which were settled on the widow for life were 752 ordinary shares of £10 each in J.F. and Co., Ltd. and 122 ordinary shares of £10 each in C.U., Ltd. As a result of an amalgamation between J.F. & Co., Ltd. and other companies in 1929, the 752 ordinary shares of J.F. & Co., Ltd. were exchanged for 15,040 ordinary shares of £1 each and 3,760 seven per cent. preference shares of £1 each in the new company (now F., Ltd.), and in 1947, on a conversion of the seven per cent. preference shares into  $4\frac{1}{2}$  per cent. preference shares, the 3,760 seven per cent. preference shares were exchanged for 5,848  $4\frac{1}{2}$  per cent. preference shares of £1 each. The present market value of the shares in F., Ltd. was 44s. per £1 ordinary share and 22s. per £1  $4\frac{1}{2}$  per cent. preference share. C.U., Ltd. was wound-up in 1948, and the trustees had received from the liquidator a sum of £13,952 in respect of the 122 shares in that company held by them on trust for the widow for life. The greater part of this sum had been invested and the remainder was still in cash. The question was whether the options granted to the sons, F. and J., became operative on the widow's death, notwithstanding the changes which had occurred in regard to the shares.

**HELD:** (i) on the true construction of the will, the testator, in granting the options, intended to confer a bounty on the sons, and, therefore, the options were exercisable on the death of the widow, notwithstanding the changes which had occurred.

*Re Cant's Estate* (1859) (28 L.J.Ch. 641), *Re Kerry* ([1889] W.N. 3), and *Re Armstrong's Will Trusts* ([1943] 2 All E.R. 537), *applied*.

(ii) the direction with regard to purchase “at par value” referred to the par value of the shares at the time of the testator's death, and, therefore, the sons were entitled to purchase in equal shares (a) 15,040 ordinary shares of £1 each and 5,848  $4\frac{1}{2}$  per cent. preference shares of £1 each in F., Ltd., at the price of £7,520, and (b) the investments and cash now representing the sum of £13,952 received by the trustees on the liquidation of C.U., Ltd., and any further sums payable by the liquidator in respect of the 122 shares, at the price of £1,220.

*Will—Option—Option to purchase real property—Subject-matter of option—Agreement by testator to purchase additional property, but sale not completed*



until after his death—Right of grantee to take property free from incumbrances—Purchaser or devisee—Real Estate Charges Act, 1854 (c. 113), s. 1.

By his will the testator, who died in 1920, devised "my estate known as the 'Stutton Hall estate' including the 'Crepping Hall estate' and all my real estate situate in the parish of Stutton" to his wife for life, and directed that, after her death, the property was to form part of the residue of his real estate as thereafter devised and was to be sold accordingly, but that "before selling the said hereditaments so devised to my . . . wife for life as aforesaid my trustees shall after her decease offer the Stutton Hall estate at the price of £15,000 and the Crepping Hall estate at the price of £8,000 to my son [F.] if living." Between the date of his will and the date of his death the testator contracted to purchase seven cottages at Stutton, adjoining the Stutton Hall estate, but the purchase was not completed until after his death. At the time of the widow's death, the Stutton Hall estate and the Crepping Hall estate were subject (a) to an equitable charge in favour of the residuary estate, and (b) to a mortgage raised by the trustees for payment of estate duty and of the purchase price which was owing in respect of the cottages. The questions to be determined were (i) whether the option to the son, F., relating to the Stutton Hall estate, included the seven cottages, and (ii) whether, if he exercised his option to purchase the estates, the properties were to be conveyed to him free from, or subject to, the charges.

**HELD:** (i) on the true construction of the will, the option relating to the Stutton Hall estate included all the testator's property in the parish of Stutton, subject only to the excision therefrom of the Crepping Hall estate, which was subject to a separate option; the position in regard to the seven cottages was the same as if they had actually been conveyed to the testator before his death (*Re Wakefield* ([1943] 2 All E.R. 29), *applied*); and, therefore, the subject-matter of the option included the cottages.

(ii) if the son exercised the option, he elected to become a purchaser and was not a devisee under the will, and, therefore, the Real Estate Charges Act, 1854, s. 1, did not apply and he was entitled to the conveyance of the estates free from any incumbrances.

*Re Wilson* ([1908] 1 Ch. 839), *followed*.

*Re Jolley* (1901) (17 T.L.R. 244), *not followed*.

[AS TO OPTIONS TO PURCHASE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 34-36, para. 29; and FOR CASES, see DIGEST, Vol. 44, pp. 211-213, Nos. 383-406.]

Cases referred to:

- (1) *Re Cant's Estate*, (1859), 4 De. G. & J. 503; 28 L.J.Ch. 641; 33 L.T.O.S. 280; 44 Digest 212, 392.
- (2) *Re Kerry*, [1889] W.N. 3; 44 Digest 212, 393.
- (3) *Re Armstrong's Will Trusts*, [1943] 2 All E.R. 537; [1943] Ch. 400; 112 L.J.Ch. 335; 169 L.T. 268; 2nd Digest Supp.
- (4) *Re Flint*, [1927] 1 Ch. 570; 96 L.J.Ch. 248; 137 L.T. 178; 40 Digest 783, 3140.
- (5) *Re Wilson*, [1908] 1 Ch. 839; 77 L.J.Ch. 564; 98 L.T. 828; 44 Digest 212, 389.
- (6) *Re Wakefield*, [1943] 2 All E.R. 29; 2nd Digest Supp.
- (7) *Radnor (Earl) v. Shafto*, (1805), 11 Ves. 448; 44 Digest 211, 383.
- (8) *Re Jolley*, (1901), 17 T.L.R. 244; 21 Digest 33, 199.
- (9) *Given v. Massey*, (1892), 31 L.R.Ir. 126; 44 Digest 211, 388i.
- (10) *Re Wimbush*, [1940] 1 All E.R. 229; [1940] Ch. 92; 109 L.J.Ch. 71; 162 L.T. 133; 2nd Digest Supp.

ADJOURNED SUMMONS to determine *inter alia* (i) whether options given by the will of the testator to his two sons to purchase certain shares on the death

of the widow were still exercisable notwithstanding changes that had occurred in regard to the shares during the widow's lifetime, and (ii) whether, in exercising an option, given by the will, to purchase real property, the grantee of the option took the property free from, or subject to, incumbrances. ROMER, J., now held (i) that the options in regard to the shares were still exercisable, and (ii) that, on exercising the option to purchase the real property, the grantee became a purchaser and was entitled to a conveyance of the property free from any incumbrances. The facts and the relevant provisions of the will appear in the judgment.

*Droop* for the plaintiff (a trustee).

*J. A. Reid* for the first defendant (the testator's elder son, Frank Fison).

*Lightman* for the remaining defendants (residuary legatees).

**ROMER, J.:** The problem raised by question (i) of this summons is due to the fact that, after the testator died, radical changes came about in regard to shares which he owned in certain companies at the time of his will and at the time of his death, and which he made the subject of express dispositions by his will. The testator made his will on May 11, 1918, and on Dec. 17, 1918, he made a codicil, which is not material for the present purposes. He died on Feb. 19, 1920. His widow, who survived him and to whom he gave certain life interests, died on Jan. 24, 1949. By his will, after appointing executors and trustees and making certain pecuniary bequests, he said:

"I bequeath my shares in 'Joseph Fison & Co., Ltd.' and in 'The Chemical Union, Ltd.' which I die possessed of as follows: As to one equal fourth part thereof to my trustees upon trust to pay the income thereof to my said wife during her life and after her death my trustees shall offer to sell the said fourth part of my shares to my sons Frank Guy Clavering Fison and John Reginald Gifford Fison at par value in equal shares and if one of my said two sons shall decline the offer thus made to him his share of the said one fourth part shall be offered at the same price to the other said son and if only one son shall be living then the whole of the said fourth part of my shares shall be offered to such son at par value and any of such shares not sold to my said sons or son shall be otherwise sold and the proceeds of sale of the shares held in trust for my said wife shall fall into and form part of the residue of my estate."

Then he dealt with the other three equal fourth parts of his shares, and made a disposition with regard to his real estate. He gave all his real and personal property not thereby otherwise disposed of to his trustees on the usual trust for sale, and directed that the trustees "shall stand possessed of the residuary trust moneys in trust" for all his children who should survive him in equal shares. He then settled the interest which his daughters took under his will on the usual trusts for the benefit of themselves and their husbands and issue. There followed a declaration in the ordinary form, giving his trustees power to postpone the sale or conversion of any part of his real and personal estate.

The facts with regard to the shares in Joseph Fison & Co., Ltd. and Chemical Union, Ltd. are as follows. First, with regard to Joseph Fison & Co., Ltd., what is described in the plaintiff's affidavit as an amalgamation took place in 1929 between that company and Packard and James Fison (Thetford), Ltd. and Prentice Brothers, Ltd. At the date of the amalgamation the one-fourth of the shares in the company which were settled on the widow for life, and were, on her death, subject to these options, were 752 ordinary shares of £10 each in the company. By an agreement, dated Apr. 11, 1929, and made between the three companies, it was provided, in effect, that Packard and James Fison (Thetford), Ltd. should absorb the undertakings of the other two companies. The terms on which that transaction should be effected were submitted to

arbitration, and as a result of the award made in that arbitration, the 752 ordinary shares of £10 each, to which I have referred, were exchanged for 15,040 ordinary shares of £1 each, and 3,760 seven per cent. preference shares of £1 each of the Packard company. The Packard company subsequently changed its name to Fison, Packard & Prentice, Ltd., and then to Fison's, Ltd., which is its present name. In 1947 the preference shares of Fison's, Ltd., were converted into  $4\frac{1}{2}$  per cent. preference shares of £1 each by the issue of fourteen of the  $4\frac{1}{2}$  per cent. preference shares in place of every nine of the seven per cent. preference shares, and the holding of preference shares by the trustees of the testator's will on trust for Mrs. Fison for life became 5,848  $4\frac{1}{2}$  per cent. preference shares of £1 each. Those shares are still held by the trustees of the will, and their present market value is 44s. per £1 ordinary share and 22s. per £1  $4\frac{1}{2}$  per cent. preference share.

With regard to the testator's holding in Chemical Union, Ltd., he held 490 ordinary shares of £10 each in that company, and 122 of those shares were appropriated by the trustees after his death on trust for Mrs. Fison for life, and on her death the option would operate on those 122 shares. At the time of the testator's death, Chemical Union, Ltd., was a trading company, but in 1926 it sold its business for cash and thereafter became an investment company in the sense that it invested the proceeds in various securities and ceased to be a trading company. In 1948 the company was wound-up and the trustees received from the liquidator a sum of £23,328 in respect of 204 shares which they held in trust including the 122 shares to which I have referred, and of that sum £13,952 was received in respect of those 122 shares. Most of the money which the trustees received from the liquidator has been invested in various investments, but there is also a sum of £2,835 cash remaining uninvested.

The question is whether, notwithstanding the changes which were brought about in the testator's shares in those two companies, the options conferred on or granted to the two sons became operative on the death of the testator's widow. It appears to me that the matter is substantially concluded, so far as this court is concerned, by authority. Counsel for the first defendant, Frank Fison, referred me to three cases, the first of which is *Re Cant's Estate* (1). The headnote says:

"Land was devised in trust for the testator's widow for life, and after her death for sale and division of the proceeds among his children equally, with a direction that the trustees should offer the land to the testator's son, at a specified price, upon the death of the widow. The land was purchased by a railway company, under the powers given by their Act, for more than twice the specified sum: *Held*, that the son was entitled to the difference."

It was argued on behalf of the grantee of the option in that case that his interest was not affected by the operation of the railway Act, which could not alter the rights of the parties. On behalf of the other children of the testator, it was argued that the testator's object in granting an option to the son, Charles Cant, was that he might use the land for a particular purpose, and that, as the land was sold during the lifetime of the tenant for life, the testator's intention became incapable of being carried into effect. KNIGHT BRUCE, L.J., and TURNER, L.J., dealt with the matter very shortly. KNIGHT BRUCE, L.J., said (4 De G. & J. 507):

"By a contract of purchase under the powers of a railway Act, a sum of money was substituted for land and became subject to all the rights which affected the land. The land had been devised with other property by the owner to his wife for life, and after her death all was to be sold, and the testator in effect said, 'as to a particular portion,' namely, the land now in question 'my son shall have it if he shall elect to be charged for it with £450 as between himself and my estate.' I conceive that this right remains not affected by the Act, and that the son is entitled to take the purchase-money, whether amounting to hundreds or thousands, on paying the sum



which the testator has specified in his will, just as he would have been entitled to the land itself if it had not been taken by the railway company."

TURNER, L.J., said (*ibid.*):

"The whole argument of the respondents rests on this, that the testator only intended to benefit his son Charles, in the event of his continuing to be a gardener. The true test of this argument is, whether, if he had ceased to be a gardener in his father's lifetime he would still have been entitled to the land. This question admits of no doubt, and the only consideration then is, whether, if the right remained at the death of the testator, the Act of Parliament subsequently passed can affect it. I am of opinion that it cannot."

The option, therefore, was held to be subsisting.

In *Re Kerry* (2), which came before NORTH, J., a testator by his will devised his real estate to trustees, on trust for sale. The proceeds of sale were to be applied in paying the testator's debts and bequests, and the residue invested and held on certain trusts. The testator directed that no sale of his dwelling-house, shop, and stock-in-trade should be made under the trust until the trustees should, when they had determined to sell the same, offer the property for sale to his son G. W. Kerry at the price of £1,500 in preference to any other person. If the son should refuse to purchase the same when offered to him for sale, or should he neglect or refuse to complete the purchase within six calendar months after the same should have been so offered to him, the trustees should be at liberty to sell the property to any other person. A similar option to purchase two cottages was given to a daughter of testator, the price fixed being £350. The testator's real estate was sold in a creditor's administration action for the payment of his debts. The dwelling-house, etc., was sold for £2,350; the two cottages were sold for £550. After the debts had been paid there remained a surplus of less than £1,050 in court. The son, G. W. Kerry, claimed to have the surplus divided between himself and the daughter, in the proportion of £850 to £200, those sums being the respective amounts by which the purchase-moneys of the two properties exceeded the respective option prices.

NORTH, J., is reported as having said ([1889] W.N. 4) that:

"... *Re Cant's Estate* (1) was an analogous case, though not a direct authority. Effect ought to be given so far as was possible to the provisions of the will. The intention of the testator was that, if the son and daughter exercised the option to purchase, the other persons entitled under the will should not receive more than £1,500 and £350 from the two properties respectively. The option was intended to be a benefit; the excess in value above the price fixed was intended to go to the person to whom the option was given. The sale in the creditor's action was not made under the trusts of the will, and, before the persons interested in the residue could take any benefit, the excess above the option prices must be paid to the son and daughter respectively. The surplus must be divided between them in the proportion of £850 to £200."

In *Re Armstrong's Will Trusts* (3), which recently came before COHEN, J., the headnote ([1943] Ch. 400) is:

"A testator by his will made in 1899 gave to his wife a life interest in land and to his son an option, exercisable within twelve months after his wife's death, to buy the land for £5,000. In 1900 the testator died. His widow, as tenant for life, sold and otherwise dealt with parts of the land. She died in 1942, and over £19,000 was due to be received in respect of her dealings with the land. Three days after her death the son purported to exercise his option: *Held*, that the son had validly exercised the option and was entitled to the moneys receivable in respect of his mother's sales of and other dealings with the land or to the investments representing them."

COHEN, J., devoted the first part of his judgment ([1943] 2 All E.R. 538) to a consideration of *Re Flint* (4), a decision of ASTBURY, J., in which:

"A testator who died in 1920 gave his property to trustees, and settled the entirety upon trust for various beneficiaries in undivided shares. He empowered the trustees at any time to sell any part of his estate, subject to a right of pre-emption thereby given to his son Alfred over property A at a price to be fixed by the trustees' valuer before sale. On Jan. 1, 1926, the land vested in the trustees on the statutory trusts for sale, etc., under the Law of Property Act, 1925, sched. I, pt. 4, s. 1 (3): *Held*, on the construction of the will, that the right of pre-emption was only intended to attach to an exercise of the power of sale under the will, and not to a sale under the statutory trusts or any other extraneous powers. *Held*, also, that, even if the right of pre-emption was intended to attach to any sale whatever by the trustees, it was not enforceable against the statutory trusts of s. 35 either as an 'equitable interest or power' within s. 3 and s. 205 (1) (ix); or as an 'additional or larger power' . . . or as an 'incumbrance'."

It was, accordingly, held

"... that the trustees on executing the statutory trusts could disregard the right of pre-emption."

COHEN, J., in *Re Armstrong's Will Trusts* (3), distinguished *Re Flint* (4), saying ([1943] 2 All E.R. 538):

"That case seems to me, however, to be distinguishable for two reasons. In the first place, Alfred was not given any option to buy at a fixed price; the testator merely directed that he should receive the first offer at a price to be fixed by a valuer at the time when the trustees decided to sell. The valuer would fix a proper price as between willing buyer and willing seller, and it is impossible, therefore, to argue that the intention of the testator by fixing a price was to confer bounty on Alfred. In the second place, the question what right, if any, Alfred might have in the proceeds of sale was not considered at all. I cannot, therefore, derive assistance in the present case from the decision in *Re Flint* (4)."

The learned judge then referred to *Re Cant's Estate* (1) and *Re Kerry* (2), and came to the conclusion which is indicated in the headnote. He supported his view on another ground which I do not think it is necessary for me to consider, although counsel for the first defendant made reference to it.

It appears to me that, subject to one point which I will mention in a moment, those decisions govern the present case. In regard to the Chemical Union shares, it might be thought that the fact that the company was wound-up during the widow's lifetime, and the trustees received in respect of the settled one-fourth part of the shares cash which they invested, gave rise to a position which was outside the testator's contemplation and outside the scope of his disposition. It seems to me, however, that the events which gave rise to and resulted in that are comparable to the events which fell for consideration in the three cases to which I have referred, in which the court saw no difficulty in holding that the options which were given in relation to the property could be exercised in connection with the money representing the proceeds of sale. Counsel for the residuary legatees was, I think, inclined to concede that, if on construction of the will the court came to the conclusion that the testator intended to confer a bounty on the two sons, then those cases would apply. He contended, however, that there was no reason to suppose that the testator intended to confer a bounty on the sons, but that the true view was that he intended to create the ordinary position of vendor and purchaser, his idea being to keep his family companies, and, as appears from other parts of the will, certain family estates, within the possession of his own family. Counsel for the residuary legatees pointed out

A that there were a good many options given in the will, and that the testator showed that it was very possible that the options might not be attractive propositions, and, therefore, he needed to provide for what should happen in the event of the options not being exercised. Counsel went on to say that that showed that the testator did not regard this as being a matter of bounty or benefit which he was conferring on his sons, but he was merely making provision for what should happen in the events which I have described. He cited *Re Wilson* (5) as showing that a person in the position of these sons should rightly be regarded as a purchaser and not as a beneficiary.

B It is plain that, for some purposes, they are to be regarded as purchasers if and when they exercise their option, but that does not, in my opinion, lead to the conclusion that the element of bounty was absent from the granting of the options. It seems to me to be evident that the element of bounty was present in the granting of the options. The grantees of the options were his sons, and, although no evidence was given in this case—even as none was given in any of the reported cases—in regard to the value of the shares at the date of the testator's death, or what the testator regarded as being their value, nevertheless, it seems to me that, when a testator makes provision in his will whereby one of his children is entitled to take either one or more of his assets at a definite price, that in itself is an indication of bounty, because in any case it would be open to any one of his children to buy the property or to bid for it in the market against all the world. If he did so, he could be run up in the bidding. If he chose to go high enough, he might get the property, but in that case his rights would be in common with those of everyone else. When the testator says that, if his son is prepared to put up £x, he can have the property, my conclusion is that that is *prima facie* a bounty. In my judgment, in the light of the cases to which I have referred, these options are exercisable still, notwithstanding what has happened to the shares.

E In regard to the argument of counsel for the residuary legatees that, by giving alternative options and providing what was to happen if the options were refused, the testator showed that he contemplated what he was doing, not as being an act of bounty, but as being an act of family policy, I would like to point out, first, that that element was present also in *Re Kerry* (2), and, secondly, that a very sensible explanation of the precaution is to be found in this circumstance. If the shares were, in fact, worth only round about par when the time to exercise the option came, it might well be that one of the sons would not want to take up the shares, while the other one, having greater confidence in the future of the company, or for some other reasons, might take up the shares instead. I think that the matter—down to this point, at all events—is covered by authority binding on me. Then comes the question: Assuming that the options are still exercisable, or were still exercisable when the widow died, what is to be the price which the sons have to pay in order to acquire the investments and cash which now represent the original shares? The words of the will were: G “I bequeath my shares in [the two companies] which I die possessed of as follows,” and the testator then directed that the income of one fourth part thereof should be paid to his wife during her life

H “... and after her death my trustees shall offer to sell the said fourth part of my shares to my sons Frank Guy Clavering Fison and John Reginald Gifford Fison at par value in equal shares ...”

The argument of counsel for the residuary legatees was as follows. He said, first, that the whole thing failed because the testator intended to project his mind forward to the par value at a future time, *viz.*, the time when the option should be exercised, and, so far as the Chemical Union shares are concerned, there is no measure now of what should be paid for them because those shares became cash and one cannot value cash. The fact of the subsequent investment of part of that cash, he said, is a mere incident and one cannot get a yardstick of



value from those investments. His alternative contention was that one had to take the ordinary price of the shares in Fison's, Ltd., to which the original shares in Joseph Fison, Ltd., could be traced, and that is the value which the sons must pay.

The difficulty of the case is that the testator never contemplated the events which, in fact, happened, or, if he did contemplate them, he certainly did not provide for them in express terms. When he says that the trustees should "offer the said fourth part of my shares at par value," he may have had in mind the par value of those shares at the time when his widow should die and the option might become effective. I think, however, that it is open to me to construe the will in such a way as to give effect to the disposition and to interpret the direction with regard to purchase price "at par value" as the par value of the shares at the time he died because it is the shares which he had at the time of his death with which he was actually dealing, since he said: "I bequeath my shares . . . which I die possessed of as follows," and then he gave an option and referred to the par value of those shares. If that were the case, at his death it would be known what shares he held, and what their par value was, and from that moment onwards, accordingly, everyone concerned would know at what price the options could, in the future, be exercised. The result, therefore, is that the gift has the same effect as though there were substituted for the words in the will, "the said fourth part . . . at par value," the words "the sum which the shares in the aggregate were worth at par at the time of my death." Accordingly, I hold that the options are still exercisable, and that the two sons are now entitled to purchase in equal shares at the price of £7,520 15,040 £1 ordinary shares, and 5,848 £1 4½ per cent. preference shares in Fison's, Ltd., and to purchase in equal shares at the price of £1,220 the investments and cash now representing the sum of £13,950 which was received by the trustees on the liquidation of Chemical Union, Ltd. in April, 1948, and any further sums payable by the liquidator in respect of the 122 shares.

The next gift which I have to consider is in the following terms:

"I devise my estate known as the 'Stutton Hall estate' including the 'Crepping Hall estate' and all my real estate situate in the parish of Stutton in the county of Suffolk unto and to the use of my said wife for and during her life she keeping the same in repair and insured against fire and I hereby direct and declare that from and after the decease of my said wife the said hereditaments and premises shall form part of the residue of my real estate hereinafter devised and shall after her decease be sold accordingly provided always and I hereby declare that before selling the said hereditaments so devised to my said wife for life as aforesaid my trustees shall after her decease offer the Stutton Hall estate at the price of £15,000 and the Crepping Hall estate at the price of £8,000 to my said son Frank Guy Clavering Fison if living."

Between the date of the codicil and the date of his death, the testator contracted to purchase seven cottages at Stutton for £751 10s. The contract had not been carried to completion at the date of his death, but was completed subsequently, and the property was conveyed, presumably to the trustees. The question for my decision is whether the option to the son, Frank, the first defendant, relating to the Stutton Hall estate, includes the seven cottages. Counsel for the residuary legatees says that it does not. He says that what the testator was dealing with under this direction in his will was property which he then had, which he was specifically describing, and which alone it was in his mind to deal with, and, therefore, the option could not include property which he did not possess at that time and which he had not even contracted to buy. I think that this is purely a question of the construction of the will. The testator appears to define the Stutton Hall estate as including the Crepping Hall estate and all the testator's

real estate situate in the parish, in addition to what was, I assume, universally recognised as forming part of Stutton Hall estate. Part of the property included in that definition, *viz.*, the Crepping Hall estate, is cut out of the totality, because of the £8,000 option, but subject, and subject only, to that excision, the whole of the Stutton Hall estate, so defined, appears to me to be within the ambit of the option for £15,000. Accordingly, had the testator bought this property, and had it been conveyed to him between the date of the codicil to his will and the date of his death, I think that the seven cottages, which, I am told, join the Stutton Hall estate itself, would plainly have been included in the option relating to the Stutton Hall estate, which the testator had previously defined as including "all my real estate situate in the parish of Stutton." That being so, having regard to the decision in *Re Wakefield* (6), I think that the testator's interest in the seven cottages under the contract at the date of his death can be properly regarded as forming part of the real estate "situate in the parish of Stutton," so that the position in that regard is the same as though the cottages had actually been conveyed to him before his death. Accordingly, I hold that the subject-matter of the option, relating to the Stutton Hall estate, includes the seven cottages.

The property which was subject to the option given to the first defendant, and exercisable by him on his mother's death, was subject at her death to certain charges or incumbrances. There was a charge for £3,531 which was owing to Barclays Bank by the testator at the time of his death, and was then secured to the bank on the Stutton Hall and Crepping Hall estates by a memorandum of deposit. This charge represented moneys borrowed by the testator for the balance of the purchase money of the Crepping Hall estate when purchased by him in 1912. The money was paid off out of the general estate on the testator's death, and presumably, therefore, in equity the charge would be kept alive in favour of the residuary estate. The trustees, then, by a mortgage on the estate, raised a sum for the payment of estate duty and for the payment of £751 10s. which was owing by the testator at the time he died in respect of his contract to purchase the seven cottages with which I have already dealt.

The question before me is whether, if the first defendant exercises his option to purchase the Stutton Hall estate for £15,000, and the Crepping Hall estate for £8,000—he has, in fact, exercised those options—he is entitled to have the properties conveyed to him free from, or subject to, the charges which I have mentioned. It appears to me that the answer to that question depends on whether the first defendant is to be regarded in this respect as a devisee under the testator's will, or whether he is to be regarded as a purchaser of the estate in pursuance of the contract of sale created between himself and the trustees in the exercise of his option. The matter is not free from complication and is rendered very uncertain because of the difficulty in reconciling some of the authorities which have a bearing on the case. It depends largely on the construction of the testator's will, so I will read once more the relevant passages:

"I devise my estate known as the 'Stutton Hall estate' including the 'Crepping Hall estate' and all my real estate situate in the parish of Stutton in the county of Suffolk unto and to the use of my said wife for and during her life she keeping the same in repair and insured against fire and I hereby direct and declare that from and after the decease of my said wife the said hereditaments and premises shall form part of the residue of my real estate hereinafter devised and shall after her decease be sold accordingly provided always and I hereby declare that before selling the said hereditaments so devised to my said wife for life as aforesaid my trustees shall after her decease offer the Stutton Hall estate at the price of £15,000 and the Crepping Hall estate at the price of £8,000 to my said son Frank Guy Clavering Fison if living."

The testator then provided for what was to happen if the first defendant was not then living, or if he did not accept the offer. There is a further proviso that:

"... no purchaser of any hereditaments under the trusts or provisions for sale hereinafter declared or contained shall be bound or concerned to see or inquire whether any such offer as aforesaid has been made to my sons or either of them."

Then there is a devise and bequest of all the testator's real and personal property "not hereby otherwise disposed of" to the trustees on the usual trust for sale and conversion with power to postpone. If the true position is that the first defendant is to be regarded as a devisee, then, by reason of the Real Estate Charges Act, 1854 (Locke King's Act), s. 1, he can only take these properties under his option subject to the incumbrances affecting them. On the other hand, if he is entitled to them as a purchaser, then he is entitled to a conveyance free from the incumbrances. I think I have sufficiently stated the matters of fact which are relevant in relation to the charges, but I should, perhaps, add this. Mr. John Fison, the plaintiff, in his affidavit says:

"The two estates, as they now are, subject to liability for discharging all moneys expended in improving them since the testator's death, and treating them as subject also to the said charges for £751 10s. and £3,531 3s. 3d., are believed to be of considerably greater value than their value as assessed for purposes of estate duty less the last-mentioned charges at the testator's death."

Counsel for the residuary legatees contended, first, that, as a question of construction, the first defendant, by exercising his option on the widow's death, became entitled only to the same subject-matter as that in which the widow had enjoyed a life interest, and that subject-matter was the Stutton Hall estate and the Crepping Hall estate subject to the charges imposed on them. If that be so, then that gives an answer to the question, because, in whatever light that property be regarded, he would only get the estates subject to the mortgages. I am, however, unable to accept that view of the matter. It appears to me to be putting too great a strain on the language used, which, in my view, was simply directed to identifying the property which the testator was intending to dispose of, *viz.*, the Stutton Hall estate and the Crepping Hall estate. The mere fact that the widow was to take a life interest in the estates first and that an option relating to the estates was exercisable at her death does not, I think, mean, or even indicate, that the testator had in mind that the subject-matter should, in the case of the widow and in the case of the first defendant, be affected by the same incidents. Therefore, I do not think that I am much assisted by the description of the estates which the testator thought right to employ. Counsel for the residuary legatees then contended that there is authority for the proposition that, in such a case as the present, the person to whom the option is given should be regarded as a devisee, *i.e.*, where an option, which is plainly a beneficial option, is given, then the recipient of that option would be treated as a devisee. He referred me to some observations of LORD ELDON, L.C., in *Earl of Radnor v. Shafto* (7), where the Lord Chancellor said (11 Ves. 455) in relation to rights of pre-emption:

"But my judgment upon this case is, that under the circumstances, that have taken place, no one is entitled by this will to the right of pre-emption proposed. In the case that has been put by the Attorney-General, of an estate, worth £50,000, offered to a particular person at £30,000, and the other case, where the testator directs the trustees to make an offer at a reasonable price, to be fixed by them, the court possibly to one intent would hold either will to amount in substance to a devise of the estate itself, if that person would accept it upon those terms: but, if the effect of the option could be construed as high in either case, that person must in his life do



some act, denoting, that he accepts the benefit: or the court cannot consider him as being in the same circumstances, as if he had made a contract for the purchase of the estate. In this instance, if Mr. Duncombe had accepted the offer, and done any act, denoting that purpose, even by his own will, it might have been compared to the case of contract: but if that person dies without doing any act, it cannot be said, that the case is the same as if he had contracted for a purchase; or, that his real representatives could call upon his personal property to pay for that estate; as if it had been contracted for."

At the end of his judgment LORD ELDON, L.C., said (*ibid.*, 458):

"Upon the whole, this right of pre-emption does not exist in any one at present. It is not necessary to say, what the court will do with rights of pre-emption in general, when that question may arise. This case does not call for a decision upon it."

I do not propose to go further into the effect of that case, but it suffices to say that these observations of LORD ELDON, L.C., were not necessary for the decision of the point which was before him and which was, indeed, quite a different question.

In *Re Jolley* (8), which was decided by JOYCE, J., in 1901 :

"... a question arose in the administration of the estate of the late Mr. Benjamin Jolley, of Cambridge. It came before the court upon an originating summons taken out for the purpose of determining how the estate duty payable in respect of certain property taken by two of the testator's sons, under an option given to them by the will, in satisfaction of their respective shares in the residuary estate of the testator should be borne as between them and the other persons interested in the residuary estate."

Among other things, the testator, by cl. 25 of his will, gave an option to his sons to appropriate to their original shares in his estate certain specific items of property, consisting partly of real estate and partly of personal estate, and including the goodwill and stock-in-trade of his business of a furniture broker:

"... but on the terms that his said sons should be liable to discharge and indemnify the rest of his estate from and against all debts and liabilities due or subsisting in respect of his said business at his decease. This option was exercised by the two sons on June 6, 1900, and the property which they elected to take thereunder was conveyed and assigned to them on July 24, 1900. The executors and trustees had paid the estate duty in respect of the whole estate, and the question was whether the sons were entitled to take the specified property freed and discharged from any proportion of that duty. The question turned to some extent upon s. 9 (1) of the Finance Act, 1894."

After some preliminary observations, JOYCE, J., said (17 T.L.R. 245) that:

"... the testator did direct payment by his trustees of his funeral and testamentary expenses and debts. So far as personalty was concerned, his Lordship thought, under that direction the estate duty, including that upon the property subject to the option, was payable by the executors out of the general personal estate. Further the testator had directed that mortgage debts should be paid primarily out of the property charged therewith. His Lordship would therefore infer, but this was only conjecture, that the testator intended his sons, taking under the option, to bear the estate duty in respect of the real estate taken by them under the option. On the other hand, cl. 25 of the will did say that the option was to be exercised on the terms that the sons should be liable to discharge and indemnify the rest of the testator's estate from and against all debts and liabilities due and subsisting in respect of the business at his decease. It might be argued, therefore, that, as there was no mention of estate duty

there, any intention on the part of the testator that the sons should bear that duty was excluded. But his Lordship had to deal with s. 9 (1) of the Act of 1894."

After setting out that section, he continues (*ibid*):

"The effect of that was, according to the decided cases, that a specific devisee must bear the estate duty in respect of the property which he took under the devise. It might be that the cases went further than that, but at any rate they went as far. What, then, was the effect of the exercise of the option by the sons under cl. 25 of the will? After some consideration his Lordship had come to the conclusion that its effect was to make the case the same as if the testator had devised his real and personal estate upon trust to sell everything except the property which was subject to the option, and there had been a specific devise to his two sons of the equitable fee in the real property subject to the option. His Lordship was of opinion in those circumstances that the charge created by s. 9 (1) of the Act remained until the real property subject to the option came to the hands of the beneficiaries and the duty was discharged by them."

In other words, he held that the estate duty in respect of the real estate comprised in the option was payable by the sons. That is a decision which points very much in the direction which counsel for the residuary legatees asks me to go.

There has, however, been a more recent decision on the subject—that of WARRINGTON, J., in *Re Wilson* (5). In that case:

"The testator, Ahab Wilson, by his will dated Sept. 1, 1890, after giving a legacy to his wife, devised and bequeathed two houses known as Stanley Villas and all other his real and personal estate to trustees upon certain trusts under which his widow was to be entitled to receive the income during her life, she thereout paying the interest of all principal moneys secured on the real estate. After her death or marriage the trustees were to hold the property upon trust for sale and conversion and to stand possessed of the proceeds upon trust for all his children who should attain twenty-one, or, being daughters, should marry. On Dec. 13, 1893, the testator made a codicil to his will, of which the material part was as follows:— 'This is a codicil to the last will and testament of me Ahab Wilson of Stanley Villas, Over, in the county of Chester, sawyer, which will bears date Sept. 1, 1890. I direct the trustees of my said will to allow my son Frank the option of purchasing at the death of my wife my two freehold dwelling houses known as Stanley Villas, Over, and the garden and land held therewith all belonging to me for the sum of £450 but I declare that my said son shall exercise the right of pre-emption hereby given to him within four months after the death of my said wife.' The testator died on Dec. 25, 1893, and his widow died on Nov. 27, 1907. The property called Stanley Villas was subject at the date of the codicil, and was still subject, to a mortgage for £300. On Dec. 17, 1907, Frank Wilson exercised his option by giving notice to the trustees of his intention to buy Stanley Villas for £450, and he took out a summons to determine the question whether the option to purchase the houses was an option to purchase them free from the incumbrances existing thereon at the date of the testator's death, or subject thereto."

It is to be observed from that citation of facts that the argument on construction with which I have already dealt in this case, *viz.*, in regard to the subject-matter of the two dispositions being identical, could fairly have been raised in *Re Wilson* (5)—though the report does not show that it was—because, both in the will and in the codicil, the description of the subject-matter is given as "Stanley Villas, Over." WARRINGTON, J., said ([1908] 1 Ch. 841):

"This is certainly a curious case and one on which there appears to be no authority except the decision of PORTER, M.R., in Ireland, which is directly in point; and what I am in fact asked to do is to say that in my opinion that decision is not correct."

It is plain from that observation of the learned judge and from the rest of the report that *Re Jolley* (8) was not cited to him. He sets forth what the question was and said (*ibid.*, 842):

"The point arose exactly in *Given v. Massey* (9). The facts in that case were these. The testator devised and bequeathed all his estate, real and personal, to trustees upon trust for sale and conversion, and he then directed as follows: 'I declare that the said Robert Loughrey shall have the option of purchasing part of the lands of Straw and part of the lands of Bonnanaboigh . . . at the price of £1,400, such option to be declared in writing within three months after my death.' These lands were subject to a judgment for £180 and a mortgage for £450. The testator then directed his trustees on payment of the £1,400 within six months after his death 'to assure the same hereditaments and premises to the said Robert Loughrey, his heirs and assigns, or as he shall direct.' Pausing there for a moment, there is in the present case no direction for the conveyance of this property, and that omission is in my opinion favourable to the contention of the son. The Master of the Rolls says (31 L.R. Ir. 130): 'There are no words purporting to devise the Straw and Bonnanaboigh property to Loughrey at all. It is plain that what the testator meant was that all his property should be sold; and that if Loughrey chose, he, and no one else, should be the purchaser of the lands at Straw and Bonnanaboigh at a fixed price; but I can see no indication of any intention that Loughrey should, when once the price was agreed to by him and paid, be on a different footing from any other purchaser. If he did not buy, the lands would have to be sold to some one else. On the language of this will, it is clear that the testator meant that Loughrey was to be a purchaser, and nothing else—a favoured purchaser no doubt, but still a purchaser. The element of bounty does enter into the matter; but the bounty conferred is the right to become a purchaser on advantageous terms, and not a devisee of the estate. And I may observe in passing that the idea of bounty would be entirely frustrated by a construction which would subject Loughrey to a burthen in respect of incumbrances which might render the bargain a losing one on his part.' The words of that part of the judgment apply to the facts in the present case, and the question is whether the decision is right. So far as construction is concerned this case is even stronger in favour of the purchaser than that before the Master of the Rolls."

WARRINGTON, J., then set out the relevant passage of the will and said (*ibid.*, 843):

"Reading that power in connection with the trust for sale and conversion which is given to the trustees, the trustees, having that power to sell to any one they please, are bound in the first place to offer this property to the son. If he desires to have it and if he exercises his option, in my opinion he elects to become a purchaser and must be taken to have made an offer to the trustees which they are bound to accept and must be taken to have accepted. If they do not expressly accept it, it will be taken by intendment of law that they have done so as if it was their duty to do so. Thus it will be inferred from the facts that there is a contract by the trustees to sell and by the son to purchase the houses. It is said that that is not enough, because the son is a person claiming through or under the testator and can only take this property subject to existing charges under Locke King's Act [Real Estate Charges Act, 1854], s. 1."



The learned judge set out the first portion of that section and then proceeded (*ibid.*, 844):

"I need not read further. The Master of the Rolls in Ireland came to the conclusion that it would be improper to treat a person in this position as a devisee of the property, and, therefore, that s. 1 of Locke King's Act did not apply to the case before him, and it could not be said that the donee of the option was not entitled to have the incumbrances paid off out of the estate. It is said now that the Master of the Rolls stopped too soon in his reading of the section, and that he ought to have gone on to consider the words 'but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged.'"

After dealing with the argument on that point, to which, I think, I need not refer, WARRINGTON, J., said (*ibid.*):

"Therefore, with great respect, I think the Master of the Rolls was right in his opinion that as the purchaser could not be treated as the heir or devisee the provisions of the Act did not apply to him. But, whether that is the true view or not, on the construction of this codicil I think the intention of the testator was to place the son in the same position as any outside purchaser would have occupied. He made no other provision for him beyond a share of the residue, and he made it incumbent on the trustees, if the son expressed his desire to purchase the property, to sell it to him at a particular price. They are just as much acting under the trust for sale as in the case of any other purchaser. Therefore the son is entitled to have the property conveyed to him free from incumbrances."

With regard to the learned judge's reference to no other provision being made for the son beyond a share of residue, I am not quite sure what significance he intended to attach to that, because the will and codicil show that the son got precisely the same benefits and interests in the testator's estate as his brothers and sisters, but he got this option as well, so, in fact, he was better off than his brothers and sisters.

That case appears to me to have a striking resemblance to the present one, because the essential considerations apply to both. Here, as there, a trust for sale of the property was to take effect on the death of the widow, but, projected in front of that trust for sale, was the option. It seems to me that the observations of WARRINGTON, J., ([1908] 1 Ch. 843):

"... the trustees, having that power to sell to any one they please, are bound in the first place to offer this property to the son. If he desires to have it and if he exercises his option, in my opinion he elects to become a purchaser ..."

apply to the present will, as they apply to the will that was before him. I do not propose to go through *Given v. Massey* (9) in detail, because it is sufficiently cited by WARRINGTON, J., in *Re Wilson* (5). It is, however, to be observed that the observations of LORD ELDON, L.C., in *Earl of Radnor v. Shafto* (7) were cited to PORTER, M.R., in *Given v. Massey* (9), and PORTER, M.R., dealt with them by saying (31 L.R. Ir. 131):

"This declaration of opinion [by LORD ELDON] is entitled to weight; but it was not necessary for the decision of the question before the court, and the decision, in fact, went upon other and different grounds."

Thus, PORTER, M.R., took a view which differed from that expressed by LORD ELDON, L.C. The Irish case was elaborately considered by WARRINGTON, J.,

in *Re Wilson* (5), and he thought that it had been rightly decided. On a will which in all material respects bears a marked resemblance to the one before me, he expressed views which were at variance with those enunciated by LORD ELDON, L.C., in *Earl of Radnor v. Shafto* (7), and came to the conclusion that the true position of a person to whom an option of this kind is given is that of a purchaser, or, rather, of a person with a right to purchase, as distinct from being a devisee.

A So far as counsel are aware, and so far as I am aware, *Re Wilson* (5) has not come up for consideration by any other court on issues which can fairly be regarded as similar to the point which I have to decide, but it has been referred to more than once, and was cited to MORTON, J., in *Re Wimbush* (10). Accordingly, I have to give effect to what appears  
B to be the law as I can best derive it from the cases cited. It is difficult in the extreme to reconcile *Re Jolley* (8) with *Given v. Massey* (9) and *Re Wilson* (5), but it appears to me that my duty is to follow the decision in *Re Wilson* (5) which, in my judgment, is binding on me and which governs the present case. In the first place, *Re Wilson* (5) was decided some seven years later than *Re Jolley* (8). In the second place, *Re Jolley* (8) is not very elaborately  
C reported, and I do not know what the arguments were or what cases were cited, as none of them is mentioned in the report. In the third place, *Re Wilson* (5) does not stand by itself because it has the strong support of the authority—which is not, of course, binding on this court, but is entitled to considerable respect—of the Master of the Rolls in Ireland in *Given v. Massey* (9). For these reasons, I think it is right that I should follow *Re Wilson* (5). If *Re Wilson* (5)  
D is wrongly decided, then let it be reviewed by the Court of Appeal. In these circumstances, I do not propose to consider in detail the argument which counsel for the residuary legatees addressed to me on the unexpected results that might flow from the application of *Re Wilson* (5) in such a case as the present, because, as I am following the decision in *Re Wilson* (5), those matters do not become relevant for consideration. Accordingly, I will give effect to  
E the decision in *Re Wilson* (5) and hold that the first defendant is entitled to the conveyance of the estates free from any incumbrances.

*Declaration accordingly. Costs to be taxed as between solicitor and client and paid out of the properties which were the subject-matter of the summons, if no notice of appeal be lodged within twenty-one days, but out of the residuary estate if notice of appeal be lodged.*

F Solicitors : *Wrinch & Fisher*, agents for *Block & Cullingham*, Ipswich (for the plaintiff and the first defendant); *Torr & Co.* (for the remaining defendants).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

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# STAG LINE, LTD. v. BOARD OF TRADE.

[KING'S BENCH DIVISION (Devlin, J.), February 13, 1950.]

*Shipping—Charterparty—Demurrage—When ship “arrived”—Ship “to proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers”—“Place”—Berth in port.*

A charterparty required a vessel to “proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers and/or shippers,” or so near thereunto as she might safely get, and there to load a cargo of pitprops. She was ordered to proceed to Miramichi, a port in East Canada, and on arrival there was told that she would be required to load at Millbank, a place within the port. As there was not then a berth for her she had to wait for six days. On a claim by the shipowners for demurrage in respect of those six days,

HELD: on construction, the charterparty gave the charterers an express right to nominate a “place” as the destination of the vessel; “place” meant a berth within the ports specified; and, therefore, the vessel did not become an arrived ship until arriving at the berth, and demurrage for the six days was not payable.

[AS TO WHEN A SHIP IS DEEMED TO HAVE “ARRIVED,” see HALSBURY, Hailsham Edn., Vol. 30, pp. 422-427, para. 592; and FOR CASES, see DIGEST, Vol. 41, pp. 568-572, Nos. 3921-3947.]

ACTION for demurrage.

The shipowners, who had chartered a vessel to the Board of Trade, claimed demurrage for six days during which the vessel had to wait for a berth at a place in a port to which the vessel had been ordered to proceed. They claimed that, on the true construction of the charterparty, the charterers' power to nominate the place of discharge extended only to the port of discharge and not to the berth, and that, accordingly, the vessel became an arrived ship on arrival at the port and demurrage was payable for the delay of six days which occurred after that arrival.

*Mocatta* for the shipowners.

*E. W. Roskill* for the charterers.

DEVLIN, J.: The shipowners' vessel, the *Cydonia*, was chartered to the Board of Trade, under a charterparty dated July 17, 1947, which required her to

“... sail and proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers and/or shippers or so near thereunto as she may safely get,”

and there to load a cargo of pitprops. She was ordered, in the first instance, to proceed to Miramichi, a port in East Canada. When she arrived there on Aug. 6 she was told that she would be required to load at Millbank, a place within the port, but, as there was not then a berth ready for her, she had to wait for six days and did not begin her loading until Aug. 12.

The present claim by the shipowners is for demurrage in respect of those six days, and the whole question turns on whether she became an arrived ship on Aug. 6 when she arrived at Miramichi, or on Aug. 12 when she arrived at her berth at Millbank. The amount of demurrage, if any, is agreed at £863 3s. 6d. When she arrived at Miramichi on Aug. 6, she anchored off Chatham, and it is admitted that Chatham was one of the four loading berths in the Miramichi area at which the vessel could load cargo and was the usual place at Miramichi at which loading vessels lie. At that time she was ready to load the cargo. The question whether she was an arrived ship or not depends, first, on the construction of the charterparty, and, secondly, on whether, if she was not an



arrived ship under the terms of the charterparty, taken by themselves, she was an arrived ship having regard to the custom of the port.

The principle of law which is applicable on the question of construction, and has not been disputed, is that, if the berth at which the vessel ultimately has to load or discharge is named in the charterparty either when originally drafted, or by virtue of a power of nomination expressly given by the charterparty, she is not an arrived ship until she arrives at the berth. If, on the other hand, no berth is named in the charterparty and no power of nomination is expressly given, and she proceeds to the berth ordered by the charterers merely by virtue of the implied right which the charterers have to select the loading berth, then she becomes an arrived ship when she arrives at the port or place named in the charterparty. That principle of law being well established and not being disputed in this case, it is not for me to investigate its merits, but it means that it is necessary to embark on the question whether or not this charterparty, properly construed, gives an express right of nomination or only an implied right of nomination.

The material words of the charterparty are:

"... and proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers and/or shippers ..."

There is no doubt that there is an express right given to the charterers to give an order regarding a "place." But "place" may be used as an alternative to a port, or as meaning a place in a port. The question which I have to determine is: What is its meaning here? The construction of the charterparty put forward by counsel for the charterers is the one which best conforms to the language of the charterparty as I read it. The construction of counsel for the shipowners, which requires me to read the word "place" as an alternative to "port," means that the charterparty is to be read as if it were "one or two safe ports or places East Canada or Newfoundland as ordered by the charterers." That requires altering the arrangement of the words and ignoring the comma which separates the words "place or places" from the words relating to ports. Having considered the other clauses in the charterparty I do not feel that there is sufficient ground for taking that course, and I think the view of counsel for the charterers is the better one, *viz.*, that what the parties were endeavouring to say was that the ship was to proceed to one or two safe ports in East Canada or Newfoundland and then within those ports the charterers would name the place or places to which the vessel was to go. If "places" had meant an alternative to "ports" it would have been very easy, and a usual way of expressing it, for the parties to have said, "one or two safe ports or places," and I feel that, by adopting the phraseology which they have, they must have intended something more than that. Since I accept the charterers' construction of the charterparty, it follows that the defence succeeds and that the claim for demurrage fails.

[HIS LORDSHIP considered the question of custom, and held that on the evidence the charterers had not discharged the burden of proving a custom.]

*Judgment for the charterers with the general costs of the action. Shipowners to have the costs of the issue relating to custom.*

Solicitors: *Holman, Fenwick & Willan* (for the shipowners); *The Treasury Solicitor* (for the charterers).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

**Re NAYLOR BENZON MINING CO., LTD.**

[CHANCERY DIVISION (Wynn-Parry, J.), December 14, 15, 1949, January 19, 20, February 8, 1950.]

*Mine—Minerals—Right to work—Grant by Minister of Fuel and Power—Compensation—“Fair and reasonable between a willing grantor and a willing grantee”—Right of electricity board to have condition imposed on mineral undertaker not to withdraw support from pylons on the land—Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 8 (1), s. 9 (2), s. 11.*

The N. Co. was the owner in fee simple of certain land, and since 1939 had as a “mineral undertaker” carried on “mining operations” thereon within the meaning of the Town and Country Planning (Minerals) Regulations, 1948. The minerals on the land were almost worked out, and the N. Co. desired to extend its operations to adjoining land owned by D., which had since July 1, 1948, (the “appointed day” under the Town and Country Planning Act, 1947) been used only for the purposes of winning clay and agriculture. Negotiations between the N. Co. and D. took place, but D. refused the terms offered. On May 7, 1949, the N. Co. applied to the Minister of Fuel and Power for a grant under the Mines (Working Facilities and Support) Act, 1923, of the right to work the minerals in question. By the present originating summons, the N. Co. sought an order that there should be granted to them the right to work the minerals in the terms of a draft lease exhibited to the affidavit in support of the summons. The substantial question between the parties was the quantum of the royalties and restoration payments, having regard to the Mines (Working Facilities and Support) Act, 1923, s. 9 (2), which provides for the assessment of compensation or consideration “on the basis of what would be fair and reasonable between a willing grantor and a willing grantee.”

**HELD:** in interpreting the basis of assessment provided for by s. 9 (2) of the Act of 1923 the same principles ought to be applied as were applicable to cases under the Lands Clauses Consolidation Act, 1845, s. 63; and s. 9 of the Act of 1923, which, on its true construction, was a section directing the assessment of compensation, was, therefore, designed to give a man the fair value to him of what was being taken from him.

By an agreement in writing dated Feb. 28, 1949, made between D., of the one part, and the E.M. Electricity Board, of the other part, D. consented to the erection of a series of pylons and cables across the land with which this summons was concerned. The agreement provided: “(10) Subject as aforesaid this agreement shall remain in force until determined by either party giving to the other party at any time twelve calendar months’ previous notice in writing in that behalf but without prejudice to the rights of the board under s. 22 of the Electricity (Supply) Act, 1919, and s. 11 of the Electricity (Supply) Act, 1922 . . . (12) Nothing in this agreement shall diminish affect or interfere with the right of the grantor and his lessees and tenants to use the said land or to work any mines or minerals therein or thereunder in as full and ample a manner as if this agreement had not been made and in working the said mines and minerals it shall be lawful for the grantor to withdraw vertical and lateral support from the works and the grantor shall not be liable to pay any compensation for damage that may be caused in working the said mines and minerals provided nevertheless that any support for electric lines above ground erected under this agreement shall be deemed to have been erected in pursuance of powers conferred on the board under s. 22 of the Electricity (Supply) Act, 1919, and the board shall accordingly be entitled to the benefit of s. 44 (2) of the Electricity (Supply) Act, 1926.” The board asked that the grant to the N. Co. should be subject to a condition (under s. 8 of the Act of 1923) preserving support for the pylons.

**HELD :** having regard to s. 11 of the Act of 1923, the N. Co. would take the grant subject to all rights of the board under the agreement; the agreement was terminable at twelve months' notice, and, in the event of such termination, the board were able to take advantage of s. 22 of the Act of 1919 and s. 11 of the Act of 1922; and, therefore, the board was adequately protected, and no condition ought to be imposed on the grant.

**A** [AS TO COMPENSATION WHERE RIGHT TO WORK MINERALS GRANTED, see HALSBURY, Hailsham Edn., Vol. 22, pp. 686-688, para. 1463; and FOR CASES, see DIGEST, Vol. 34, pp. 635, 636, Nos. 321-327.]

Cases referred to:

- B** (1) *Re Nunnery Colliery Co.'s Application*, (1924), 69 Sol. Jo. 52; 34 Digest 635, 321.
- (2) *Re Charlesworth (J. and J.), Ltd. and Briggs (Henry), Son & Co., Ltd.*, (1926), 43 T.L.R. 100; 34 Digest 635, 324.
- (3) *Re South Eastern Ry. Co. & London County Council's Contract*, [1915] 2 Ch. 252; 84 L.J.Ch. 756; 113 L.T. 392; 79 J.P. 545; 11 Digest 124, 156.
- (4) *Re Lucas & Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; 77 L.J.K.B. 1009; 99 L.T. 767; 72 J.P. 437; 11 Digest 127, 169.
- C** (5) *Corrie v. MacDermott*, [1914] A.C. 1056; 83 L.J.P.C. 370; 111 L.T. 952; 11 Digest 124, 157.

ADJOURNED SUMMONS for an order granting to the Naylor Benzon Mining Co., Ltd., the right to mine stone on the land of the respondent, H. M. Dunkerley.

**D** The main question was as to the quantum of the payment to be made by the company, but consideration was also given to the position arising under the Town and Country Planning Act, 1947, having regard to the fact that that Act contains no provisions applicable to a mining lease entered into after July 1, 1948, but before the approval of a relevant development plan which are comparable to those in s. 81 of the Act. The company put forward a draft lease with a view to the insertion therein of royalty payments on a scale which would have been fair and reasonable if the Act of 1947 had never been passed, and including machinery for adjusting the royalties and other payments when the development charge had been assessed. WYNN-PARRY, J., held that the amount of the royalties to be paid ought to be arrived at on the same basis as was applicable to cases under the Lands Clauses Consolidation Act, 1845, and that with the appropriate addition the draft lease ought to be executed by the parties.

**E** An objection by an electricity board, that conditions ought to be imposed on the company to preserve the support of certain pylons which the board had on the land in question, was dismissed. The facts appear in the judgment.

*C. L. Henderson, K.C.*, and *J. L. Arnold* for the applicant, Naylor Benzon Mining Co., Ltd.

**G** *Milner Holland, K.C.*, and *Hesketh* for the respondent, Kingscliffe Super Refractories, Ltd.

*Lindner* for the respondent, H. M. Dunkerley.

*J. R. Willis* for the respondent, the East Midland Electricity Board.

*Cur. adv. vult.*

**H** Feb. 8. WYNN-PARRY, J., read the following judgment. This is an originating summons which, following on the passing of the Railway and Canal Commission (Abolition) Act, 1949, is brought in the High Court for an order that pursuant to the Mines (Working Facilities and Support) Act, 1923, as amended by the Mines (Working Facilities) Act, 1934, there may be granted to the applicants

"the right to work the ironstone sand and gravel limestone building stone and any other stone existing and remaining unworked and ungotten



under the lands situate in the parishes of Nassington and Yarwell in the county of Northampton which are delineated and coloured pink on the map which is intended to be exhibit 'H.G.B.1.' to the affidavit intended to be sworn in support of this summons by Hugh Gilbert Barnes on the terms subject to the conditions and for the period respectively mentioned in the draft lease which is intended to be exhibit 'H.G.B.6' to the said affidavit or on such other terms subject to such other conditions or for such other period as the court shall think fit."

The company is, and has since 1939 been, the owner in fee simple of the land edged red on the map, and has since that year continuously carried on on that land iron ore mining operations by surface working. These operations are "mining operations," and the company is a "mineral undertaker" within the meaning of those phrases as defined in the Town and Country Planning (Minerals) Regulations, 1948 (S.I. 1948, No. 1521). There are two lines of working on the land edged red, the present positions of which are shown by the green lines on the map marked No. 1 Face and No. 2 Face respectively. The land which has already been worked out is coloured brown. The stage has now been reached at the No. 2 Face at which the workings have almost reached the adjoining land coloured pink on the map, leaving space only for one further cut of ore and a margin of land necessary for the support of the land coloured pink. The respondent, Dunkerley, to whom I will refer as "Mr. Dunkerley," is the owner in fee simple of the whole of the land coloured pink and yellow on the map. The land coloured yellow on the map, which amounts in area to five acres, is used for the purposes of a farm house and buildings, and this summons is not concerned with this land, or the minerals under it. The land coloured pink which is hatched red on the map is the subject of a licence to Kingscliffe Super Refractories Ltd. (to whom I will refer as "the Refractory Company") for the purpose of winning clay therefrom. The Refractory Company entered an objection to the grant of the relief asked for on this summons, but the applicants have since come to terms with the Refractory Company and it has become unnecessary to consider this objection. The whole, or substantially the whole, of the remainder of the land coloured pink on the map is used for agricultural purposes. The winning of clay and agricultural purposes are the only uses to which the land coloured pink has been put since July 1, 1948, the appointed date under the Town and Country Planning Act, 1947. The winning of iron ore from the land of the applicants lying to the east of the land coloured brown on the map is not considered to be an economic proposition, and, therefore, the company now desire an order which will enable them to conduct mining operations for iron ore on the land edged pink, or at any rate on a large part thereof.

The *modus operandi* followed by the applicants is

"the removal of overburden with a dragline excavator and the subsequent removal of the then exposed ironstone by means of a shovel excavator. The depth of overburden on the company's said land has varied to a maximum depth of fifty-two feet. The depth of overburden varies with the changes of contour of the surface, the bed of ironstone being at a comparatively constant datum level. The overburden is dealt with by the company just as earth is dealt with in double spit digging in a kitchen garden. The first cut of overburden down to the ironstone bed has to be placed on land which is not intended to be worked. The ironstone exposed by this first cut is then removed by rail to the sidings. The second cut of overburden is deposited in the cavity (known as the gullet) left after the removal of the first cut of overburden and ironstone. As each successive cut of overburden and ironstone is removed the overburden portion is thrown back into the cavity of the preceding cut. The depth of the ironstone bed varies from three feet to six feet six inches."

The pivot of the applicants' operations is at the western end of the land coloured brown, where are situated the office, weighbridge, locomotive sheds, shops and other operational buildings. South-east of these are sidings which are connected on the north-west to the lines which traverse the No. 1 Face and the No. 2 Face, and on the south-east to the Seaton and Wansford line of British Railways. It will thus be seen, and this is common ground between the applicants and Mr. Dunkerley, that the applicants are in a particularly favourable position to develop the land coloured pink, both as regards continuity of work and as regards saving of expense. Further, it is common ground that it is in the national interest that the applicants should be granted the necessary authority to conduct iron ore mining operations on the pink land by way of continuation of their present operations. Again it is common ground that, for reasons to which I shall later refer, the most convenient course will be for the court to approve a form of lease to be executed by Mr. Dunkerley as lessor, and the applicants as lessees, and authorise the applicants to work the ironstone and other specified minerals under the pink land on the terms of that form of lease.

Negotiations, to which I need not refer, took place between the applicants and Mr. Dunkerley, with a view to the grant of a lease by Mr. Dunkerley to the applicants on agreed terms. These negotiations came to nothing, and on May 7, 1949, the applicants made application to the Minister of Fuel and Power for a grant under the Mines (Working Facilities and Support) Act, 1923, of the right to work the minerals in question. As a result of the coming into force of the Railway and Canal Commission (Abolition) Act, 1949, this originating summons was issued on June 22, 1949, by which the applicants put forward for the consideration of the court the form of lease, being exhibit "H.G.B.6," to which I have already referred, as representing, at the date of the issue of the summons, fair and reasonable terms as between Mr. Dunkerley and themselves. The only terms which are in dispute between the parties are, first, the quantum of royalty payments and restoration payments, and, secondly, as to the necessity for providing, and as to the method of providing, against the position which will arise under the Town and Country Planning Act, 1947, if and when a development plan under that Act affecting the pink land comes into force.

The relevant provisions of the draft lease are:

"4. Yielding and paying therefor yearly and every year during the term the following rents royalties or sums of money clear of all deductions (except as hereinafter provided) half-yearly on Apr. 1 and Oct. 1 in every year. (i) The surface rent of £2 for every acre and so in proportion for any less quantity than an acre of the described lands of which the lessees may have taken possession for the purpose of this lease by notice as hereinafter provided such last mentioned rent to commence from the day when the lessees take possession thereof and to be paid until such land be handed back as hereinafter provided and the first half-yearly payment or a proportionate part thereof to be made on such one of the said half-yearly days appointed for the payment of rent as shall happen next after such taking of possession. Provided always that nothing herein contained shall be deemed to render the lessees liable to pay surface rent under the provisions of this sub-clause in respect of any land which they now hold or may hereafter take on agricultural tenancy. (ii) In addition to the surface rent hereinbefore mentioned (but subject to the provisions hereinafter contained) the following royalties *viz.*:—(a) For every ton of 2,640 pounds (hereinafter referred to as 'a royalty ton') of raw ironstone raised or gotten during each year by the lessees out of the described lands a royalty of 5*d.* per royalty ton where the overburden does not exceed thirty-five feet in thickness 4*d.* per royalty ton where the overburden is between thirty-five feet and fifty feet and 3*d.* per royalty ton where the overburden exceeds fifty feet or the minerals are

mined by underground operations. (b) For every royalty ton of gravel limestone building stone ganister or other stone or building sand raised or gotten during each year by the lessees out of the described lands a royalty of 3d. (c) A royalty by way of wayleave rent . . .”

By cl. 6 (h) it is provided that the applicants

“may on Apr. 1 or Oct. 1 in any year hand back to the lessor all or so much of the surface of the described lands which the lessees shall have entered upon and which they shall no longer require for the purpose of carrying on their works on the payment of the following amounts in respect of every acre and so in proportion for any less quantity than an acre of land so handed back to the lessor which shall not have been restored as aforesaid:—(i) Where the overburden is forty feet in thickness or under and the ironstone is not mined at the rate of £30 per acre; (ii) Where the overburden is over forty feet in thickness or the ironstone is mined at the rate of £20 per acre. Provided that if the lessee shall be required under the provisions of the Town and Country Planning Act 1947 or any other statute or rule, order or regulation made thereunder, or under any planning permission or development plan to restore the demised lands or any part or parts thereof to agriculture and/or to level the same and/or to afforest the same and/or to effect any other restoration or rehabilitative treatment or reinstatement of the same then the amount payable under this sub-clause in respect of such lands when handed back to the lessor shall be reduced by such sum per acre as is provided for in cl. 8 (c) hereof to the intent that such abatement may be either of the amount payable under this sub-clause or of the royalties or both as may be just and appropriate having regard to the expenditure incurred or to be incurred.”

As regards these questions, the course of events since the issue of the originating summons is somewhat curious. It is clear from the evidence, first, that the applicants were anxious to come to an amicable agreement with Mr. Dunkerley if possible; secondly, that they considered what from the applicants' point of view would represent a good commercial transaction, taking into account that, for the reasons to which I have already referred, they were in a particularly favourable position to conduct mining operations on the pink land: and, thirdly, that, with this in mind, they put forward the suggested terms as to royalty payments in order to induce Mr. Dunkerley to come to an agreement. Mr. Dunkerley was not satisfied with the terms offered, either as regards royalty or restoration payments, and he persisted in his objection until the afternoon of the first day of this hearing, when he intimated through his counsel that he would be willing to accept the draft lease as it stood, with certain amendments made since the issue of the summons, and would not, therefore, oppose the quantum of the royalty or restoration payments. This, however, could not end the matter, because the applicants' offer was no longer open. In order to support their view that the terms of the draft lease were fair and reasonable between the parties the applicants retained the services of Mr. R. B. Beilby, a mining engineer, surveyor and valuer, having great experience, particularly in the district in question, and he swore an affidavit in these proceedings on Sept. 22, 1949. I shall have to consider his evidence in more detail later in this judgment. For the moment it is sufficient to say that, in his view, the scale of the royalty payments provided in the draft lease is higher than a mineral owner might reasonably expect to pay, and that the royalties which he would consider reasonable for ironstone of the class of that with which this application is concerned under a lease entered into before July 1, 1948, are as follows:

“Where the overburden is up to forty feet in depth—4d. per royalty ton of 2,640 lbs. Where the overburden is over forty feet in depth or where mined—2½d. per royalty ton of 2,640 lbs. With a reduction in royalty in



respect of an agreed excess tonnage in the areas where there is less than forty feet of overburden for ironstone worked in any year to 3*d.* per royalty ton."

Mr. Beilby does not criticise the scale of restoration payments. It will, therefore, be seen that there is a substantial difference as regards royalty payments between the terms put forward in the draft lease and those which Mr. Beilby considers  
A proper in a lease entered into before July 1, 1948.

The applicants do not desire to resile from the terms put forward in the draft lease, and I am quite satisfied that they obtained Mr. Beilby's affidavit to justify those terms and not in the least with a view to enabling them to make out a case for resiling. Their submission is that the combined effect of Mr. Beilby's evidence and ss. 13 and 25 of the Iron and Steel Act, 1949, assuming  
B that it should come into operation, creates such a position that, although they do not seek to resile from the terms of the draft lease, they cannot safely consent thereto. With that submission I have every sympathy. The Iron and Steel Act, 1949, s. 13, reads as follows:

"(1) Where any company which comes into public ownership under this  
C Part of this Act has made or varied an agreement or lease on or after Oct. 21, 1947, and before the date of transfer, and the agreement or lease remains unperformed or unexpired, in whole or in part, on the date of transfer, and the corporation are of the opinion that the making or variation of that agreement or lease was not reasonably necessary for the purposes of the activities of the company, or that the agreement or lease  
D was made or varied with an unreasonable lack of prudence on the part of the company, regard being had in either case to the circumstances at the time, the company shall, if so directed by the corporation, by notice in writing given to the other parties to the agreement or lease at any time within six months after the date of transfer, disclaim the agreement or lease: Provided that any of the said other parties may, within two months after the date on which the notice is served, refer to arbitration under this  
E Act the question whether or not the agreement or lease ought to be disclaimed under this section, and the corporation (as well as the publicly-owned company) shall be made a party to the arbitration."

The vital provision in that sub-section is contained in the words "and the corporation are of opinion that the making or variation of that agreement or lease was not reasonably necessary for the purposes of the activities of the company." On the application of that provision may turn the rights of many parties involving, maybe, large sums of money, yet the corporation are invited to form an opinion one way or another on a test which, as expressed in the sub-section, does not begin to be expressed in the King's English. The words "reasonably necessary," used as a phrase in which the adverb is designed to  
G qualify the adjective, are meaningless. A thing is necessary or it is not necessary. It may be regarded or treated as necessary in one context and not in another, but the context cannot be provided by merely preceding the word "necessary" with an adverb such as "reasonably." As it stands, the phrase, to me, is a contradiction in terms. The legislature, presumably, in its wisdom, has not thought fit to throw the burden of interpreting and applying this apparently  
H meaningless phrase on the High Court, but instead on the arbitration tribunal. I am, therefore, spared the task of considering it further. I felt it necessary to advert to it, because honest business men coming before the High Court on an application such as this are entitled to protection against the possible dangers with which they may in the future be faced as a result of the use in an Act of Parliament of such sloppy language as this. The urgency and importance of this aspect of the matter is only emphasised by the provisions of s. 25, under which "all parties to the transaction, and all persons who were

directors of the company at the time when the transaction was entered into " may find their pockets threatened in regard to a transaction in respect of which the arbitration tribunal may have to express an opinion as to whether or not the transaction was " reasonably necessary." In face of these sections and the possibility that they may come into operation, I am of opinion that the applicants are justified in taking up the attitude which they do, namely, that they cannot actively consent to enter into a lease in the form of the draft, exhibit " H.G.B.6," but that they leave themselves entirely in the hands of the court.

For myself, I shall propose to approach and deal with the matter without any further regard to the provisions of the Iron and Steel Act, 1949, except that I make and proceed on the assumption that both the corporation and the tribunal, if the lease authorised by this order should come before them, would have regard to the substance and not merely the form of this order, namely, that it is an order for which this court takes full responsibility, and that it directs the execution of an agreement *inter partes* for purposes of convenience only. If I had any fear that a contrary view could possibly prevail, I should not hesitate to dispense with the document *inter partes*, and direct that every term should be set out in the body of the order. Counsel for Mr. Dunkerley pressed on me the submission that the applicants were bound by the terms of the draft lease, which they themselves had put forward, and that it was not open to the court to grant the authority asked for on terms which would be less favourable to Mr. Dunkerley. I cannot accept this contention. In exercising the present jurisdiction, the court is the guardian of the national interest and cannot be bound by any agreement between the parties before it, nor *a fortiori* by an offer put forward by one of them. If authority for this proposition be wanted, it will be found in *Re Nunnery Colliery Company's Application* (1) and *Re J. and J. Charlesworth, Ltd.* (2). I have already stated that it is common ground between the parties that the order should take the form of approving the form of a lease *inter partes*. It is also necessary that these terms should represent what would have been fair and reasonable between a willing grantor and a willing grantee (see the Mines (Working Facilities and Support) Act, 1923, s. 9 (2)) if the lease had been entered into immediately prior to July 1, 1948, the appointed date under the Town and Country Planning Act, 1947. The adoption of this basis is necessitated, partly because of what the legislature has enacted, but even more because of what it has failed to enact.

The expropriation of all mineral rights in this country is effected by s. 81 of the Act of 1947 in these words:

" (1) In relation to development consisting of the winning and working of minerals, the provisions of this Act shall have effect subject to such adaptations and modifications as may be prescribed by regulations made under this Act with the consent of the Treasury . . . (3) Regulations made for the purposes of this section shall provide for securing—(a) that where a development charge is payable under Part VII of this Act in respect of the winning and working of minerals comprised in a mining lease which was in force on the appointed day, the royalty or other payment required to be made under the lease may be varied, by such tribunal as may be prescribed by the regulations, so far as may be just having regard to the amount of the charge; (b) that where a development charge is payable under the said Part VII in respect of the winning and working of minerals authorised by an order made under Part I of the Mines (Working Facilities and Support) Act, 1923, the provisions of the order may be varied by the Railway and Canal Commission so far as may be just having regard to the amount of the charge."

Sub-section (4) deals with the position where a development plan is in operation. Section 5 of the Act provides:

“(1) As soon as may be after the appointed day, every local planning authority shall carry out a survey of their area, and shall, not later than three years after the appointed day, or within such extended period as the Minister may in any particular case allow, submit to the Minister a report of the survey together with a plan (hereinafter called a ‘development plan’) indicating the manner in which they propose that land in that area should be used (whether by the carrying out thereon of development or otherwise) and the stages by which any such development should be carried out.”

Turning back to s. 81, it is manifest that there is a serious gap because there is no provision dealing with the case of a mining lease brought into existence in the period between the appointed date—the very case before this court—and the approval of a development plan in regard to the area comprised in such lease. In the present case, which is the first of its kind to come before the court, the ingenuity of the applicants has devised a method of avoiding the consequences of this gap, namely, of putting forward a draft lease substantially in the form in use in the district prior to the appointed date under the Town and Country Planning Act, 1947, with a view to the insertion therein of royalty payments on the scale which would have been fair and reasonable as between a willing grantor and a willing grantee if the Act had never been passed, and including machinery in the form of the proviso to sub-cl. (c) of cl. 8 providing for adjustment of the royalties and other payments when the development charge payable by the applicants under the Act as mineral undertakers has been assessed. Nevertheless, as many of these leases may be brought into existence, either voluntarily or as a result of an order of the court, before the development charge can be known, it would clearly be desirable that the gap in s. 81 of the Act, to which I have referred, should be filled by further legislation.

The whole matter has to some extent an atmosphere of unreality. The effect of the expropriation of the minerals under his land is that Mr. Dunkerley has nothing but a bare legal interest and no beneficial interest in them. His beneficial interest, for what it may be worth, has been converted into a claim to share in the £300,000,000 fund. It is conceded that, assuming the full operation of the Town and Country Planning Act, 1947, he would be entitled to some royalty, though not to one at more than a nominal rate. On the other hand, assuming that the Iron and Steel Act, 1949, comes into operation, the undertaking of the applicants will be expropriated. On this basis the amount of the royalty can be of no interest to them. Nevertheless, as I see it, the duty which is laid on me is to bring into existence a lease between Mr. Dunkerley, as lessor, and the applicants, as lessees, authorising the applicants to win by surface mining operations the iron ore and other minerals mentioned in the summons under the land coloured pink on the map, the lease containing provisions usual in mining leases in the district existing before July 1, 1948, and containing provisions as to surface rent, royalty and restoration and other payments which would represent in a lease granted before the above date a consideration fair and reasonable as between a willing grantor and a willing grantee.

As I have said, substantially nothing turns on the provisions of the lease other than the clauses dealing with the scales of the royalty and restoration payments. In order to fix these scales I have to turn again to the Mines (Working Facilities and Support) Act, 1923, s. 9, and my first task is to construe the phrase in s. 9 (2) “on the basis of what would be fair and reasonable between a willing grantor and a willing grantee.” Two views have been put forward. On behalf of Mr. Dunkerley it is said that the sub-section presupposes complete freedom of negotiation between the parties, in which event it is proper to take into account the favourable circumstances, to which I have already referred, in which the applicants are placed in regard to mining operations on the pink land, and thus justify the scale of royalty payments in the draft lease—exhibit “H.G.B.6”—



even assuming they are higher than those prevailing in the district before July 1, 1948. On the other hand, it is submitted by the applicants for the consideration of the court that, in assessing compensation or consideration under the Mines (Working Facilities and Support) Act, 1923, s. 9, the court should apply the principles enunciated by EVE, J., in *Re South Eastern Ry. Co. and London County Council's Contract* (3). The learned judge said ([1915] 2 Ch. 258):

"In answering such inquiry the following propositions may, I think, be treated as established by authorities binding on this court: (1.) The value to be ascertained is the value to the vendor, not its value to the purchaser; (2.) in fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his hands are to be taken into account, but the possibility of such restrictions being modified or removed for his benefit is not to be overlooked; (3.) market price is not a conclusive test of real value; (4.) increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded; (5.) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (6.) the true contractual relation of the parties—that of purchaser and vendor—is not to be obscured by endeavouring to construe it as another contractual relation altogether—that of indemnifier and indemnified."

In *Re Lucas and the Chesterfield Gas and Water Board* (4) FLETCHER MOULTON, L.J., said ([1909] 1 K.B. 30):

"No better example of the problem could be found than that which we have in the present case. The land in question is by its position and conformation marked out as a favourable site for an impounding reservoir to collect water for the public supply of a district. The peculiarities which make it suitable for that purpose add nothing to its value as agricultural or grazing land, which I will assume to be the only alternative uses. A public authority obtains powers to take it for a reservoir; ought it to pay any higher price than is represented by its agricultural or grazing value? Is not any price in excess of this a violation of the canon that you are only to give that which represents its worth to the seller, and that you are to disregard all questions of its worth to the buyer? The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes."

In delivering the judgment of the Privy Council in *Corrie and Another v. MacDermott* (5) LORD DUNEDIN said ([1914] A.C. 1065):

"Their Lordships cannot accede to this view, and they agree particularly with the reasoning of ISAACS, J., on this part of the case. In their opinion it puts upon the word 'value' an amplification of the bare word, treating it as if it was 'unrestricted value,' which it will not bear. And, further, the law of compensation being as they have stated it, namely, the value to the owner as he holds, which law has been so often laid down that it must be held to have been known to the contracting parties, it was, their Lordships think, incumbent on a party who wanted the valuation to proceed upon another footing to take care that the words used clearly so expressed it."

The first two cases arose under the Lands Clauses Consolidation Act, 1845, s. 63 of which provides:

"In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

Judicial interpretation of that section has given rise to the principles enunciated by EVE, J., which I have read, including the principle that the value to be ascertained is the value to the vendor not to the purchaser. I pass over the Acquisition of Land (Assessment of Compensation) Act, 1919, which gave statutory force to the views of FLETCHER MOULTON, L.J., as to special adaptability, but which, in my view, does not apply to this case, and I come back to the Mines (Working Facilities and Support) Act, 1923, s. 9. It is true that the words in this section are "on the basis of what would be fair and reasonable between a willing grantor and a willing grantee," which are to be compared with the words "the value of the land to be purchased" in the Lands Clauses Act, 1845, s. 63, but it is to be observed that the words in s. 63 of the latter Act, "In estimating the purchase money or compensation", compare with the words "the compensation or consideration" in s. 9 of the former Act. As EVE, J., pointed out in *Re South Eastern Ry. Co. and London County Council's Contract* (3), the adoption in compensation cases of any other principles than those enunciated by him would lead to startling results, the most obvious one being that it would upset all uniformity of value, and further, as FLETCHER MOULTON, L.J., pointed out in *Re Lucas and the Chesterfield Gas and Water Board* (4), it would offend against the principle that a man cannot give more than he has. There is no authority interpreting the effect of the phrase in s. 9 of the Mines (Working Facilities and Support) Act, 1923, which I am considering, which directly binds me, but, in my judgment, the same principles which have been applied in the application of the Lands Clauses Consolidation Act, 1845, s. 63, ought to be applied to cases under s. 9 of the Act of 1923, which, in my view, on its true construction, is a section directing the assessment of compensation, and, therefore, designed to give to a man the fair value to him of what is being taken from him.

Having armed myself with this interpretation of s. 9 of the Act of 1923, I now turn to consider the expert evidence. This consists of the affidavit of Mr. Beilby, to which I have already referred, and his evidence on cross-examination, on the one hand, and the affidavit evidence of Mr. Cowen, a Fellow of the Land Agents Society, a Mr. Lambert, an affidavit of Sir Frederick Villiers Robinson, and an affidavit of Mr. Henry Wing. [His LORDSHIP considered the evidence and continued:] In the result, I have no evidence on which I feel that I can safely act, apart from the evidence of Mr. Beilby. I propose to accept his evidence, and conclude that in the circumstances the scale of royalty payments which he suggests is fair and reasonable in the circumstances and should be inserted in the form of lease in place of the scale of royalty payments specified in the draft lease. The lease to be executed will take the form of the exhibit "H.G.B.6" subject to any amendments which may have been agreed between the parties as to which I shall require to be informed.

I now turn to deal with a different point, namely, the objection of the East Midland Electricity Board, who contend that, as a condition of making the grant asked for, I should impose conditions on the applicants in favour of the board in

exercise of my jurisdiction under the Mines (Working Facilities and Support) Act, 1923, s. 8. The matter arises in this way. By an agreement in writing dated Feb. 28, 1949, and made between Mr. Dunkerley, of the one part, and the board, of the other part, Mr. Dunkerley consented to the erection of a series of pylons and cables across the pink land as shown on the map, for the purpose of enabling the board to supply electric power to the Refractory Company, which pylons and cables were duly erected. The agreement provides:

"(10) Subject as aforesaid this agreement shall remain in force until determined by either party giving to the other party at any time twelve calendar months' previous notice in writing in that behalf but without prejudice to the rights of the board under s. 22 of the Electricity (Supply) Act, 1919, and s. 11 of the Electricity (Supply) Act, 1922, but in the latter case the periodical payments provided for under cl. 7 of this agreement shall not necessarily be deemed the annual value for the purpose of assessing the rental . . . (12) Nothing in this agreement shall diminish affect or interfere with the right of the grantor and his lessees and tenants to use the said land or to work any mines or minerals therein or thereunder in as full and ample a manner as if this agreement had not been made and in working the said mines and minerals it shall be lawful for the grantor to withdraw vertical and lateral support from the works and the grantor shall not be liable to pay any compensation for damage that may be caused in working the said mines and minerals provided nevertheless that any support for electric lines above ground erected under this agreement shall be deemed to have been erected in pursuance of powers conferred on the board under s. 22 of the Electricity (Supply) Act, 1919, and the board shall accordingly be entitled to the benefit of s. 44 (2) of the Electricity (Supply) Act, 1926."

Section 8 of the Act of 1923 provides:

"(1) If any person having an interest in any land is not entitled to support or sufficient support, whether vertical or lateral, for any buildings or works, whether on or below the surface, erected or constructed, or intended to be erected or constructed, on or below the surface, and alleges that it is not reasonably practicable to obtain a right to such support by private arrangement for any of the reasons mentioned in s. 4 of this Act, he may send to the Board of Trade an application that such restrictions may be imposed on the working of the minerals under that land and the land adjacent thereto as he may consider necessary to secure sufficient support to the buildings or works."

There follow provisions giving jurisdiction to impose conditions.

In view of the agreement, the erection of the pylons and cables, and the intention of the applicants in due course to work the minerals under the pink land, the board ask that a condition be imposed preserving support for the pylons. The applicants are unwilling to agree to the imposition of any such condition, and submit that not only is there no precedent for the imposition of such a condition, but that the board are adequately protected by the terms of s. 11 of the Act of 1923, and the statutory provisions, namely the Electricity (Supply) Act, 1919, s. 22, and the Electricity (Supply) Act, 1922, s. 11, referred to in cl. 10 of the agreement. Section 11 of the Act of 1923 provides:

"A right granted under this Part of this Act shall not confer on the person to whom it is granted any greater or other power than if the right had been granted by a person legally entitled to grant the right, or relieve the grantee from any obligation or liability to which he would have been subject had the right been granted by such a person."

The effect of that section, to my mind, is that the applicants will take the grant which I propose to order in their favour, subject to the agreement and therefore



subject to all rights of the board thereunder. On that short ground, I should be prepared to decide that this is not a case in which any condition should be imposed on the applicants at the instance of the board under s. 8 of the Act of 1923. I think, however, that the correctness of this conclusion is further demonstrated when one remembers that the agreement is terminable by either party on twelve months' notice, and further that, in the event of such termination, if the board desire to continue to maintain the pylons in their present position they will have the opportunity of satisfying the Minister of Fuel and Power that it is right and proper, subject to the provisions of the Electricity (Supply) Act, 1919, s. 22, that they should remain there. On any such reference both parties can be heard. I might add that, if the Iron and Steel Act, 1949, comes into force and any such application is made to the Minister of Fuel and Power, the somewhat Gilbertian situation will arise of two government departments being parties to a dispute before the head of a third government department. Whether or not such a situation is one which in the words of that author "no man can view with equanimity" is fortunately not a question for decision.

Counsel for the Electricity Board pressed on me the provisions with which cl. 12 of the agreement ends. The Electricity (Supply) Act, 1926, s. 44, provides:

"(2) Where the board or any authorised undertakers have in pursuance of powers conferred on them under s. 22 of the Electricity (Supply) Act, 1919, erected on any land supports for an electric line above ground, the board or undertakers shall, for the purposes of s. 8 of the Mines (Working Facilities and Support) Act, 1923, be deemed to be persons having an interest in the land on which such supports are erected."

Counsel submitted that in view of that provision and the threat to work the minerals under the pylons, with which he said the board would in due course be faced, the board was entitled to protection under s. 8 of the Act of 1923. The answer to that contention appears to me again to be the terminable nature of the agreement, as provided by cl. 10 thereof and the protection afforded to the board on termination by the statutory provisions to which I have referred. In these circumstances and for these reasons, I conclude that this is not a case in which I should impose under s. 8 of the Act of 1923 any conditions on the applicants at the instance of the board, who, in my view, will be adequately protected by the conjoint effect of s. 11 of the Act of 1923, the Electricity (Supply) Act, 1919, s. 22, and the Electricity (Supply) Act, 1922, s. 11.

*Grant made accordingly. No order as to costs.*

Solicitors : *Kingsford, Dorman & Co.*, agents for *Wilson & Wilson*, Kettering (for the applicants); *Sharpe, Pritchard & Co.*, agents for *Kershaw, Tudor & Co.*, Sheffield (for the respondent Kingscliff Super Refractories, Ltd.); *Rider, Heaton, Meredith & Mills* (for the respondent Dunkerley); *E. F. Turner & Sons* (for the respondent East Midland Electricity Board).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

SMILEY *v.* TOWNSHEND.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.J.J.), February 2, 3, 6, 7, 1950.]

*Landlord and Tenant—Requisition—Land—Requisition during lease—Covenant to repair—Breach—Measure of damages—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1).*

By s. 18 (1) of the Landlord and Tenant Act, 1927: "Damages for a breach of covenant or agreement to keep or put premises in repair . . . shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid."

In 1945 the tenant took an assignment of a lease which contained a full repairing covenant on the part of the tenant. The premises were then under requisition, and they were still under requisition on the expiry of the lease in 1947, there being no indication when the requisition was likely to come to an end. At the date of the requisition, the premises were not in such a state of repair as was required under the covenant, and though some repairs had been done by the requisitioning authority during the currency of the lease, the premises were to some extent in a state of disrepair on the expiry of the lease. On the question of the measure of damages claimed by the landlord for breach of the covenant to repair:

**HELD:** (i) the diminution in the value of the reversion within the meaning of s. 18 (1) of the Act of 1927, must be assessed by reference to its value, not at the time when the land reverted in possession, but at the time when the lease expired.

(ii) accordingly, it was not permissible to speculate as to the possibility of the requisitioning authority doing repairs which it was under no legal liability to do, so lessening the damages to the landlord, but the premises had to be valued as at the date when the lease expired, having regard to the fact that they were under requisition, and the difference found between the value of the requisitioned premises at that date if the repairing covenant had not been broken and their reduced value owing to the breach was the measure of the landlord's damages.

*Decision of* LYNKEY, J. ([1949] 2 All E.R. 817), *affirmed*.

[AS TO DAMAGES FOR BREACH OF COVENANT TO REPAIR, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 219-221, paras. 239-241; and FOR CASES, see DIGEST, Vol. 31, pp. 339-343, Nos. 4820-4859.]

FOR THE LANDLORD AND TENANT ACT, 1927, s. 18 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 902.]

Cases referred to:

- (1) *Matthey v. Curling*, [1922] 2 A.C. 180; 91 L.J.K.B. 593; 127 L.T. 247; 31 Digest 342, 4857.
- (2) *Joyner v. Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; Digest 341, 4841.
- (3) *Hanson v. Newman*, [1934] Ch. 298; 103 L.J.Ch. 124; 150 L.T. 345; Digest Supp.
- (4) *Ebbetts v. Conquest*, [1895] 2 Ch. 377; 64 L.J.Ch. 702; 73 L.T. 69; *affd. sub nom.*, *Conquest v. Ebbetts*, [1896] A.C. 490; 65 L.J.Ch. 808; 75 L.T. 36; 31 Digest 340, 4828.
- (5) *Terroni & Necchi v. Corsini*, [1931] 1 Ch. 515; 100 L.J.Ch. 289; 145 L.T. 95; Digest Supp.
- (6) *Slater v. Hoyle & Smith*, [1920] 2 K.B. 11; 89 L.J.K.B. 401; 122 L.T. 611; 39 Digest 481, 1026.
- (7) *Bradburn v. Great Western Ry. Co.*, (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 17 Digest 125, 339.

- (8) *Salisbury v. Gilmore*, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 2nd Digest Supp.  
(9) *Espir v. Basil Street Hotel, Ltd.*, [1936] 3 All E.R. 91; Digest Supp.  
(10) *James v. Hutton*, [1949] 2 All E.R. 243; [1950] 1 K.B. 9.  
(11) *Jones v. Herxheimer*, p. 323 ante.  
(12) *Landeau v. Marchbank*, [1949] 2 All E.R. 172.

A APPEAL by the tenant from an order of LYNSEY, J., made on Oct. 27, 1949, and reported [1949] 2 All E.R. 817, whereby he awarded £585 damages to the landlord for breach by the tenant of a repairing covenant contained in a lease of requisitioned property. The premises had been requisitioned before the assignment of the lease to the tenant and they continued under requisition until after the expiration of the lease. Liability was admitted, and the appeal  
B was concerned with the measure of damages. The Court of Appeal, in dismissing the appeal, held that the learned judge had correctly applied the test of the diminution in the value of the reversion.

*Shelley, K.C.*, and *L. A. Blundell* for the tenant.

*H. J. Phillimore* for the landlord.

C BUCKNILL, L.J.: I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J.: This case raises questions as to the proper measure of damages for breach of covenant to repair when the premises were under requisition at the material time.

The plaintiff landlord was at all material times the owner of the freehold of 31 Montpelier Square, Knightsbridge. Those premises were let in 1849 on a  
D ninety-eight years' lease at a ground rent of £10 10s. 0d. The lease was due to expire on June 24, 1947. It contained full repairing covenants, and this action is brought for breach of those covenants when the lease came to an end. On Dec. 20, 1944, the premises were requisitioned by the Westminster City Council to house the homeless. They were then somewhat out of repair, but not badly  
E so. The council made considerable alterations and did a certain amount of repairs to make the premises suitable for occupation by two or three families, and the premises were then occupied by those families as licensees of the council. The council not only retained possession of the premises up to the time when the lease came to an end on June 24, 1947, but they still retain possession. In May, 1945, the defendant tenant took an assignment of the lease, which had little more than two years to run. He received the compensation rent from the  
F council, but did no repairs himself. Now he is sued by the landlord for breach of the repairing covenants at the end of the lease, and the question is: What is his responsibility?

If the landlord had sued the person who held the lease in December, 1944, when the premises were originally requisitioned, there is no doubt that, as against that person, the landlord could have recovered considerable damages  
G for breach of the covenant to keep in repair during the term, because his reversion was injured by reason of the dilapidations which existed in December, 1944. The presence of those dilapidations would mean that the requisitioning authority would pay a lower compensation rent, and that would affect the landlord after the lease fell in. They would also affect the compensation payable to the landlord when the council gave up the premises, because less compensation would  
H be paid at the end of the requisitioning if the premises were already dilapidated at the beginning. The question is, however, not what is the responsibility of the previous lessee, but what is the responsibility of this assignee, who only took his assignment in May, 1945, after the premises had been requisitioned. He had no right to go into possession to do any repairs, even if he had wished to do them, and it might at one time have been said that, as it was impossible for him to do the repairs, he ought not to be liable. Since *Matthey v. Curling* (1), however, it has been settled that the fact that premises have been requisitioned



is no answer for a tenant who is sued for breach of repairing covenants. He is just as responsible for the time during which the premises were requisitioned as he would have been if the premises had been sub-let. So, also, if the premises have been requisitioned, an assignee is responsible in law for seeing that the covenants are complied with during the period while he is assignee. That means that he must see that the premises are in repair. A covenant to keep in repair imports a covenant to put in repair, if repair is necessary. There is no doubt, therefore, that the assignee was responsible in point of law for seeing that the premises were kept in a good state of repair right up to the end of the lease in 1947, even though they were requisitioned. This is, however, subject to the qualification which has been introduced by s. 1 (1) of the Landlord and Tenant (Requisitioned Land) Act, 1944, by which the tenant is not liable for damage occurring to the land during the period of requisition. The defendant is not liable, therefore, for damage done during the time when the Westminster City Council were in, but he is liable for the previous want of repair in so far as it still continued during his time. If and in so far as structural or other alterations were made by the Westminster City Council before June 24, 1947, which would have rendered any of the covenanted repairs valueless, the tenant is not responsible, because that is damage done by the council for which he is not liable. If and in so far as the council before June 24, 1947, made good any of the previous want of repairs, he has the benefit of their work just as he would have the benefit of any repairs done by a sub-tenant, but, if and in so far as the premises remained unaltered and unrepaired—as, to some extent, they seem to have done—he remained responsible up to the end of the lease.

The question is: What is the proper measure of damages for that breach? It was strongly urged before us that the damages should be nominal. Counsel for the tenant argued that before 1927 the damages would have had to be assessed as at the end of the lease: *Joyner v. Weeks* (2), but that the effect of the Landlord and Tenant Act, 1927, is that they must be assessed by reference to the time when the land actually reverts in possession to the landlord, and that, if, as here, that time has not yet arrived, the court must look into the future to see what the condition of the premises will be. It may be, said counsel, that in this case that the council will make good all the dilapidations. He points out that they have already done the outside painting. They may do more. They may do all. If they do so, the landlord will get his premises back fully repaired, so why should he get damages as well? He cannot, therefore, show that he will suffer any damage. Junior counsel for the tenant put the argument rather differently. He said that there could be no damage to the landlord from any want of decorative repair during the time of this assignment, because the landlord could not benefit from the doing of decorative repairs, or suffer by the omission of them. On the one hand, the landlord would not benefit, for, if the tenant had, in fact, done all the decorative repairs during his time (*i.e.*, in 1945, 1946 or 1947), the landlord would not have benefited because, by the time that the requisition comes to an end, whenever that may be, the benefit of the repairs would have worn off. Indeed, Mr. Ward, the landlord's surveyor, in the course of cross-examination admitted that the value of the decorative work would have been exhausted in the course of a long requisition. On the other hand, the landlord would not suffer whether the tenant did the decorative repairs or not, because under s. 10 (1) of the Requisitioned Land and War Works Act, 1948, he gets compensation for all dilapidations during the requisitioning. The landlord's compensation would, therefore, not be lessened one penny whether the tenant had done the decorative repairs in 1947 or not.

I appreciate the force of these arguments, and, if the correct measure of damages was such a sum as represents the damage which the landlord will sustain when he gets the premises back, they would have great weight, but the answer to them both is that the damages must be assessed, not by reference to

A the time when the land reverts in possession, but as at the end of the lease. I take it from authorities which this court is not at liberty to disregard that the proper measure of damages is the difference between the value of the reversion at the end of the lease with the premises in their then state of disrepair and its value with the premises in the state in which they would have been if the covenants had been fulfilled. That test was laid down by this court in *Hanson v. Newman* (3). What has to be considered is the diminution in value of the reversion at the end of the lease, and I take "reversion" to mean the landlord's then interest in the premises. If he is the owner and the premises are requisitioned, the reversion is his freehold subject to the existing requisition, because that is the landlord's then interest in the premises. The question is, therefore: How much was the market value of the landlord's interest diminished at the end of the lease by reason of the disrepair for which the then assignee was responsible? If we were to take, not the end of the lease, but the time when the land reverts in possession, there could be great difficulty. The future cost of repair would be the measure and the court would be asked to deduct the estimated amount of repairs which will be done by the council after the lease comes to an end, but the court cannot speculate as to what repairs may be done by the council during the period of requisition. It is entirely a matter of speculation how long the requisition will last, and whether the local authority is going to do any more repairs, and in that situation the words of LORD HERSCHELL ([1896] A.C. 495) in *Conquest v. Ebbetts* (4) are in point:

D "I do not think the court would do right, in assessing the damages in the present case, to involve itself at the instance of the appellants in considerations of that character . . . They have broken their covenant, and when sued for the breach they have, in my opinion, no right to demand that a speculative inquiry shall be entered upon as to what may possibly happen and what arrangements may possibly be come to, under the special circumstances of the case . . ."

E It has turned out that, since the lease came to an end, the council have, during the requisition, done the outside painting, so that is not matter of speculation, but it does not of itself alter the position, for, if the landlord is lucky enough to have some repairs done later by the local authority (or it may be in other cases by a fresh tenant under a reversionary lease: *Terroni & Necchi v. Corsini* (5)), that does not of itself affect the measure of damages as against an assignee who has broken his covenant. It is *res inter alios acta*. It is like the cases of the sale of goods where it has been held that a buyer of goods which are not up to contract is entitled to recover damages for the inferiority in quality even though he has made a profitable re-sale and has suffered no damage: see *Slater v. Hoyle & Smith, Ltd.* (6). In the course of the argument, BUCKNILL, L.J., gave another illustration. If a man's motor car is damaged by negligence and is out of repair, is the wrongdoer exempted because at some later date the car is destroyed by fire? The answer is clearly: No, and we are all familiar with the rule that insurance money does not go in reduction of damages: *Bradburn v. Great Western Ry. Co.* (7). There are, therefore, many cases in which things that happen after a breach of contract or after a wrong done cannot be prayed in aid by the man who breaks his contract or by the tortfeasor in diminution of damages, because it is *res inter alios acta*.

H It does not follow, however, from all this that, when one comes to apply the proper measure of damage—injury to the reversion—future events and probabilities are to be disregarded. They may have an important bearing on the value of the reversion at the end of the lease. Section 18 (1) of the Landlord and Tenant Act, 1927, shows that future events are to be regarded, for, if the premises are to be pulled down at or shortly after the end of the lease so that any repairs would have been valueless, that is a ground for depriving the landlord of any damages, but, in such cases, the subsequent event, when it happens, is

not in itself sufficient to extinguish the damages. It is only evidence, albeit strong evidence, in retrospect, of the future as it appeared at the end of the lease. In *Salisbury v. Gilmore* (8) it was shown that the Marquess of Salisbury had the intention at the end of the lease of pulling down the premises, but a few days later he changed his mind and determined not to do so. The court said that the material time was at the end of the lease, and, if at the time of the end of the lease he had the intention to pull down, it did not matter that he changed his mind afterwards. The true view is, therefore, that matters happening subsequently to the end of the lease do not of themselves affect the damages. The only effect of subsequent demolition is that it shows in retrospect what was the future when the lease came to an end, and thus throws strong light on the injury to the reversion at that time.

Counsel for the tenant took another instance which is not covered by s. 18 (1). He took the example of a house let on a long lease which was, by reason of its large size and great number of rooms, not suitable for occupation as a dwelling-house at the present day, but only for use as a warehouse, for which decorative repairs would be valueless. If the decorations were not, in fact, done, he said that the court would take the use to which the premises were being put into account, even though it did not fall within s. 18. I agree that the court would do so, but the reason would be because in such a case the damage to the reversion would be *nil*. At the end of the lease the premises would be of as much value as a warehouse as a highly decorated dwelling-house. These illustrations show that, although future events or probabilities do not in themselves reduce or extinguish the damages, nevertheless, they may properly be regarded in so far as they throw light on the value of the reversion at the end of the lease. I think, therefore, that the judge directed himself quite properly. He asked himself what was the lack of repair at the end of the lease for which the defendant was responsible, and he inquired by what amount at that time was the value of the existing reversion, subject to the requisition, reduced by reason of that lack of repair. That was the proper test. It is, however, said that, even so, the learned judge did his calculation wrongly. He founded himself on the schedule of repairs at Dec. 20, 1944, and the cost of making good that schedule. He then made allowances for repairs done by the council before June 24, 1947, and thus arrived at his figure. It is said that he was wrong in basing himself on the cost of repairs.

In cases where it is plain that the repairs are not going to be done by the landlord, the cost of them is little or no guide to the diminution in value of the reversion, which may be nominal: see *Espir v. Basil Street Hotel, Ltd.* (9) and *James v. Hutton* (10). In cases where the repairs have been, or are going to be, done by the landlord, the cost may be a very real guide. That is shown by the recent case of *Jones v. Herxheimer* (11). In cases where it is open to question whether the repairs will be done by the landlord, as in the present case, the cost may afford a starting figure, but it should be scaled down according to the circumstances, remembering that the real question is: What is the injury to the reversion? That is what the judge did here. He used the cost merely as an aid in assessing the diminution in value of the reversion. I do not think that I would myself have given so much weight to the cost of repairs, or, at any rate, having regard to the requisition, I would have scaled down the figure considerably, just as damages for breach of covenant to keep in repair during the term are scaled down according to the length of time unexpired: see *Conquest v. Ebbetts* (4) ([1895] 2 Ch. 384, and [1896] A.C. 494); but the fact that I would have given less is not a ground for interfering with the assessment made by the judge. He has directed himself properly on the measure of damages and we cannot interfere merely on a question of *quantum* unless the figure is plainly wrong, which is not the case here. In my opinion, therefore, this appeal should be dismissed.

BUCKNILL, L.J.: I will now ask SINGLETON, L.J., to deliver his judgment.



**SINGLETON, L.J. :** I agree that this appeal should be dismissed. The decision must depend on the interpretation of s. 18 of the Landlord and Tenant Act, 1927, which provides:

A “(1) Damages for a breach of a covenant or agreement to keep or put premises in repair . . . shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as afore-said.”

The attention of this court was directed also to s. 10 (1) of the Requisitioned Land and War Works Act, 1948, which places a limit on the amount of compensation payable by the requisitioning authority in respect of making good requisitioned land.

B With regard to the interpretation of s. 18 (1) of the Landlord and Tenant Act, 1927, this court is bound by what was said in *Hanson v. Newman* (3). In that case, LAWRENCE, L.J., approving what had been said by LUXMOORE, J., in the court of first instance, said ([1934] Ch. 305):

C “A reversion may not be a reversion in possession (*i.e.*, it may not be immediate) by reason of the freeholder having granted a reversionary lease, and in that case the reversionary lease is to be disregarded in assessing the damages. In my judgment, what the court has to do in assessing damages under the section in the circumstances of this case is to ascertain the actual value of the property at the date of re-entry and the value which the property would then have had if there had been no breach of covenant; and the difference between these two values is the amount of the damage sustained by the landlord (that is to say) the difference between the value of the property as it stands and the value which it would have had in case the tenant had fulfilled his obligations under the covenants in the lease.”

D In the present case LYNKEY, J., followed that test and he had before him evidence as to values. The landlord called one surveyor, Mr. Ward, and the tenant called another, Mr. Ling.

E The property in question here, which was a house in Montpelier Square, was requisitioned by the Westminster City Council on Dec. 20, 1944. The tenant became the assignee of the lease on May 11, 1945. That lease had two years and one month to run, and it expired on June 24, 1947. There was no complete schedule of dilapidations or of lack of repair as at the termination of the lease, which is the important time, but there was a schedule of condition as at the date of the requisition, and that was checked by both surveyors soon after the termination of the lease and it is on that that they base their figures. One argument on behalf of the tenant was of this nature. True, the tenant was under a liability to do repairs and those repairs were half done. *Prima facie*, it is said, there is damage to the reversion, but it may be only nominal damage. The only time that the tenant was able to do the repairs was after the property was requisitioned, because he was not assignee until after the requisition, and, if he had done those repairs at that time, the landlord would not have benefited one penny in actual money. Therefore, counsel submitted, the tenant could not be liable in this case for anything more than nominal damages.

H The answer to that may be dependent on whether there was damage to the reversion. Evidence was called on that matter, and I should not have been surprised if a surveyor had said: “In view of the nature of the lack of the repair or of the breaches of covenant, and the facts that this property was requisitioned by the Westminster City Council, that it has been altered to some extent, and that no one knows how long the requisition will last, the damages ought to be small or nominal.” I think it is difficult for anyone to say that lack of repair of that kind, particularly decorations, may have the effect of

diminishing the value of a reversion, if the property is, in fact, requisitioned at the time and no one can say how long the requisition will last. It seems to me, however, that, when the court is asked to consider a matter such as that, it must be guided by the evidence unless there be some overriding consideration of law which compels the court to say, notwithstanding that evidence, that only nominal damages can be given because the damage to the reversion can only be nominal. Counsel for the tenant was really asking this court to do the work of witnesses. There was evidence on which **LYNSKEY, J.**, decided and, unless he misdirected himself, this court ought not to say that he was wrong. Still less ought this court to be asked to take the place of experienced valuers.

Mr. Ward, the landlord's surveyor, was responsible for the original schedule, and, after the expiration of the lease, the tenant instructed Mr. Ling to examine that schedule from the point of view of his liability in respect of repairs. Mr. Ward and Mr. Ling agreed that, subject to any question under the Landlord and Tenant Act, 1927, the liability in respect of repairs under the covenant in the lease was the sum of £585. They were agreed that at the expiration of the lease the premises were not in the order that they should have been. Both of them had to consider the question which arose under s. 18 (1) of the Act of 1927, and Mr. Ward was asked:

"Q.—As you know, the landlord is only entitled to damages to the reversion?

A.—Yes.

Q.—Can you help his Lordship about that? What do you say about the £585, as to whether that is damage to the reversion or not?

A.—I think the damage to the reversion in this particular case might easily have been more."

The learned judge then asked him to deal with the diminution in value of the reversion with the property (a) requisitioned and (b) not subject to requisition. The witness said that the value of the property as requisitioned was £5,000, and, if it had not been requisitioned, £7,000, subject to the question of lack of repair. He said that the diminution in the value through lack of repair was £750, with the property requisitioned, and I think that he put it as more if the property had been unrequisitioned, bringing the value of the property, in its state of disrepair, to a figure of £6,140. In either event, Mr. Ward said that the damage to the reversion was greater than the sum of £585.

On the question of the diminution in value, counsel for the tenant submitted that there was no evidence on which the court could decide it. There was, however, the evidence of Mr. Ward, who was not cross-examined on the point, though he was asked a question to show that, if the repairs had been done, the value of the repairs, particularly decorations, would have been exhausted before the date of de-requisition and so the landlord had suffered no damage. He was not cross-examined to show that his estimate of value was wrong, nor was he asked on what it was based. Mr. Ling, the tenant's surveyor did not deal in his examination-in-chief with the question of diminution in value, but, when he was cross-examined, **LYNSKEY, J.**, asked him about the figure of £585 which he had agreed with Mr. Ward, and the witness answered: "It really means that I thought that was the correct method of assessing Mr. Townshend's liability in 1947." The learned judge asked:

"Q.—You thought that was the fair amount he ought to have paid, having regard to the schedule of condition?

A.—Yes, I did at the time."

Then counsel for the landlord resumed his cross-examination:

"Q.—And that that was a fair amount which he ought to pay as being the damage to the reversion?

A.—Yes."

While the witness was being re-examined the learned judge asked:

“Q.—Tell me this from the point of view of a surveyor. You were asked a question which you answered; you said that you agreed with £585, the value of making good the dilapidations; you thought that was a fair amount which he ought to pay as being damage to the reversion. When you are considering what amount you should be paid for dilapidations, do you take into account the value of damage to the reversion, or not?

A.—Yes. In this case I had thought, probably erroneously, that the damage to the reversion was equal to the amount by which the claim under s. 2 (1) (b) of the 1939 Act would be reduced by the dilapidations evidenced in the 1945 schedule. That is why I went ahead and agreed with Mr Ward the value of the dilapidations in the 1945 schedule provisionally at £585.

Q.—Does that mean, in effect, that the price was the price of making good the dilapidations shown in the schedule of condition, and that your view was that, taking into account any reduction that might be caused by what the council would have had to pay, that would affect the selling price of the reversion to a like amount. Is that approximately right, or not?

A.—Yes, approximately that was the view I took then.”

C There was, therefore, evidence of diminution in value given by the surveyors on both sides.

I have been interested in the discussions on the law which have taken place, but it is first essential to ascertain the facts. There was evidence on which the learned judge was asked to come to a conclusion. He has, as I think properly, said that before the termination of the lease some work had been done by the requisitioning authority to effect some of the repairs which ought to have been effected by the tenant or his predecessor in title or both. He assessed the amount of the work so done at the sum of £150. The tenant had already paid something on account of structural repairs which were necessary, and the learned judge deducted both those sums from the £585 and gave judgment for the difference. I think that that was right. It has been said that he ought to have taken into consideration things which were done by the requisitioning authority after the termination of the lease and before the date of the hearing, and that he must always bear in mind the fact that this property was requisitioned. With regard to the first of those propositions I thought at one time that the tenant ought not to be asked to pay for the outside painting, for instance, which was done by the requisitioning authority after the expiration of the lease but before the case was heard. That was a sum of £39, and it may well be that, if that outside painting ought to have been done long before it was in fact done, the damage to the property had already taken place, because the object of painting is to avoid damage to property. On the whole, I do not think it right to say that anything should be done with regard to that one item, particularly as it has not been raised as an individual item by the tenant's counsel. As to the suggestion that the learned judge ought to bear in mind that this property was requisitioned, I agree that he should. I think that he did. The evidence of the valuer was based on that, and it is on that evidence that the learned judge gave judgment.

This case was heard on Oct. 26 and 27, 1949, and one of the authorities to which we were referred, *Landeau v. Marchbank* (12), was before the same learned judge in June, 1948, his judgment being given in May, 1949. In that case the judge decided that, although there was evidence of lack of repair, in the circumstances the landlord had not proved diminution in the value of the reversion, and so he gave judgment for only nominal damages. In the course of his judgment in *Landeau v. Marchbank* (12), LYNKEY, J., said ([1949] 2 All E.R. 175):

“It seems to me that . . . the fact that repairs are necessary is not in itself even *prima facie* evidence of damage to the value of the reversion.



In certain circumstances it may be an important factor, but of itself the fact that a certain amount of repair needs to be done does not, in my view, necessarily mean that there is damage to the reversion."

I agree with that judgment, except that in place of the words "even *prima facie*" there ought to be placed the word "conclusive." Evidence of lack of repair is not conclusive evidence of damage to the value of the reversion, but it may well be, and is generally held to be, some *prima facie* evidence of that damage. My reason for referring to this judgment is to show that the judge had the right test before him earlier in the year in *Landeau v. Marchbank* (12) and that he was not coming, in any sense, anew to the problem when he had before him the present case. In one case he decided that there was no evidence of diminution in value of the reversion, but in the case under appeal he had before him, as he found, evidence on both sides that there was diminution in value of the reversion. That being so, it was for him to say, on that evidence, how much that was, and he was satisfied that it was more than the cost of the repairs which he held ought to have been done under the covenant. In my view, the learned judge approached the question from the proper angle and he decided it on the evidence before him.

BUCKNILL, L.J. : I also agree.

*Appeal dismissed with costs.*

Solicitors : *Woodham Smith, Borradaile & Martin* (for the tenant); *Withers & Co.* (for the landlord).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

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*Affirmed on different grounds. H.L.*  
[1951] 2 All E.R. 278.

## FALMOUTH BOAT CONSTRUCTION, LTD. v. HOWELL.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.JJ.), January 31, February 1, 10, 1950.]

*Ship—Repairs—Licence—Need to be in writing—Oral permission given by Admiralty licensing officer—Legality—Restriction of Repairs of Ships Order, 1940 (S.R. & O., 1940, No. 142), art. 1.*

By the Restriction of Repairs of Ships Order, 1940 (S.R. & O., 1940, No. 142), art. 1, the Admiralty, in pursuance of powers conferred on them by reg. 55 (1) of the Defence (General) Regulations, 1939, ordered that no ship repairer was to carry out any repairs or alterations to ships "except under the authority of a licence granted by the Admiralty." On June 24, 1942, the Director of Merchant Shipbuilding and Repairs at the Admiralty sent a circular letter to all licensing officers as follows: "I understand that it has been made clear to you that when you are dealing with reliable ship repairers and owners with a good record you ought not to delay the putting in hand of obvious repairs, merely pending the actual issue of a licence."

In or about May, 1947, the defendant entered into a contract with the plaintiffs, a firm of ship repairers, for the conversion of a naval vessel into a passenger carrying vessel. Before they began any work on the ship, the plaintiffs applied to the licensing officer of the Admiralty for a licence, and from time to time that officer gave the plaintiffs verbal permission to proceed with the work, which they carried out under his inspection. On being presented with an account for work done, the defendant refused to pay on the ground that the work was illegal, it being alleged that the Restriction of Repairs of Ships Order, 1940, required a written licence and this had not been obtained.

HELD: (i) assuming that the Order postulated a written licence, it should not be treated as an Act of Parliament, and it was not even a Defence Regulation, but merely an Order made under the authority of a regulation which could be revoked or varied without any formality or publicity; and, applying the maxim *omnia praesumuntur rite esse acta*, in view of the circular letter of June 24, 1942, the court should presume that the Order had been varied so as to enable verbal permission for the work to be given.

*Jackson Stansfield & Sons v. Butterworth* ([1948] 2 All E.R. 558), distinguished.

(ii) on construction, the words "a licence granted by the Admiralty" were capable of meaning a verbal licence.

(iii) whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume; in the present case the plaintiffs, having acted on what they were told by the licensing officer, had not been guilty of an offence and they were entitled to claim payment for the work which they had carried out.

*Robertson v. Minister of Pensions* ([1948] 2 All E.R. 767), applied.

[EDITORIAL NOTE.—The Restriction of Repairs of Ships Order, 1940, art 1, has been revoked by the Restriction of Repairs of Ships Revocation Order, 1949 (S.I. 1949, No. 1766).]

Cases referred to:

(1) *Jackson Stansfield & Sons v. Butterworth*, [1948] 2 All E.R. 558; 112 J.P. 377; 2nd Digest Supp.

(2) *Bostel Bros., Ltd. v. Hurlock*, [1948] 2 All E.R. 312; [1949] 1 K.B. 74; [1948] L.J.R. 1846; 2nd Digest Supp.

(3) *Blackpool Corpn. v. Locker*, [1948] 1 All E.R. 85; [1948] 1 K.B. 349; [1948] L.J.R. 847; 112 J.P. 130; 2nd Digest Supp.

(4) *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767; [1949] 1 K.B. 227; [1949] L.J.R. 323.

(5) *Langton v. Hughes*, (1813), 1 M. & S. 593; 12 Digest 270, 221A.

(6) *Watcham v. A.-G. of East Africa Protectorate*, [1919] A.C. 533; 87 L.J.P.C. 150; 120 L.T. 258; 17 Digest 51, 557.

APPEAL by the plaintiffs from an order of His Honour SIR TOM EASTHAM, K.C., Official Referee, made on July 18, 1949, on a preliminary point.

The official referee found that certain work in connection with a ship, the property of the defendant, had been carried out by the plaintiffs without the written licence of the Admiralty, and was illegal and, therefore, that the plaintiffs could recover nothing from the defendant in respect of the work. The Court of Appeal now reversed this decision, holding that an oral licence was sufficient. The facts appear in the judgment of DENNING, L.J.

*Ryder Richardson and S. H. Noakes* for the plaintiffs.

*Havers, K.C., C. H. Duveen and W. I. Percival* for the defendant.

*Cur. adv. vult.*

Feb. 10. The following judgments were read.

DENNING, L.J.: The plaintiffs, Falmouth Boat Construction Ltd., are ship repairers. The defendant is a gentleman who, in December, 1946, bought a sea-going naval vessel, M.L.229. His intention was to convert it into a passenger carrying vessel. In or about May, 1947, he entrusted the ship repairers with the work. They have done a great deal of it. Their account amounts to nearly £7,000, of which they have only received £2,500 on account. They now claim to be paid the balance of £4,371 11s. 7d. The defendant disputes the claim on several grounds, but this court is only concerned with one of them.

It is the defence of illegality. The defendant says that the work was illegal because there was no written licence granted by the Admiralty. If this defence is good, it defeats the greater part of the claim, and so the official referee has taken the convenient course of hearing it as a preliminary issue. He has held that the defence is good. From that finding the ship repairers appeal to this court.

Before considering the legal point, it is as well to set out the relevant facts. There is at Falmouth a Board of Trade surveyor, named Mr. Thompson, who is not only the surveyor of ships under the Merchant Shipping Act, 1894, s. 724 (1), but was also at all material times the licensing officer for the Admiralty under the Orders restricting the repair of ships. He was, indeed, expressly authorised by the Admiralty to sign licences on their behalf. On Feb. 3, 1947, the plaintiffs, before they did any of the work on the ship, made written application to Mr. Thompson to grant them a licence for the work. Mr. Thompson told them that he could not grant a licence at that time because he was short of timber. The plaintiffs said that they had sufficient material in stock to carry on, and added that in any case there was a lot of stripping to do before materials were needed, and they asked Mr. Thompson if he had any objection to their carrying on in the meantime. He said that he had no objection and that he would give them a licence as soon as he had materials available. On the faith of what Mr. Thompson had told them, the plaintiffs got on with the work. They actually started in May, 1947. The work was all done under the eyes of Mr. Thompson and his assistant. Those gentlemen inspected it three or four times a week and gave oral permission for all that was done. In October, 1947, the plaintiffs needed materials. They wanted timber, and, bearing in mind what Mr. Thompson had told them, they made another written application for a licence. They filled in the printed application form with the words "to complete B.O.T. requirements for modified steam 3 certificate." Those words were not as precise as a lawyer could wish. The plaintiffs should have asked for a licence "to complete the alteration of the ship, such completion to be in accordance with the B.O.T. requirements for modified steam 3 certificate," but they were not lawyers. Nor was Mr. Thompson. They all took the application as covering the completion of the ship. It was more or less correct, because most of the work was, in fact, within the Board of Trade requirements, but there was a little of it which was not actually within those requirements. None of those concerned, however, noticed this defect in the application, and Mr. Thompson duly signed the printed form granting the application as asked. It was dated Oct. 11, 1947. Armed with this licence the plaintiffs were able to get the necessary materials and go on with the work. Mr. Thompson and his assistant still made their inspections and gave oral permission for all the work that was done. In January, 1948, for some reason with which we are not now concerned, the work on the ship ceased. The plaintiffs then brought this action claiming to be paid for what they had done, but the official referee has held that nearly the whole of it was illegal with the result that they are entitled to practically nothing.

This unjust result is reached by a logic which looks at first sight to be unanswerable, and I can well understand that the official referee felt bound to give effect to it. These are the steps in it: (i) by the Restriction of Repairs of Ships Order, 1940, art. 1, the Admiralty, in pursuance of powers conferred on them by reg. 55 (1) of the Defence (General) Regulations, 1939, ordered that no ship repairer was to carry out any repairs or alterations to ships "except under the authority of a licence granted by the Admiralty." It is said that under that order, for any work to be lawful, there must be a written licence issued before the work is done, and that an oral permission, such as that given by Mr. Thompson, is not only ineffective in itself, but it also cannot be made good by a subsequent licence issued retrospectively. This argument is supported by a decision of this court on the wording of reg. 56A of the Defence (General)



Regulations which is said to be indistinguishable: see *Jackson Stansfield & Sons v. Butterworth* (1). Hence it is said that all the work done by the plaintiffs with Mr. Thompson's oral permission before the written licence was issued on Oct. 11, 1947, amounting to £4,400 worth, was illegal. (ii) It is said that most of the subsequent work also is illegal because the written licence was on a printed form which contained a standard condition saying that "this licence shall automatically determine if any unauthorised alterations or repairs are carried out." It is said that, shortly after the licence was issued, a small amount of work was done which was unauthorised because, although it was orally permitted by Mr. Thompson to complete the ship, it did not come within the precise words of the application "to complete Board of Trade requirements." Hence it is said that by reason of this standard condition, the licence was there and then automatically determined, and that all the work done thereafter, amounting to £2,300 worth, was illegal, even though nearly all of it was, in fact, done to complete B.O.T. requirements. (iii) It is said that the effect of this illegality is that the plaintiffs can recover nothing for any of the illegal work: see *Bostel Bros. Ltd. v. Hurlock* (2). It is perforce conceded by the defendant that the plaintiffs can keep the £2,500 which they have been paid on account, but that still leaves them over £4,000 out of pocket. The essence of all that argument is that a written licence was absolutely necessary, that no oral permission could take its place, nor would any of its terms or conditions be waived by any oral dispensation. The steps by which that result is reached are logical enough, but these courts have never been disposed to give effect to a ruthless logic if it means that injustice will thereby be done. So it was sought to strengthen the logic by the argument of expediency.

Resort was had to the observations of SCOTT, L.J. ([1948] 2 All E.R. 560) in *Jackson Stansfield v. Butterworth* (1), and it was said that this court would be quite justified in ignoring the oral permission given by the licensing officer because

"... the effective enforcement of the licensing system could never be achieved except by means of written licences."

Further that

"If the licence were merely an unrecorded oral permission, the certainty needed for a criminal prosecution would not be a practical possibility."

Whatever the merits of that argument under the Building Regulations—and I confess that the view of JENKINS, J., appeals much to me—the argument has no merits whatever under the ship repairing Order because there is overwhelming evidence that it was administratively very convenient—indeed, almost essential—that the licensing officers should be able to give oral permission for work to be done before they issued a written licence. The reason was because it took some time to get out a licence, and it would be quite intolerable that ships in need of repair should be held up in port idle and waiting for a licence when it was most important to get on with the work. The Admiralty themselves acted on this sensible view. On June 24, 1942, the Director of Merchant Ship Shipbuilding and Repairs writing from the Admiralty sent a circular letter to all licensing officers in which he said:

"I understand that it has been made clear to you that when you are dealing with reliable ship repairers and owners with a good record you ought not to delay the putting in hand of obvious repairs, merely pending the actual issue of a licence."

Mr. Thompson said that he had granted permission in that way ever since the beginning of the war. Let me quote his actual words:

"I was the only licensing officer at Falmouth. Sometimes I had as many as twenty to twenty-five ships in for repair at one time and it was almost

impossible to deal with the licences immediately because I had to go through the ships repair list and cut out what I thought was unnecessary to get the ship in operation. Therefore, it was quite a fairly common practice with me to defer the issue of the licence until time permitted for the licence to be issued. In the meantime, I would give permission for the work to carry on. If I had not done that, ships would have had to spend rather longer in port than was necessary."

That shows the way in which the Admiralty and their licensing officers acted. To avoid delay to ships, they gave oral permission for the work and followed it up later by a written licence. It was a very sensible thing to do. Yet we are asked to say it was illegal and that the plaintiffs were guilty of a criminal offence when all that they did was to do as they were told by the licensing officer. If they were guilty, then surely the Admiralty and their licensing officer were even more guilty for leading them astray. The truth is, in my opinion, that none of them was guilty of a criminal offence at all. Let me explain why. It really depends on the nature of the Order issued by the Admiralty in 1940. That was not an Act of Parliament and should not be treated as such, nor was it even a Defence Regulation such as reg. 56A which was considered by this court in the *Jackson Stansfield* case (1). It was merely an Order made by the Admiralty under the authority of the regulation. As such it was not discussed in Parliament or laid on the table of the House. It was not even necessary that it should be made public: see *Blackpool Corpn. v. Locker* (3). It could be made without any formality or publicity and—this is the point—it could be revoked or varied likewise: see Defence (General) Regulations, reg. 98. Assuming, therefore, as I am prepared to assume, that the original Order postulated a licence in writing, nevertheless, it could be varied without any formality or publicity. The circular letter of June 24, 1942, is cogent evidence that it was so varied. That letter issued from the Admiralty and it showed clearly that licensing officers were authorised to grant oral permission for repairs pending the actual issue of a licence. It seems to me quite plain that that letter could not, or, at any rate, should not, have been circulated unless the original Order had been varied so as to enable oral permission to be given. In these circumstances in point of law I think that this court should presume that it had been so varied. If there ever was a case in which the maxim *omnia praesumuntur rite esse acta* should apply, it is this case, because licensing officers, ship repairers and shipowners have assumed throughout that oral permission could validly be given. Every reasonable presumption should be made to support their action rather than it should be held that all of them have over all these years been acting illegally.

Let me assume, however, that I am wrong about this and that we ought not to presume that the original order had been varied. Nevertheless, I decline to believe that the plaintiffs were guilty of any illegality. They acted on what they were told by the licensing officer. They did not know what Orders had actually been made by the Admiralty, or what variations had been made in them. They had no means of knowing the Orders, or, at any rate, they had no sure means, because the Admiralty was not bound to publish them. They could only rely on what they were told by the licensing officer. Can it be seriously suggested, that, having relied on him, they have been guilty of an offence? In my judgment, there is a principle of law which protects them from such an injustice. It is a principle of particular importance in these days when the officers of government departments are given much authority by Orders and circulars which are not available to the public. The principle is this: Whenever government officers, in their dealings with a subject, take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume. He does not know, and cannot be expected to know, the limits of their authority and he ought not to suffer if they exceed it. That was the principle which I applied in *Robertson v. Minister of Pensions* (4)

and it is applicable in the present case also. It was not canvassed in *Jackson Stansfield v. Butterworth* (1) and that case is, therefore, no obstacle to its adoption.

In my judgment, therefore, the plaintiffs were guilty of no illegality, and their claim is not to be defeated on that account. The appeal should be allowed.

**SINGLETON, L.J.:** I agree that this appeal should be allowed. It is right that I should give my reasons for coming to that conclusion in view of the fact that we are differing from the learned official referee who took great trouble with the case and who stated his findings with admirable clarity.

The question before the court arises from the defendant's plea in the amended defence that the repairs or alterations executed by the plaintiffs before Oct. 11, 1947, were illegal, and that, consequently, the plaintiffs are not entitled to recover the cost of them from the defendant. This plea is based on the principle enunciated by LORD ELLENBOROUGH, C.J., in *Langton v. Hughes* (5) (1 M. & S. 593, 596) and stated by SOMERVELL, L.J. ([1948] 2 All E.R. 313) in *Bostel Bros., Ltd. v. Hurlock* (2):

“What is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action.”

The relevant Order is the Restriction of Repairs of Ships Order, 1940 (S.R. & O., 1940, No. 142), art. 1. The defendant says that the plaintiffs had no licence to do the repairs or alterations at the time they (or the greater part of them) were done, and that the doing of them without a licence granted by the Admiralty was in contravention of the Order. It is for the defendant to establish this, and he seeks to do so by saying that the word “licence” in the Order means “written licence,” and that it is common ground that the plaintiff did not have a written licence until Oct. 11, 1947, whereas work to the value of £4,000, or thereabouts, was done before that date. Thus the question depends on whether “licence” in the Order ought to be read, or must be read, as meaning “written licence.” *Prima facie* he who sets up that a criminal offence has been committed must prove it, and yet I do not think that anything really turns on onus of proof in this case. At the same time that question of construction cannot be determined without regard to the surrounding circumstances and to the exigencies of the times at the date of the Order. Perhaps I should say that one is entitled to bear those matters in mind if there be ambiguity, as I think there is: see *Watcham v. A.-G. of East Africa Protectorate* (6).

On behalf of the defendant reliance was placed on the decision of this court in *Jackson Stansfield & Sons v. Butterworth* (1) in which the court (by a majority) held that the words “a licence granted by a Minister” in reg. 56A (2) meant a licence in writing, and it was submitted that that decision covered the present case. It is right to point out that JENKINS, J., in the course of a dissenting judgment, said that he was unable to find anything in reg. 56A which constrained him to construe para. (2) of that regulation as requiring that the licence must be in writing. He thought that the regulation should be construed strictly in favour of the subject. Regulation 56A deals with the control of building operations and, as was pointed out by counsel for the plaintiff, it provides a complete code, and, in particular, it gives an accused person a defence under para. (6) (a) if he had reasonable grounds for believing that the cost would not exceed the amount stated, and under para. (6) (b) if the acts done without authorisation or licence were urgently necessary and were done in circumstances of emergency which rendered it impracticable to obtain authorisation thereof or a licence therefor. There is nothing of this kind in the Order now under consideration, which was made by virtue of reg. 55, which provides that Orders may be made for the general control of industry. And how different is the subject-matter. Regulation 56A, as I have said, provides a code for the control of building operations, and building operations are seldom a matter of extreme urgency. Ship repairs, on the other hand, often must be done immediately



sometimes to keep a ship afloat, and in war time because of the urgent need for all available shipping, and, again, no one can tell the extent of the repair necessary until he has commenced the repairs. In such cases it would be hampering the efforts of those who were endeavouring to keep shipping afloat and active to say that no repairs could be done by ship repairers without a written licence. It may well be possible for the ship repairer to see, or to speak by telephone to, the proper authority (in this case the ship surveyor) and to obtain verbal authority or licence to do what is necessary, it being understood that the surveyor would give a written licence at some later stage after he had inspected the ship. Only thus was the Order workable, as I think. If I am right in this view, that which is given in the first instance in such a case is an oral licence. In the normal case it is followed by a written licence, which is important for purposes of record, if for no other purpose. If it were otherwise, the ship repairer would be committing an offence every time he did a small repair to keep a ship afloat unless he had a licence in writing which, maybe, could not be obtained in time to be of use, and which the surveyor might refuse to give until he had inspected. The Order ought not to be read in that way unless it is necessary so to read it. Moreover, the practice is shown by the letter from the Admiralty of June 22, 1942, signed by the Director of Merchant Shipbuilding and Repairs. Paragraph 3 of that letter reads:

"On the other hand, I understand that it has been made clear to you that where you are dealing with reliable ship repairers and owners with a good record you ought not to delay the putting in hand of obvious repairs merely pending the actual issue of a licence."

This I take to mean: You may give an oral licence to reliable ship repairers (as the plaintiffs were) pending the giving of a written licence. To read it in any other way would be equivalent to saying that the department encouraged the licensing officer to aid and abet the ship repairers in committing offences against the Order. I do not see that on this wholly different subject-matter and under a different Order and regulation we are bound by the decision in *Jackson Stansfield & Sons v. Butterworth* (1). I respectfully agree with ASQUITH, L.J. ([1948] 2 All E.R. 566) that normally, when one is considering a licence granted by the Minister (or by the Admiralty) one thinks of a written instrument, but that does not mean that an oral licence can never be a licence within the meaning of the word "licence" in a statutory Order. This case must be decided on a fair view of the Order itself, regard being had to that with which it was dealing.

Everything in the way of alterations or repairs done to the ship was done under the eye of Mr. Thompson, a surveyor of ships under s. 724 (1) of the Merchant Shipping Act, 1894, and the licensing authority under the Admiralty. Incidentally, Mr. Thompson is a Board of Trade surveyor, and at the time he was also the Ministry of Transport's senior surveyor at Falmouth. He said in evidence that he inspected the work from time to time and that no unauthorised work was done. There were no unauthorised repairs. In other words, he had given an oral licence for all that was done. Written application had been made on Form M.S.4 on Feb. 3, 1947. Some £4,000 worth of work was done under oral licences. A further application to complete Board of Trade requirements for modified steam 3 certificate was made on Oct. 7, 1947, and this was authorised, and written licence given on Oct. 11, 1947. In view of the evidence, I do not think that it can be shown that the repairs, etc., were carried out without a licence granted by the Admiralty. The oral licences given from time to time were sufficient. In considering the authority of Mr. Thompson one must look at the letter of June 22, 1942, from the department of the Admiralty dealing with these matters, as well as at the documents referred to by the official referee. Certainly I am not prepared to say that there was any contravention of the Order by the plaintiffs. It is interesting to consider what would be the direction to the jury if, on these facts, there was a committal for trial. Counsel for the

defendant submitted that it would be the duty of the judge to direct the jury that "licence" in the order means "written licence," and, it being admitted that a great part of the repairs were done without a written licence having been first obtained, it would be the duty of the judge to direct the jury to convict. I am not disposed to take that view. I regard the word "licence" in the Order as capable of meaning either a written or an oral licence. I think it would be the duty of the judge in such a case to point out to the jury that though "a licence granted by the Admiralty" would normally connote a written instrument, it need not of necessity bear that meaning if it was capable of another meaning, and if so to read it would make the carrying out of urgent repairs in war time impossible without committing a breach of the Order. After all, common sense must apply to construction, and, if there are two possible meanings of the word, the one which makes sense of the Order and renders its working practically possible should be given. In other words, I do not think the judge would be right if he directed the jury to convict. It would be for them to say whether there was a licence in fact; and I have no doubt as to what their answer would be—indeed, it is more than likely that the case would not get so far. It is impossible to think of the Admiralty prosecuting in circumstances such as these. The defendant, in an effort to escape paying for work which has been done for him, sets up a plea of illegality on the part of the plaintiffs. For the reasons I have given, I consider that is a bad plea, and I would allow the appeal of the plaintiffs.

BUCKNILL, L.J.: I agree that this appeal should be allowed. The main question at issue seems to me to lie in a small compass, *viz.*: Did the plaintiffs commit an unlawful act when they started work on the ship in question for the purpose of altering her from an armed motor vessel to a passenger ship? I need not set out the facts which have been fully stated by DENNING, L.J., in his judgment. The result of the conversations between the plaintiffs and Mr. Thompson, the licensing officer, was, to quote from the judgment of the official referee:

"They, the plaintiffs, proceeded with the work on the oral permission of Mr. Thompson, the licensing officer. Mr. Thompson and his assistant inspected the work as it was being carried out, and if any work was being done which was not permitted, they could and would have stopped it. They inspected the work three or four times a week. In their official capacity Mr. Thompson and his assistant gave the plaintiffs instructions to carry out certain work which the Board of Trade would require, and the plaintiffs complied with their instructions."

Can it be said in these circumstances that this work, which was done by the plaintiffs before Oct. 11, 1947, when the written licence was granted by Mr. Thompson, was illegal because it contravened the Order issued by the Lords Commissioners of the Admiralty on Feb. 1, 1940?

The answer to that question seems to me to turn on the ordinary and natural meaning which a man, whose business is to repair, alter or dry dock ships, would give to the words of para. 1 of the Order—"a licence granted by the Admiralty?" In my opinion, these words are clearly capable of including a verbal licence, and ought not to be construed as limited to a licence set out in a written, typed or printed document. I cannot think that the framers of the Order intended these words to have such limitation. Take, for instance, the very simple case of the dry docking of a ship. This is a task which often can only be done at high water, that is to say, once in every twelve hours. Dry docking a ship does not involve the use of any material other than the temporary use of the appliances of the dry dock, or of much labour. It may be that the ship is to be dry docked solely for inspection of her bottom, and will only stay in the dry dock for one tide. It may be that the dry docking is a matter of urgency. The suggestion that

the Order was intended to impose on the owners or users of the dry dock the duty of obtaining a formal licence in writing to dry dock the ship, and that a verbal permission to dry dock her from the representative of the Admiralty was invalid, and that a man acting on such a verbal permission was doing something which might amount to a criminal offence, seems to me very unreasonable. At the time when the Order was made, it was just as necessary that essential work to ships should not be impeded by the necessity of obtaining formal documents as it was necessary that all shipyard facilities should be available for such work on ships as would promote the war effort of the country.

The official referee, when dealing with the second point, made on behalf of the defendant, *viz.*, that the licence was automatically determined when the first of the unauthorised repairs, alterations, or dry docking was carried out, said in his judgment:

“If the licensing officer can authorise repairs, alterations or dry docking by giving oral permission for such work to be done, then there were no unauthorised repairs and the licence was not automatically determined.”

A little earlier in his judgment he had said:

“I am satisfied that he (the licensing officer) gave oral permission to the plaintiffs to do all the work.”

I think that in this case also an oral permission or licence was sufficient to comply with the Order. For these reasons I think that the defendant has failed to establish the plea in his amended defence that the work done by the plaintiffs for the defendant before Oct. 11, 1947, was illegal and/or irrecoverable in law, and that so much of the claim as related to repairs and/or alterations as were carried out after Oct. 11, 1947, were illegal and/or irrecoverable in law. I have had the opportunity of reading the judgments of SINGLETON and DENNING, L.JJ., and I respectfully agree with the reasoning therein set out whereby the present case is distinguished from *Jackson Stansfield v. Butterworth* (1) and the different nature of the two Orders is pointed out.

*Appeal allowed with costs.*

Solicitors: *Layton & Co.* (for the plaintiffs); *Theodore Goddard & Co.* (for the defendant).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

## R. v. CLARKE.

[COURT OF CRIMINAL APPEAL (Humphreys, Hilbery and Sellers, JJ.), February 6, 13, 1950.]

*Criminal Law—Suspected person—Previous convictions—Character not known to police before arrest—Vagrancy Act, 1824 (c. 83), s. 4.*

A person who is proved to have frequented or loitered about a “place” within the meaning of s. 4 of the Vagrancy Act, 1824, with intent to commit a felony and to have been previously convicted can be properly described as a “suspected person” within the section although the police officers who give evidence of his frequenting or loitering with that intent and who arrested him were then unaware of the previous convictions.

[AS TO SUSPECTED PERSONS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 440-442, para. 790; and FOR CASES, see DIGEST, Vol. 37, pp. 363-365, Nos. 1651-1662 and Digest Supp.]



Cases referred to:

- (1) *Ledwith v. Roberts*, [1936] 3 All E.R. 570 ; [1937] 1 K.B. 232 ; 106 L.J.K.B. 20 ; 155 L.T. 602 ; 101 J.P. 23 ; Digest Supp.  
(2) *R. v. Fairbairn*, [1949] 2 K.B. 690.

APPEAL against conviction.

A The appellant was convicted at Middlesex Quarter Sessions on an indictment which charged him under s. 23 (2) of the Firearms Act, 1937, with the offence specified in that section. The appeal was dismissed. The facts appear in the judgment of the court.

*Havers, K.C.*, and *Michael Havers* for the appellant.

*J. M. Griffith-Jones* for the Crown.

*Cur. adv. vult.*

B Feb. 13. HUMPHREYS, J., delivered the following judgment of the court. The appellant was convicted at Middlesex Quarter Sessions and appeals from that conviction by virtue of a certificate granted by the deputy chairman who presided at his trial. The indictment contained one count, charging the appellant under s. 23 (2) of the Firearms Act, 1937, with the composite offence created by that section which provides, *inter alia*, that a person who has in his possession any imitation firearm at the time of his committing an offence referred to in sched. III to the Act shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence and liable to imprisonment for a term not exceeding seven years in addition to any penalty to which he may be sentenced for the offence mentioned in the schedule. One of the offences in sched. III is an offence under the provisions of s. 4 of the Vagrancy Act, D 1824, as amended by s. 15 of the Prevention of Crimes Act, 1871, and s. 7 of the Penal Servitude Act, 1891. Section 4 provides that:

E " . . . every suspected person or reputed thief, frequenting or loitering about any street, highway, or avenue leading thereto, or any place of public resort, . . . with intent to commit felony . . . shall be deemed a rogue and vagabond . . . "

By s. 6 such a person may be arrested without warrant.

The sole point raised by this case is whether a person who loiters about such a place with intent to commit a felony can be properly described as a "suspected person" because he has been previously convicted of theft or dishonesty although the police officers who give evidence of his loitering with F that intent are unaware of those previous convictions. The appellant was kept under observation by two police officers for some twenty minutes at about 2 a.m. on Nov. 6, 1949, in different parts of the Great West Road, London. He was seen to be loitering in and about various streets in circumstances which satisfied the jury that he was loitering with intent to commit a felony. He was arrested, and an imitation firearm was found in his G possession. In order to establish that he was a suspected person it was proposed to prove that on Aug. 17, 1942, he had been convicted at Leicester City Quarter Sessions of larceny, that he then admitted twelve other cases of larceny which he asked to be taken into consideration, and that he was sentenced to three years' Borstal detention, and, further, that on July 22, 1948, at the same court, he was convicted of shopbreaking and stealing and was sentenced to H eighteen months' imprisonment. Those convictions were unknown to the police officers who watched him on Nov. 6, 1949. Before any witness was called, the question of the admissibility of the evidence of the convictions at Leicester was discussed in the absence of the jury, counsel for the appellant contending that it was inadmissible.

The evidence objected to was plainly admissible on this charge as evidence of intent to commit a felony, since by s. 15 of the Prevention of Crimes Act, 1871, it is provided that

" . . . in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved . . . it appears . . . that his intent was to commit a felony."

It was argued for the appellant on his trial and before us that such evidence could not show that he was a suspected person within the meaning of the Vagrancy Act, 1824, s. 4, unless the previous convictions were known to the police officers who arrested him. It was, apparently, admitted by counsel for the prosecution that he could not rely on the evidence of the police as proving antecedent acts of the appellant before the time when they, being satisfied that he was loitering with intent, arrested him. It would have been better if that admission had not been made before the evidence had been called, because, in truth, when the evidence came to be called, the police officers were able to give in evidence certain facts which might well have been found by the jury to be proof of antecedent acts showing the appellant's purpose. Nor was it necessary that the argument should proceed in the absence of the jury, since the real objection was that the evidence, when given, did not create a *prima facie* case on which the jury could find that the appellant was a suspected person. However, as the case went to the jury on the basis that the sole ground for alleging the appellant to be a suspected person depended on his previous convictions, the appeal was argued on that footing.

The words "suspected person" in s. 4 of the Vagrancy Act, 1824, and their meaning have been discussed in many cases, to most of which we think it unnecessary to refer. No case would seem to have been reported which has raised this point, but, in our opinion, there is nothing in the Act or in any of the authorities to which our attention has been drawn to suggest that the previous convictions must be known to the arresting officers in order to prove that as the result of those convictions the person convicted became a suspected person. Any such decision would, in our view, tend to make the provisions of s. 4 useless since a thief might change his venue and the places where he chose to loiter with sufficient frequency to make it unlikely that the local police officers would recognise him or know anything about him. Counsel for the appellant relied on *Ledwith v. Roberts* (1), the facts of which were very different from those in this case. That was an appeal from a decision of the presiding judge of the Liverpool Court of Passage who had held that the facts alleged in the defence to an action for wrongful imprisonment, even if proved, would afford no defence in law to the action. No evidence was called and the case was decided on the basis that the allegations in the defence were assumed to be true. The case, however, is, in our opinion, the leading decision on the question of the meaning and effect of the words "suspected person" in s. 4. GREER, L.J., in his judgment, said ([1936] 3 All E.R. 575):

"In my judgment . . . the special powers given to constables are confined to a class of persons described as 'suspected persons' or 'reputed thieves.' They can only be apprehended without warrant if they already are at the time of their arrest and imprisonment suspected persons or reputed thieves. I do not think this means that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant . . . I think 'suspected person' means a person who has acquired the character of a suspect . . . In my judgment, the powers of a constable to arrest without warrant are confined to cases in which he finds frequenting or loitering, etc., a person who has by his previous conduct become a suspected person."

That case was followed in 1949 by *R. v. Fairbairn* (2), the headnote of which is as follows ([1949] 2 K.B. 690):

“Evidence of a previous conviction is admissible to establish that a person who is arrested under s. 4 of the Vagrancy Act, 1824, on a charge of loitering with intent to commit a felony, is a ‘suspected person’ within the meaning of the section at the time of his arrest.”

A LORD GODDARD, C.J., in delivering the judgment of the court, discussed many of the cases, including *Ledwith v. Roberts* (1). It is true that in that particular case the evidence of the police officers was that they knew the two persons who were arrested as convicted persons, but the judgment of the court, in our opinion, clearly did not proceed on the ground of their knowledge, and there are many passages in the judgment of LORD GODDARD, C.J., which are quite inconsistent with any such view. Dealing with *Ledwith v. Roberts* (1), he observed that that case laid down that the conduct or character of the people concerned must be such that they come fairly within the category of B being suspected persons, and added ([1949] 2 K.B. 694):

“If people who have been previously convicted of theft are found loitering in the streets and their conduct is such as to give rise to a proper and reasonable suspicion that they are there for the intention of committing a felony, they are guilty of an offence under the Vagrancy Act, 1824, and can be dealt with as suspected persons loitering with intent C to commit a felony.”

After observing that SCOTT, L.J., in *Ledwith v. Roberts* (1) obviously had in mind the fact that it would be possible to show that a person was a suspected person by proving his previous record and character, LORD GODDARD, C.J., added (*ibid.* 694):

D “... as a matter of common sense that must be so. If a man is found loitering in the street and acting in a suspicious manner and it is also found that he has had half a dozen previous convictions, obviously he can rightly be regarded as a suspected person by reason of his previous convictions.”

E Later in his judgment there is the following expression of opinion (*ibid.*, 695):

“... it must, we think, be obvious that the prosecution must be allowed to prove a man’s previous convictions, to show that he was a suspected person. It is those previous convictions that make him a suspected person and previous convictions can always be proved if they are relevant to F the charge before the court.”

No case was brought to our attention in which any judge has expressed any view as to knowledge on the part of police officers of the past character of the accused person being required. In our opinion, the two cases cited show that such knowledge on the part of the police is irrelevant, and, certainly, is not G essential. For those reasons this appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant) ; *Solicitor to the Metropolitan Police* (for the Crown).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

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"SUNNUCKS v. SMITH. SAME v. SAME.

[CHANCERY DIVISION (Vaisey, J.), February 16, 1950.]

*Costs—Counsel's fees—Fee on appeal—Allowance of fee less than that allowed at first instance.*

In taxing the costs of an action at first instance a taxing master allowed a fee of thirty guineas on the brief of counsel for the defendant. Counsel's brief on the appeal (which was by the plaintiff) was also marked thirty guineas, and the taxing master reduced the fee to twenty guineas. The defendant objected to the reduction, and, in overruling the objection, the taxing master gave as his reason " . . . I consider the work counsel had to do did not merit more. Counsel appeared against [the plaintiff] previously always with success and there was no expectation that she would win in the Court of Appeal." On a summons to review taxation,

**HELD :** while there were exceptions to the rule that counsel's fee should be the same in the Court of Appeal as at first instance, there was no indication in this case that the taxing master had found valid grounds for regarding counsel's work in the Court of Appeal as of less value than that in the court below, and, therefore, the *prima facie* rule ought to be applied and the brief fee restored.

*Sturgis v. Morse* (No. 2) (1859) (33 L.T.O.S. 5), applied.

[AS TO ALLOWANCE OF FEES ON TAXATION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 548-554, paras. 753-763 ; and FOR CASES, see DIGEST, Practice, pp. 932-940, Nos. 4722-4807.]

Case referred to:

(1) *Sturgis v. Morse* (No. 2), (1859), 26 Beav. 562; 33 L.T.O.S. 5.

SUMMONSES to review taxation.

By the first of these summonses the plaintiff in an action (against whom costs were awarded at first instance and on appeal) *inter alia* asked that the brief fee for the hearing at first instance of counsel for the defendant be reduced. By the second summons the defendant asked that he be allowed the full amount of the fee marked on his counsel's brief on appeal, which fee the taxing master had reduced. VAISEY, J., dismissed the first summons, but accepted the defendant's objection on the second.

The plaintiff appeared in person.

W. F. Waite for the defendant.

VAISEY, J. (having dismissed the summons issued by the plaintiff to review the taxation of the costs of the action by reducing the fee payable to counsel for the defendant): In the action with which these summonses are concerned, there were originally two defendants, the surviving defendant being the respondent in the Court of Appeal. On the taxation of the costs of the appeal the master reduced the fee of counsel for this defendant from thirty guineas to twenty guineas. The defendant objects to the reduction, and says that it is wrongful because of the principle in *Sturgis v. Morse* (No. 2) (1). That case, undoubtedly, does lay down that, *prima facie*, counsel is entitled to the same fee in the Court of Appeal as he was entitled to be paid in the court below. The taxing master had disallowed £44 out of a fee of £100 to leading counsel and £23 out of a fee of £77 to junior counsel, although the larger sums, amounting to £177, were allowed by the master on the original hearing of the cause. The taxing master stated the grounds and reasons for his decision at length. He said (26 Beav. 563):

"Firstly. Because the fees to counsel on the original hearing were given in respect of the whole case, as it then stood, between the plaintiff and the whole of the defendants, and as the appeal was the appeal of

one defendant only, whose interest was separate and distinct from all the rest, and the other defendants could not be heard except to support the decree, I arrived at the conclusion, after having carefully looked through the briefs, that the answers of all the other defendants (except that of the defendant Ling, which was read by order as an affidavit), and the evidence and exhibits used on the part of those defendants, were not necessary for the plaintiff's counsel on the hearing of the defendant Morse's appeal ; and such answers and evidence, amounting to upwards of two hundred sheets, I feel that the objection taken to the amount of the fees given was a valid one, and I accordingly reduced those fees in proportion to what I considered might and ought to have been the briefs given to counsel on the appeal. Secondly. I consider the understanding, that there has existed a rule, that counsel are entitled to the same fees on the argument of an appeal as were given on the original hearing, can only have been applicable to a period when a year and upwards elapsed between the two hearings, and could then only apply to cases where the same briefs were necessarily given. Whereas, in the present instance, the appeal was heard in the term immediately following that in which the decree was pronounced, a circumstance in itself, in my judgment, a ground for giving less fees than those given on the original hearing, as counsel would not have the labour of making themselves masters of the case as in the first instance."

SIR JOHN ROMILLY, M.R., in his judgment, said (*ibid.* 565):

"I think the master has, through misapprehension, come to a wrong conclusion. The master seems to have thought that the fees paid to the plaintiff's counsel on the original hearing were proper and has allowed them. The principal defendant appealed from the whole decree, I call it the whole decree, because, except a small portion, it was so, and the whole matter was really before the Court of Appeal. The master has disallowed a portion of the fees paid with the briefs on the appeal, on the ground that it was 'the appeal of one defendant only, whose interest was separate and distinct from all the rest, and that the answers of the other defendants were not necessary for the plaintiffs' counsel on the appeal.' But I apprehend that evidence given for any defendant is evidence for the whole cause, and that the plaintiff may make use of it both in argument or comment. I have known it done repeatedly, and I think that any evidence in the cause may be made use of by the plaintiffs against the defendants, and by the defendants against the plaintiffs. That being so, I do not see how the master could come to a right conclusion in determining that any part of the evidence was unnecessary without hearing the cause itself. Where there is an appeal from a small portion of a decree, as in respect of parties or as to a trifling matter, I can understand that the fees to counsel may be much less than on the original hearing, and I have no doubt that this would be a matter of *quantum* quite in the discretion of the taxing master. But as he states the rule to be this, *viz.*, to allow the same fee on an appeal from whole decree as on the original hearing, I do not see how he could decide that a portion of the brief which was necessary on the first hearing was unnecessary on the appeal, without hearing the cause ; nor do I see how the solicitor could take upon himself to decide that any part of the original brief might prudently be omitted from the brief on the appeal. The master, as a second reason, attributes something to the rapidity with which the appeal was brought to a hearing, and thinks that therefore there would be less labour to counsel to master the case. I dissent from that view of the case also, and as I disagree with the master, I must either allow the fee to counsel, or direct a review of the taxation."

I think it is going much too far to say there is a universal rule that the fee in the Court of Appeal should be the same as in the court below. In my view, the matter has to be looked at to see whether there were the same issues and the same matters to go into in the Court of Appeal as there were in the court below. I have not been able to do that here. When I look at the master's note on the objection to the taxation, the objection being that there is such a rule of uniformity between the briefs in the two courts, I find some difficulty in following it. He says:

"In taxing the bill on the appeal, I reduce counsel's fees to twenty guineas on the ground that I consider the work counsel had to do did not merit more. Counsel appeared against Mrs. Sunnucks previously always with success and there was no expectation that she would win in the Court of Appeal."

If the master had stopped at the words "did not merit more," I think I should have had great difficulty in interfering with his discretion, but when he gives as a further reason that counsel appeared against the same defendant on previous occasions and goes on further to allege as some ground for his decision that the lady's appeal was, apparently, hopeless, I find some difficulty in following it.

Having regard to the grounds stated by the taxing master, I think that the general rule that the fee should be the same ought to prevail. I have seen no reason whatever for reducing the fee in the court below. This was a case brought against a solicitor accusing him of conduct the proof of which would have been prejudicial to his career, and I think he was entitled to have an experienced counsel to protect his interests. A fee of thirty guineas in the Court of Appeal does not seem to be too much. Why should it be less in the Court of Appeal than in the court below? If the master had said that the issues were greatly limited or that a smaller fee would be adequate to cover the argument as compared with that in the court below, I am inclined to think he would be justified in saying a lower fee should be allowed, but he does not say that. He says that counsel had had previous experience of this plaintiff, that he had always been successful, and that her appeal was hopeless. None of those grounds seems to me to be in the least bit relevant. I have known appeals to succeed unexpectedly, and it is all the more advisable for counsel, presented with the brief in a case in which his success seems certain, to take particular care not to be taken by surprise.

It seems to me very difficult indeed on these grounds to suggest that the fee in the Court of Appeal should be any less than the fee in the court below, and I propose to restore the fee of thirty guineas which was marked on the brief. I wish to make it perfectly clear for the master's guidance that, although there is a *prima facie* rule that the fee should be the same in both courts, it is a rule to which there may be many exceptions, and, if the taxing master finds that there are valid grounds for regarding the work as of less value in the Court of Appeal than in the court below, it is open to him, and it is within his discretion, to proceed accordingly. In the present case I find no suggestion that the master has applied his mind to that kind of consideration which would have justified a lower fee.

*Taxing master's certificate varied accordingly. Costs of both summonses to be the defendant's.*

Solicitors: *Griffith, Smith, Wade & Riley* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]



## KING v. SMITH.

[COURT OF APPEAL (Cohen, Asquith, L.J.J., and Roxburgh, J.), February 10, 1950.]

*Land—Encroachment on adjoining land by tenant of house—Purchase by tenant of house subject to tenancy—Sale by landlord of adjoining land—Right of purchaser of land to possession.*

A In 1930, M., the owner of a partially developed building estate, let a house on the estate known as Gunnislake to the defendant on a weekly tenancy. The defendant encroached on a portion of waste land, which was part of the estate, and continued in possession of this land for over twelve years. In 1938 the building estate became vested in C. who, on June 11, 1947, sold the estate by auction. At the sale the waste land was bought by the plaintiff  
B with vacant possession on completion, and Gunnislake was bought by an investment company. On Oct. 6, 1947, the investment company conveyed Gunnislake to the defendant, who continued to occupy the waste land, but offered to buy or rent the land from the plaintiff. The plaintiff rejected the defendant's proposals and brought proceedings for possession.

C HELD: (i) the presumption that the encroachment accrued to the holding of Gunnislake, so that the defendant had no interest therein beyond a leasehold interest coterminous with his tenancy and that the landlord could recover possession of the disputed parcel of land on the termination of the tenancy, applied up to the moment of the conveyance of Gunnislake; the merger of the defendant's leasehold interest in Gunnislake in the freehold in Gunnislake which was conveyed to him and the fact that the landlord then lost for ever any right to recover possession of Gunnislake did not result in the conversion of the defendant's leasehold interest in the disputed parcel of land into a freehold interest in it, and so render the presumption inapplicable; but on the merger the plaintiff became entitled to recover possession of the disputed parcel, and the defendant was thenceforth a trespasser.

E *Dictum of THESIGER, L.J., in A.-G. v. Tomline* (15 Ch.D. 161), *applied*.  
*Dictum of CHANNELL, J., in East Stonehouse Urban Council v. Willoughby Brothers, Ltd.* ([1902] 2 K.B. 336), *approved*.

F (ii) on the facts, the conduct of the parties (in particular, the action of the landlord in offering the waste land for sale with vacant possession, and that of the defendant in negotiating with the plaintiff for a sale or lease of the land) did not indicate that at the material time either the landlord or the defendant regarded the encroachment as having been made for the defendant's benefit, and, therefore, the presumption in favour of the landlord was not rebutted, and the plaintiff was entitled to possession.

[As to EXTINGUISHMENT OF RIGHTS BY ENCROACHMENT, see HALSBURY, Hailsham Edn., Vol. 4, pp. 628-630, paras. 1175-1179; and FOR CASES, see  
G DIGEST, Vol. 11, pp. 55-57, Nos. 822-855.]

Cases referred to:

- H (1) *A.-G. v. Tomline*, (1880), 15 Ch.D. 150; 43 L.T. 486; 11 Digest 56, 842.  
(2) *East Stonehouse Urban Council v. Willoughby Brothers, Ltd.*, [1902] 2 K.B. 318; 71 L.J.K.B. 873; 87 L.T. 366; 32 Digest 448, 1163.  
(3) *Bryan d. Child v. Winwood*, (1808), 1 Taunt. 208; 11 Digest 56, 843.  
(4) *Doe d. Lloyd v. Jones*, (1846), 15 M. & W. 580; 16 L.J.Ex. 58; 11 Digest 57, 851.  
(5) *Andrews v. Hailes*, (1853), 2 E. & B. 349; 22 L.J.Q.B. 409; 21 L.T.O.S. 151; 11 Digest 56, 850.  
(6) *Doe d. Croft & Skinner v. Tidbury*, (1854), 14 C.B. 304; 23 L.J.C.P. 57; 11 Digest 56, 846.  
(7) *Kingsmill v. Millard*, (1855), 11 Exch. 313; 19 J.P. 661; 11 Digest 56, 847.

- (8) *Berney v. Bickmore*, (1863), 8 L.T. 353; 11 Digest 56, 848.  
 (9) *Whitmore v. Humphries*, (1871), L.R. 7 C.P. 1; 41 L.J.C.P. 43; 25 L.T. 496; 35 J.P. 807; 11 Digest 56, 849.  
 (10) *Doe d. Baddeley v. Massey*, (1851), 17 Q.B. 373; 20 L.J.Q.B. 434; 17 L.T.O.S. 221; 32 Digest 475, 1389.

APPEAL by the defendant from an order of His Honour JUDGE GRANVILLE-SMITH made at Barnet County Court on Nov. 8, 1949, granting possession to the plaintiff of certain land the subject of encroachment by the defendant. A

The defendant, while the tenant of a house adjoining land which was also the property of the landlord, encroached on the land more than twelve years prior to its purchase by the plaintiff. The defendant contended that the plaintiff's claim to possession of this land was statute barred and that any presumption that the encroachment enured for the benefit of the defendant's landlord was rebutted when the defendant purchased the reversion of the house of which he had hitherto been tenant. The Court of Appeal, in dismissing the appeal, held that although, after twelve years, the tenant had acquired a leasehold interest in the disputed land, on the defendant purchasing the house, the landlord was entitled to recover possession of the land and to convey it to the plaintiff free from the defendant's interest. B

*S. N. Bernstein* for the defendant.

*H. A. P. Fisher* for the plaintiff. C

**COHEN, L.J.:** I will ask ROXBURGH, J., to deliver the first judgment.

**ROXBURGH, J.:** This is an appeal by the defendant from an order of His Honour JUDGE GRANVILLE-SMITH made at Barnet County Court on Nov. 8, 1949, and it raises a question of title to a small parcel of land. Alexandra Road and Well End Road are two parallel roads on a partially developed building estate at Well End, Borehamwood, Hertfordshire. There are some houses in each road with gardens in the rear and between the gardens there is a long, narrow, irregular strip of back land. In 1930 William Andrew Marsh was the owner of the estate, and he let a house in Well End Road, known as Gunnislake, to the defendant on a weekly tenancy. The defendant carried on the business of poultry farming, he proceeded to encroach on a small portion of the back land which belonged to his landlord, and he remained in continuous and exclusive possession of that portion for more than twelve years. In 1935 Marsh conveyed the building estate to Mrs. Alice Lucy Clay. In 1937 the plaintiff bought a plot in Alexandra Road and built a house known as Puck's Hill. On May 27, 1937, Mrs. Clay died, having devised the estate to her daughter Doris Helen Clay, who shortly afterwards became Mrs. Carter. On Aug. 11, 1938, a vesting deed was made in favour of Mrs. Carter. In 1947 Mrs. Carter advertised the estate for sale by auction on June 11, 1947. Before the auction the whole estate was sold to Pedigree Stock Farm Development, Ltd., who became the vendors at the auction sale which later took place. At the sale the plaintiff bought the back land numbered Lot 27, which included the land the subject of the encroachment. On that date Pedigree Stock Farm Development, Ltd., were entitled in equity to Gunnislake in reversion expectant on the then still existing tenancy of the defendant. One Ernest Joyce, an agent for North London Property Investment Co., Ltd., bought Lots 12 to 17. Lot 17 was Gunnislake. North London Property Investment Co., Ltd., then sold Gunnislake to the defendant, and it was conveyed to him on Oct. 6, 1947. D

Two things are clear—(i) that the defendant's weekly tenancy terminated on Oct. 6 by merger in his freehold estate; (ii) that the conveyance did not comprise the disputed parcel. On Sept. 4, 1947, the plaintiff wrote to the defendant as follows: E

"Further to our conversation, I have now seen my solicitor, and I am prepared to allow you to rent the land in question at a ground rent of F

G

H

£7 10s. 0d. per annum, exclusive of rates, payable half-yearly, on a six-monthly tenancy to terminate at any date. First payment in advance due at Michaelmas, Sept. 29. The land is subject to the usual restrictions and stipulations contained in the schedule of the conveyance of this land. The above cancels the terms set out in my previous letter dated Aug. 29. Unless you can agree to this, the matter will have to be referred to the agents' solicitor, Mr. Lloyd-Jones, who will be obliged to give me vacant possession. I hope this will not be necessary."

On Oct. 14, 1947, Lloyd-Jones & Sons wrote to the defendant's solicitors as follows:

"We are writing to you as you acted for Mr. E. R. Smith on his recent purchase of 'Gunnislake.' We are instructed that Mr. Smith has encroached on other land forming part of Lot 27. We are informed that your client has large poultry houses on the land, and that he offered to purchase the land from the purchaser of Lot 27 (a Miss King) for £40. She told him that she did not want to sell, but would rent it to him for £10 p.a.—subsequently reducing this to £7 10s. p.a., but your client is not prepared to pay more than £5 p.a. In the meantime your client's poultry houses are still on the land and he is still using it. Our client sold Lot 27 with vacant possession on completion and Miss King will not complete her purchase until she gets vacant possession and is threatening proceedings to enforce the contract. The land purchased by Mr. Smith was, as you know, clearly defined on his conveyance plan. We shall therefore be obliged if you will inform Mr. Smith that unless he vacates the land and removes his chicken houses by Monday, Oct. 27; our client will have to institute proceedings."

On Dec. 10, 1948, Lot 27, including the disputed parcel, was conveyed to the plaintiff. As the defendant was a weekly tenant of Gunnislake from 1930 to Oct. 6, 1947, there is a presumption that the encroachment which he made accrued to the holding or, in other words, that he had no interest therein beyond a leasehold interest coterminous with his tenancy, and that his landlord could recover possession of the disputed parcel on the termination of the tenancy. That presumption can be rebutted by proving that the landlord and the tenant so conducted themselves as to show that the landlord treated the encroachment as not enuring for her benefit. This is, in effect, the principle laid down in a number of cases to which we have been referred. In *A.-G. v. Tomline* (1) THESIGER, L.J. said (15 Ch.D. 161):

"It appears from the cases cited by Mr. *Cookson* that there is a difference of opinion among judges as to the exact grounds of the doctrine that encroachments made by tenants enure for the benefit of their landlords. This much at least is clear, and all judges are agreed, that the doctrine involves a presumption of fact which is capable of being rebutted. Now here it appears to me that the facts necessary to support the presumption do not exist, and for two reasons."

After holding that there was no encroachment, he said (*id.*):

"... even assuming that not to be so, it seems to me clear that inasmuch as the principle that encroachments by tenants enure for the benefit of their landlords is founded upon a presumption of fact, a landlord and tenant may so conduct themselves in the course of transactions either by deed or otherwise as to show that the landlord treated the encroachment as not enuring to his benefit. Now, is not that the position of things here? It appears that since the encroachment (because upon this branch of the case I will assume it was an encroachment) there have been surrenders of the land which was the subject of the original copyhold grant, and admittances in pursuance of such surrenders. Now, we find that the new surrenders and



admittances included only the land which was the subject of the old surrender, so that the person who is assumed to have the right to take the benefit of the encroachment did not take the benefit of it, but treated it as not enuring for his benefit."

Again, in *East Stonehouse Urban Council v. Willoughby Brothers, Ltd.* (2) a lessor had two adjoining properties referred to as the stable property and the foundry property. The tenant of the foundry property encroached on the stable property which was also in the possession of a tenant. CHANNELL, J., said ([1902] 2 K.B. 336):

"Assuming, however, that the statute did begin to run in 1856 against Lord Mount Edgcumbe, so that he would be barred when his tenant of the stable property was barred, still the statute ran in favour of another tenant (or the *cestui que trust* of another tenant, which I think is the same thing) of the other property, and all the authorities show that a presumption would arise that the encroachment was an accretion to the holding. The result therefore would, in my opinion, be that, if Lord Mount Edgcumbe had a right of entry in August, 1856, on these two disputed parcels, these parcels would, when the statute ran out, be presumed to be held with the foundry property, and when that lease determined or was surrendered he could resume possession. That lease did not determine until July 24, 1890, or shortly before, when the third life is said to have dropped. He would then have acquired a new right of possession, and it would be within twelve years of this action, unless the third life dropped before July 18, 1889. Mr. Foote answers this point as to accretion to the tenancy by referring to the observations of all the lords justices in *A.-G. v. Tomline* (1), to the effect that this presumption of accretion to the holding is a question of fact, and if on the facts proved in any particular case the landlord and tenant are shown to have 'so conducted themselves as to show that the landlord treated the encroachment as not enuring for his benefit,' then the presumption would be rebutted."

Counsel for the defendant has submitted two quite separate arguments. First, he says that in the present case the presumption ceased to apply when the landlord, by conveying Gunnislake to the defendant, lost for ever any right to recover possession of Gunnislake. I cannot accept that argument. The presumption, unless rebutted, applied up to the moment of the conveyance. The defendant's interest in the disputed parcel up to the moment of conveyance was an interest coterminous with the defendant's interest in Gunnislake. When his leasehold interest in Gunnislake merged in the freehold in Gunnislake which was conveyed to him, nothing happened, so far as I can see, which could automatically convert the defendant's leasehold interest in the disputed strip into a freehold interest in the disputed strip and so render the presumption inapplicable. On the contrary, unless the presumption is rebutted, it appears to me that on the merger the plaintiff became entitled to recover possession of the disputed parcel, and the defendant was thenceforth a trespasser.

Counsel's second point is that, by their conduct immediately before, at, and after the auction sale the landlord and the defendant so acted as to show that they were treating the encroachment as not enuring for the landlord's benefit, or, in other words, as having been made by the defendant for himself alone. I have already described in detail what the conduct of both parties was. The landlord's actions both before, at, and after the auction were really dictated by the erroneous view that the defendant had no interest at all in the disputed parcel—not even a weekly tenancy—but such an attitude, and, in particular, the action of the landlord, in offering the disputed land for sale with vacant possession was, as the county court judge says, a complete negation of the proposition that the encroachment had been made for the defendant alone.

Nor did the defendant act at the time of the conveyance of Gunnislake to himself as though he thought that the encroachment had been made for himself alone. He was prepared to bargain for a sale or lease of the disputed land, and he did not put forward any claim to a possessory title until after the conveyance. There is, in my view, nothing to rebut the presumption. Mrs. Carter first became entitled to recover possession (for she was still the legal owner of the estate, though not the equitable owner) on Oct. 6, 1947, and the plaintiff became entitled so to do on Dec. 10, 1948. I think the learned county court judge came to a right conclusion.

**COHEN, L.J.:** I am of the same opinion. Counsel for the defendant asks us to reverse the learned county court judge's order on two grounds. First, he says the presumption ceased to apply when the defendant purchased the reversion of Gunnislake. He says that the defendant then acquired all the rights of the landlord, including such rights as the landlord had in the disputed strip on which the defendant had encroached. Secondly, he said that the presumption was rebutted by the circumstances to which my Lord has referred. I do not wish to add anything on the second point, but I do desire to add just a few observations on the first point, which is a matter of law pure and simple and not one of fact, and, therefore, the more important of the two. I think counsel for the plaintiff supplied the right answer to this point when he said that the true effect of the presumption was that, from the time of the encroachment, the disputed strip became an accretion to the demised premises, and at the expiration of twelve years from the date of the encroachment, the defendant acquired a leasehold interest in the disputed strip and the landlord had the freehold reversion therein. This reading of the presumption, as he rightly said, would fit not only the case where the land on which the encroachment was made was the property of the landlord, but also the case where it belonged to an outside party who would lose his whole interest at the end of the twelve years period. If that be so, the landlord can plainly deal with the reversion in the disputed strip separately. This is what I think he did in the present case. True, he purported to deal with the reversion free from the defendant's leasehold interest. The effect (if any) of that would be that the plaintiff, if she had not already done so, might have to give notice to the defendant terminating his leasehold interest. It would not enable the defendant as purchaser of the demised premises to claim the freehold of the disputed strip which was plainly not included in the conveyance to him. For these reasons, as well as the reasons given by my Lord, in my opinion, this appeal fails and should be dismissed.

**ASQUITH, L.J.:** I also agree and have nothing to add.

*Appeal dismissed with costs.*

Solicitors: *Wright, Son & Pepper* (for the defendant); *Edward Moeran* (for the plaintiff).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

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# KORNER v. WITKOWITZER BERGBAU UND EISENHUETTEN GEWERKSCHAFT.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.J.J.), January 17, 18, 19, 20, 23, February 13, 1950.]

*Practice—Service—Service out of jurisdiction—Breach of contract committed within jurisdiction—Proof of such breach—Contract to pay pension—Contract made in Czechoslovakia—Pension payable in England—R.S.C., Ord. 11, r. 1 (e)—R.S.C., Ord. 11, r. 4.*

The plaintiff applied under R.S.C., Ord. 11, r. 1 (e), for leave to serve notice of a writ of summons out of the jurisdiction on a Czechoslovak company in an action claiming *inter alia* sums of money alleged to be due to him under an agreement for a pension, on the ground that, under the contract between the parties, the pension was, in the events that had happened, payable in England. The plaintiff had been an officer of the company and the agreement was made in Czechoslovakia. Shortly after his retirement in March, 1938, he came to live in England, where he had remained ever since. In support of his allegation that the pension was payable to him in England, the plaintiff, in his original affidavit, sworn on Apr. 17, 1946, relied on a letter from the company, dated Jan. 18, 1929, which stated that "should the value of the Czech crown be reduced by more than ten per cent. of its present gold value, the difference in value will be made good to you . . ." In a letter, dated Nov. 23, 1938, which was written by the plaintiff to the company in the course of a dispute in regard to the correct manner of calculating his pension, he stated that he had particularly requested the gold clause to be inserted as he was going overseas. The plaintiff had not kept a copy of this letter, but it was exhibited to an affidavit sworn on behalf of the company, and on re-reading it he swore a second affidavit, on June 9, 1948, saying that the letter had brought to his mind details of an oral agreement, made in January, 1929, between him and the manager of the company, whereby it was agreed that he was to receive his pension abroad in the country in which he was living at the time it accrued, and it was for this reason that the clause providing for the payment of the full gold value of the Czechoslovak crown was inserted in the letter of Jan. 18, 1929, which contained the agreement between him and the company on the matter.

**HELD:** (i) [BUCKNILL, L.J., *dissenting*] on an application under R.S.C., Ord. 11, r. 1 (e), unless the plaintiff could show to the satisfaction of the court that a breach of contract, if there was one, was committed within the jurisdiction, the case was not a "proper one for service out of the jurisdiction," within R.S.C., Ord. 11, r. 4.

*Malik v. Narodni Banka Ceskoslovenska* ([1946] 2 All E.R. 663), *applied*.

*Per* BUCKNILL, L.J. [*dissenting*]: "On principle, I do not see why there should be a different standard of proof on the issue whether the act or omission on which the jurisdiction is alleged to be based occurred within the jurisdiction from the standard of proof required of the act or omission of the defendants which is alleged to give rise to their liability to the plaintiff. It may well be that the same set of facts will be relied on, both to found liability and to found jurisdiction. I do not see why there should be a different standard of proof required for each allegation . . . In each case the plaintiff must, as I think, make out a *prima facie* case, and, if that case is based on facts which are put in issue, nevertheless leave should be given."

(ii) [DENNING, L.J., *dissenting*] on the plaintiff's affidavits it was shown that the breach, or breaches, of contract had been committed within the



jurisdiction, and, therefore, he was entitled to an order for service out of the jurisdiction.

*Malik v. Narodni Banka Ceskoslovenska (supra), distinguished.*

[AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-35, paras. 44-50; and FOR CASES, see DIGEST, Practice, pp. 344-351, Nos. 610-666.]

Cases referred to:

(1) *Fowler v. Barstow*, (1881), 20 Ch.D. 240; 51 L.J.Ch. 103; 45 L.T. 603; Digest Practice 369, 796.

(2) *Malik v. Narodni Banka Ceskoslovenska*, [1946] 2 All E.R. 663; 176 L.T. 136; 2nd Digest Supp.

(3) *Thomas v. Hamilton (Duchess Dowager)*, (1886), 17 Q.B.D. 592; 55 L.J.Q.B. 555; 55 L.T. 385; Digest Practice 371, 816.

(4) *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks*, (1904), 90 L.T. 733; Digest Practice 340, 577; *affg.*, 88 L.T. 490.

(5) *Tyne Improvement Comrs. v. Armement Anversoise Société Anonyme, The Brabo*, [1949] 1 All E.R. 294; [1949] A.C. 326; [1949] L.J.R. 435.

(6) *Hemelryck v. Lyall Shipbuilding Co.*, [1921] 1 A.C. 698; 125 L.T. 133; *sub nom.*, *Van Hemelryck v. William Lyall Shipbuilding Co., Ltd.*, 90 L.J.P.C. 96; Digest Practice 345, 613.

(7) *The Hagen*, [1908] P. 189; 77 L.J.P. 124; 98 L.T. 891; Digest Practice 340, 579.

(8) *Comber v. Leyland*, [1898] A.C. 524; 67 L.J.Q.B. 884; 79 L.T. 180; Digest Practice 346, 620.

(9) *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; Digest Supp.

(10) *Fessard v. Mugnier*, (1865), 18 C.B.N.S. 286; 5 New Rep. 307; 34 L.J.C.P. 126; 11 L.T. 635; 12 Digest 452, 3656.

(11) *St. Pierre v. South American Stores (Gath & Chaves), Ltd. & Chilean Stores (Gath & Chaves), Ltd.*, [1937] 3 All E.R. 349; Digest Supp.

(12) *Rein v. Stein*, [1892] 1 Q.B. 753; 61 L.J.Q.B. 401; 66 L.T. 469; Digest Practice 349, 646.

(13) *Bremer Oeltransport G.m.b.H. v. Drewry*, [1933] 1 K.B. 753; 102 L.J.K.B. 360; 148 L.T. 540; Digest Supp.

(14) *L'Estrange v. Graucob (F.), Ltd.*, [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164; Digest Supp.

(15) *Yates v. Thomson*, (1835), 3 Cl. & Fin. 544; *sub nom.*, *Yeats v. Thomson*, 1 Sh. & Macl. 795; 11 Digest 372, 522.

(16) *Bain v. Whitehaven & Furness Ry. Co.*, (1850), 3 H.L.Cas. 1; 11 Digest 488, 1400.

(17) *Leroux v. Brown*, (1852), 12 C.B. 801; 22 L.J.C.P. 1; 20 L.T.O.S. 68; 11 Digest 393, 672.

APPEAL by the plaintiff from an order of SLADE, J., made in chambers, and dated June 28, 1949, dismissing an appeal from an order of MASTER GRUNDY allowing an application by the defendants, a Czechoslovak company, to set aside an order, made under R.S.C., Ord. 11, r. 1 (e), giving leave to serve notice of a writ out of the jurisdiction. The plaintiff claimed (*inter alia*) sums of money alleged to be due to him from the defendants under an agreement for a pension made in Czechoslovakia, on the ground that, in the events that had happened, the pension was payable to him in England, and in an affidavit, sworn on Apr. 17, 1946, he relied on a written agreement contained in a letter, dated Jan. 18, 1929, written to him by the defendants. After re-reading a letter, dated Nov. 23, 1938, which was written by him to the defendants and was exhibited in support of an affidavit sworn on behalf of the defendants, the plaintiff swore a second affidavit, on June 9, 1948, in which he relied on an oral agreement, on which,

he alleged, the agreement contained in the letter of Jan. 18, 1929, was based. SLADE, J., held that, where the contract was not made within the jurisdiction, R.S.C., Ord. 11, r. 4, required him to be satisfied that a breach had been committed within the jurisdiction. He stated that he was not satisfied that there was a contractual obligation to pay the pension only in this country, and, therefore, he refused to give leave for service out of the jurisdiction. The majority of the Court of Appeal (DENNING, L.J., *dissenting*) now allowed the appeal. The facts appear in the judgment of SINGLETON, L.J.

*Sir Andrew Clark, K.C., Gahan, and Dennis Lloyd* for the plaintiff.  
*Clive Burt* for the defendants.

*Cur. adv. vult.*

Feb. 13. The following judgments were read.

**BUCKNILL, L.J.:** I have had the opportunity of reading the judgments (to be delivered) of SINGLETON, L.J., and DENNING, L.J. I adopt the statement of the material facts as set out in the judgment of SINGLETON, L.J. As SLADE, J., said in his judgment, the crucial questions for determination in the case of each of the two contracts are: (i) Was there a contract at the date of the issue of the writ? (ii) Was there a breach of that contract? (iii) If there was a breach of that contract, was the breach committed within the jurisdiction of the English courts? In the case of the pension agreement, the judge said that the pension agreement was operative at the date of the issue of the writ, and continued:

“Was there a breach of it? Again I apply the *prima facie* standard, and I answer that question in the affirmative, because on the evidence I think there is certainly a *prima facie* case that no payment under it has even been made. Certainly not all the payments under it have been made.”

I think, therefore, that the sole question as regards the pension agreement is whether the breach was committed within this jurisdiction. On this point I think that our decision should turn on the weight which we attach to the allegation of the plaintiff in para. 3 of the affidavit sworn by him on June 9, 1948. This paragraph is as follows:

“When I negotiated the pension agreement of Jan. 18, 1929, with the defendants, I stated that I intended to enjoy my pension abroad, although I did not then know in which country, and it was expressly agreed by Dr. Sonnenschein, who was the general manager of the defendants, and who was acting on their behalf, that I should receive payment of my pension in the country in which I might be living at the time it accrued.”

SLADE, J., when referring to this allegation, said:

“That sets out an alleged express agreement by Dr. Sonnenschein that there should be a contractual obligation on the part of the defendants to make payment in the country in which the plaintiff might be living at the time it accrued.”

If, therefore, that allegation is established, the breach within the jurisdiction is also established.

In these circumstances what ought the court to do where such an allegation is made? I think that the allegation is not on the face of it unreasonable, for the reasons given by SINGLETON, L.J., in his judgment. SLADE, J., in his judgment does not say that he rejected this statement by the plaintiff as untrue or unreasonable. He dealt with the point in these words:

“I have to ask myself whether I am satisfied, and again I say that I am not satisfied, that there was any express term of the agreement or any manifestation of intention which ought, according to Czech law, to be treated as though it were part of the agreement, and still less am I satisfied that,

if there were any such manifestation of intention, it was a contractual obligation to pay and to pay only in this country."

A Having regard to the judge's interpretation of the allegation by the plaintiff, to which I have already referred, I read the first part of this statement as meaning that the judge is not satisfied that the allegations by the plaintiff are true. The judge does not give any reasons why he is not satisfied, but the reasons may be inferred from his statement in the paragraph immediately preceding the passage which I have quoted in which he says that he is not satisfied. The judge there said:

B "The defendants' answer to that [*viz.*, the plaintiff's allegation of an express agreement] is: 'Well, Dr. Sonnenschein has been dead a long while and it is very convenient for [the plaintiff], who made no reference to that in his first affidavit, when he finds himself in difficulty, to come along with an express verbal agreement attributed to this gentleman who is long since deceased.' That is the way they put it."

C I think that the judge considered that it was his duty to take into account such matters as those put forward by the defendants by way of criticism of the veracity of the plaintiff when deciding whether he was satisfied that a breach of contract had been committed within the jurisdiction, and, if he decided that there was weight in them, he was entitled to say that he was not satisfied, and on that ground refuse to give leave to issue the writ. The crucial question, as I see it, is whether the judge, in exercising his discretion, applied a wrong principle as regards standard of proof.

D It is clear from the judgment that the judge drew a distinction between the standard of proof required of the plaintiff as regards the formation of the contract with the defendants, which is sued on, and its breach, on the one hand, and the proof required to establish that the breach was committed within the jurisdiction, on the other hand. On this point SLADE, J., said:

E "I emphasise that all that is required in the first part of R.S.C., Ord. 11, r. 4, is that the deponent shall depose to his belief that the plaintiff has a good cause of action. What is involved in a good cause of action in an action in contract? Two things, and two things only: (i) that there should be a contract between the parties, and (ii) that there should be a breach of that contract. Those two matters are, of course, if they are disputed in the pleadings, matters which will have to be decided at the trial, wherever the trial takes place. But, where the contract is not one made within the jurisdiction, even though there be a contract and a breach, the case does not fall within the terms of R.S.C., Ord. 11, r. 1, unless the breach relied on is a breach within the jurisdiction of a contract which ought to have been performed within the jurisdiction. I, therefore, have to ask myself  
F  
G at the outset the question as to the standard of proof which I ought to apply in considering the evidence before me as to whether the contract is one which ought to be performed within the jurisdiction, and whether the alleged breach of that contract was, or was not, a breach within the jurisdiction."

He quoted the concluding words of R.S.C., Ord. 11, r. 4:

H "... no such leave shall be granted unless it shall be made sufficiently to appear ... that the case is a proper one for service out of the jurisdiction under this Order."

He decided that these words required him to be satisfied that there was a breach within the jurisdiction. Again, he said:

"To make it quite clear, I apply the *prima facie* case test to the alleged contract, and the alleged breach. I apply the test that I must be satisfied as to the place where the breach occurred."



Unless there is authority which this court ought to follow for this conclusion of the judge, I think that it is erroneous. On principle, I do not see why there should be a different standard of proof on the issue whether the act or omission on which the jurisdiction is alleged to be based occurred within the jurisdiction from the standard of proof required of the act or omission of the defendants, which is alleged to give rise to their liability to the plaintiff. It may well be that the same set of facts will be relied on, both to found liability and to found jurisdiction. I do not see why there should be a different standard of proof required for each allegation.

The Supreme Court of Judicature Act, 1875, sched. I, contains the Rules of Court. Order 11, r. 4, then was the same as the present Ord. 11, r. 5 (except that it did not contain the last few words of the present r. 5) and r. 3 (now the first part of r. 4) did not contain the words relied on by SLADE, J. Rule 4, in its present form, came into existence when the Rules of the Supreme Court, as revised, came into operation on Oct. 24, 1883: see STATUTORY RULES AND ORDERS (Revised to 1890), Vol. VII, p. 7. No reason for the addition of these words appears in any reported case, so far as I know, but the facts in *Fowler v. Barstow* (1) show that some such words were needed, because it was doubtful what course the court should adopt in cases where there was merely an affidavit stating that in the belief of the plaintiff he had a good cause of action. The point was decided in *Fowler v. Barstow* (1). The plaintiff, Fowler, sued the defendant, Barstow, who resided in Edinburgh, to recover a sum of money which Fowler had paid to Barstow and to two other persons, Larchin and Lynch, for an interest in a colliery. Fowler founded his claim on alleged misrepresentations made by the defendant as to the value of the colliery and the sum which it had cost. On an *ex parte* application, the vacation judge gave Fowler leave to serve the defendant in Scotland, and in support of his application Fowler swore an affidavit that he was induced to buy this interest by the misrepresentations of Barstow and Lynch and Larchin, and that the whole of the negotiations which resulted in his paying the purchase price took place in the city of London. Barstow then entered a conditional appearance, and moved the court to discharge the order. In support of his application he filed an affidavit denying all the allegations of the plaintiff, and also stating that he was not in London in the latter part of 1875, and never saw Fowler in his life till February, 1876. Fowler filed an affidavit in reply, in which he said that the representations were made to him by Larchin and Lynch, adding:

"I was further informed by them, who I claim were the agents of the defendant [Barstow] in the representations they made to me, that they were in communication with [Barstow] as to the terms upon which I should be sold an interest in the colliery."

CHITTY, J., did not allow Barstow's affidavit, or Fowler's affidavit in reply, to be read, and refused the application to discharge the order for service. On appeal the Court of Appeal held that the affidavits of Barstow and of Fowler in reply might be put in, and allowed the appeal. JESSEL, M.R., in the course of his judgment, said (20 Ch.D. 246):

"On the main point as to whether or not there was a cause of action within the jurisdiction, I am in favour of the appellant [Barstow] . . . On the first affidavit I agree that if the plaintiff had not retired from it there would have been a case. But it appears to me plain upon reading all these affidavits that the statement made by the plaintiff in his first affidavit is now admitted by him to be incorrect, and there is no longer any allegation whatever by anybody that the defendant Barstow made any representation within the jurisdiction."

BAGGALLAY, L.J., said (*ibid.*, 247):

"As I am at present advised . . . I think that the original affidavit filed by the plaintiff was sufficient to obtain leave to serve out of the jurisdiction . . . But then the defendant puts in an affidavit in which he makes a statement which, if true, shows that there was no jurisdiction whatever to make an order, because, he says, he never made any misrepresentation at all . . . Noy, I quite think that upon an application to discharge such an order as was made in this case, an affidavit may be made for the purpose of showing that the court had no jurisdiction to make an order . . ."

LUSH, L.J., said (*ibid.*, 250):

"The defendant is allowed to show that no cause of action did accrue within the jurisdiction. That is what the defendant proposes to do here, and that has been the established practice."

After dealing with the allegations in the affidavits, LUSH, L.J., continued (*ibid.*):

"It therefore stands admitted on the affidavit in reply that the defendant did not make a representation to the plaintiff, that he did not make it by letter, and that he did not make it by agency at all. The defendant has clearly shown to my mind that a cause of action, as far as he is concerned, did not occur within the jurisdiction. That is the question we have to decide, and upon that I entertain no doubt."

Apart from some remarks of LORD GODDARD, C.J., in his judgment in *Malik v. Narodni Banka Ceskoslovenska* (2), there was not brought to our notice any reported case during the sixty-six years that have passed since R.S.C., Ord. 11, r. 4, appeared in its present form to suggest that there was such a different standard of proof as SLADE, J., has required. In every case to which we were referred, the concluding words of R.S.C., Ord. 11, r. 4, appear to have been treated as of general application when the court considered whether the case was one in which leave to serve out of the jurisdiction should be given. The proper interpretation of R.S.C., Ord. 11, r. 4, was considered by the Court of Appeal in *Thomas v. Dowager Duchess of Hamilton* (3). In that case FIELD, J., in chambers, had given the plaintiff leave to serve a writ on the defendant, who was a foreigner, residing out of the jurisdiction, claiming a balance in respect of the price of goods supplied. The defendant duly applied to DAY, J., in chambers to rescind or vary the order of FIELD, J., and to set aside the subsequent proceedings thereon. The matter in dispute on the affidavits was whether the price for the goods was, by the terms of the sale, made payable in this country or abroad. DAY, J., refused to set aside the service of the writ, but ordered that the plaintiff's claim in the action should be limited to the recovery of the price of goods in respect of which it might appear at the trial that a writ could have been properly served out of the jurisdiction. On appeal to the Divisional Court, composed of FIELD, J., and BUTT, J., the plaintiff argued that DAY, J., ought not to have imposed this limitation on the claim. In his judgment FIELD, J., said (17 Q.B.D. 594):

"Upon the affidavits before me when I made the order for service out of the jurisdiction I was satisfied that the breach of contract . . . was within the jurisdiction as required by the rule, and consequently I made the order. The defendant subsequently applied on affidavit to set aside that order . . . It was competent to the judge . . . to set aside the order . . . if not satisfied that the breach of contract arose within the jurisdiction. He did not, however, take that course, but not being altogether satisfied as to whether the breach . . . arose within the jurisdiction or not he imposed [the limitation on the claim]."

FIELD, J., decided that in general it was not right, as a matter of principle, to impose such a limitation, because it postponed until the trial a preliminary question of procedure which ought properly to be determined at the outset of

the litigation. He was, therefore, in favour of allowing the appeal. The appeal was allowed, but on appeal to the Court of Appeal the decision of the Divisional Court was reversed. LORD ESHER, M.R., said (*ibid.*, 595):

"In such a case ... a judge ... is not bound to make the order for service ... out of the jurisdiction. He has a discretion whether, under all the circumstances, he will make it or not ... Orders similar to that in question here ... have only been made where the judge is left in doubt."

LORD ESHER, M.R., concluded his judgment by saying (*ibid.*, 596):

"I think that DAY, J., was right in entertaining doubt whether on the affidavits any breach of the contract was shown to have taken place in England, and having that doubt I think that it was competent to him to make the order he did make, and that it should be restored."

BOWEN, L.J., said (*ibid.*) that he thought that DAY, J., was justified in entertaining great doubt whether any breach of the contract was shown to have occurred in England, and, after reading the affidavits and hearing the arguments, he himself entertained the same doubt. He went on to say that it was a matter for the discretion of the judge whether he should allow service out of the jurisdiction, and that what DAY, J., had done was a very natural and simple mode of exercising the discretion. FRY, L.J., agreed. If this decision of the Court of Appeal still stands, it seems to me that it shows clearly that SLADE, J., was not bound to refuse leave unless he was satisfied, and that he was in error when he said that he must be satisfied, that there was an obligation to pay only within the jurisdiction before he could give leave for the writ to issue.

The interpretation of R.S.C., Ord. 11, r. 4, was also considered in 1904 in *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks* (4). The plaintiffs, a German company, owned letters patent for the United Kingdom relating to the manufacture of aniline dyes. The defendants were manufacturers of aniline dyes at Basle, in Switzerland, and had agents permanently resident in England. The plaintiffs asserted that the defendants in selling some of their aniline dyes in England had infringed the patent rights of the plaintiffs. The plaintiffs obtained an order giving leave to serve on the defendants notice of a writ to restrain them from this infringement. The defendants then applied to the court to discharge the order on the ground that they had not infringed the plaintiff's patent by sales of their dyes in England. JOYCE, J., refused to discharge the order, and his decision was affirmed in the Court of Appeal and in the House of Lords. COLLINS, M.R., in his judgment, said (88 L.T. 494):

"Now, it does not appear to me that in conferring this jurisdiction—which I agree is an important one and one to be carefully exercised—the legislature has imposed on the courts the duty of trying the case before they allow the plaintiff to put it in suit. That would be going much too far in favour of persons outside the jurisdiction. The legislature has thought fit to allow persons outside the jurisdiction to be brought into it under certain conditions. It has fenced them round with a good many conditions which have to be fulfilled in order to allow them to be brought within the jurisdiction. But if *prima facie* evidence by persons against whom nothing can be urged touching their veracity of information and belief is brought to show that these conditions have been fulfilled, and that there has been that special breach within the jurisdiction which lets in the jurisdiction of the court over foreigners, then it seems to me that the court is not called upon there and then to try that case. It has the right to, and it is necessary that it should, see what the other side have got to say about the matter. But when that has been said, and there is an apparent conflict of fact raised, it seems to me that it is not [the] function of the court there and then to decide upon the issue of fact. If the court has got before it a *prima facie* case which is not completely displaced by the evidence on the other side,



then it seems to me that the plaintiff has not lost his right to have that case tried."

In the House of Lords LORD DAVEY, after stating that the case was alleged to come under R.S.C., Ord. 11, r. 1 (f), said (90 L.T. 735):

- A "Rule 4 of the same Order [R.S.C., Ord. 11] prescribes that the application is to be supported by evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and no such leave is to be granted unless it be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order. This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction . . . called upon to try the action or express a premature opinion on its merits . . . The words at the end of the Order do not, I think, mean more than that the court is to be satisfied that the case comes within the class of cases in which service abroad may be made under r. 1 of the Order."
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- C There is nothing in these general statements of principle to indicate that the words at the end of R.S.C., Ord. 11, r. 4, should have a different interpretation, when applied to the question whether the wrong complained of has been committed, from the interpretation to be given to them when the question is whether the wrong has been committed within the jurisdiction. It may be said that in the case which I have just cited the question was whether any
- D infringement of the patent had taken place, as to which *prima facie* proof was sufficient, and that the court did not deal with the point that it must be satisfied that the infringement took place within the jurisdiction, because that point was not in dispute. But it seems strange to me that no such suggestion was mentioned in any of the judgments, if, in fact, such a difference in the standard of proof was there recognised.
- E In the most recent case in the House of Lords *Tyne Improvement Comrs. v. Armement Anversoils S.A., The Brabo* (5), the question which the court had to consider was whether an action had been "properly brought" against a party within the jurisdiction. It will be noted that the words "properly brought" bear a marked similarity to the words at the end of R.S.C., Ord. 11, r. 4: "the case is a proper one for service out of the jurisdiction." The House of Lords
- F decided that the action was not "properly brought" because there was no dispute about the facts, and on those facts the law was clear that the defendants sued within the jurisdiction were not liable. It is clear from the speech of LORD PORTER that, if the alleged liability of the defendants within the jurisdiction had depended on disputed facts, he would have regarded it as an action "properly brought" within R.S.C., Ord. 11, r. 1 (g). If, then, an action may be "properly
- G brought" although the material facts are in dispute, I do not see why the case should not be "a proper one for service out of the jurisdiction," if there is a *prima facie* case made out by the plaintiff that the admitted breach of contract is a breach of a term which ought to have been performed within the jurisdiction, although the truth of the facts alleged by the plaintiff is disputed. On the principle adopted by SLADE, J., an odd legal position would have arisen in
- H *The Brabo* (5) if it had appeared from the affidavits that there was a serious issue of fact whether the defendants sued within the jurisdiction were liable or not. The judge would then, presumably, have been faced with this position: "I think the case is properly brought against the defendants here, although the material facts are in dispute, but, on the other hand, I am not satisfied that the case is a proper one for service out of the jurisdiction, because the same material facts, on which the defendants within the jurisdiction are being sued, are in dispute." Although R.S.C., Ord. 11, r. 4, was discussed during

the course of the argument in *The Brabo* (5) before the House of Lords, and is the basis of the speech of LORD MACDERMOTT, it nowhere appears in any of the speeches that r. 4 raised a different standard of proof as regards jurisdiction, such as SLADE, J., has accepted in this case.

I must now consider *Malik v. Narodni Banka Ceskoslovenska* (2). The facts in that case were somewhat similar to the facts in the present case. Malik, a Czechoslovak subject, came to England, and then sought leave to issue a writ claiming damages for breach of contract against the defendant bank in Czechoslovakia to pay him his salary in England. But there was one vital difference between *Malik's* case (2) and the present case. In *Malik's* case (2) there was no allegation of any contract made between the plaintiff and the defendants that the defendants should pay the sums claimed under the contract to the plaintiff in England. This is quite clear from the judgment of LORD GODDARD, C.J., when he said ([1946] 2 All E.R. 665) that there was no vestige of a case for saying that there was any trace of a contract by the defendants to pay the plaintiff his salary in London, and, in those circumstances, the failure to pay him in London was no breach of the contract sued on. MORTON, L.J., in his judgment, said (*ibid.*, 667) that he agreed that the notice of writ should not issue because it was not shown that a breach of contract had been committed within the jurisdiction. TUCKER, L.J., said that it was clear that under the subsisting contract the obligation was to pay the plaintiff in the currency of his own country, and that payment was to be made there. He said (*ibid.*):

"... the original contract remains the operative contract, and under it it is clear that payment had to be made in Czechoslovakia."

It is clear, therefore, that, whatever the standard of proof required by the law that a breach had been committed of a contract to pay in England, the proof failed for the simple reason that there was no proof at all. In the course of his judgment LORD GODDARD, C.J., made some remarks on the standard of proof required in cases such as this, which were adopted by SLADE, J., in his judgment. LORD GODDARD, C.J., said ([1946] 2 All E.R. 664):

"... I cannot accede to ... the argument ... that the question whether there is a breach, and the question whether it is committed within the jurisdiction, stand exactly on the same footing. The court in these cases must approach the matter on the footing of the assumption that there has been a breach, and then they have to consider whether or not the breach has been committed within the jurisdiction because it is only if the breach has been committed within the jurisdiction that this court can allow the writ to be served out of the jurisdiction."

After referring to *Hemelryck v. William Lyall Shipbuilding Co.* (6) LORD GODDARD, C.J., continued ([1946] 2 All E.R. 665):

"No doubt, when the court is considering whether it will give leave to serve notice of the writ out of the jurisdiction the court wants to see that there is, at least, an arguable case. If it can see, by what appears on the affidavits, that the case put up is a groundless or frivolous one, the court can refuse to give leave because it can say: Whether you allege a breach within the jurisdiction or not, you are putting up a case which on the face of it is groundless and we are not going to allow notice of a writ to be served, wherever the breach took place. On the other hand, the court, having looked at the affidavits, could say that there were disclosed on the affidavits facts which, if they were proved at the trial, would show that there had been a contract and breach of the contract. The action has to be in respect of the breach of contract. The court on this application is not going to inquire whether the case is one in which the plaintiff must necessarily succeed, but, if they see on the face of the proceedings that it is a groundless action, no

doubt, they will not allow an order to go for service out of the jurisdiction. As a general rule, the court will approach the case on the footing that the plaintiff has got a case which can be properly put before the court and argued, and one in which, if the court finds in accordance with the facts alleged by him, the result would probably be judgment for him. When, however, it comes to the question whether a breach has been committed within the jurisdiction, that is another and very different proposition . . . r. 4 of Ord. 11 expressly says that: ' . . . no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this Order.' Therefore, the court has to be satisfied on the affidavits that the action is brought in respect of a breach committed within the jurisdiction."

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If these remarks of LORD GODDARD, C.J., have the meaning attributed to them by SLADE, J., which I doubt, I think they were *obiter* in that they were not necessary for the decision of the court. As I have already said, however low the standard of proof required, the plaintiff failed to reach it, because he produced no evidence at all of a contract to pay him in England. If they were not *obiter*, I think that they lay down a rule of construction of R.S.C., Ord. 11, r. 4, which is inconsistent with the decisions to which I have referred.

I, therefore, do not think that this court is bound to accept the view put forward by SLADE, J., that there is a special standard of proof required which must satisfy him that there has been a breach of contract within the jurisdiction, before he will allow service of the writ outside the jurisdiction. Where the facts are disputed or open to criticism, it seems to me that such satisfaction can only be reached by trial and determination of those facts. I think that the concluding words of R.S.C., Ord. 11, r. 4, applicable as they are to all the instances of R.S.C., Ord. 11, r. 1, only require that in each case and on every material part of it the court must not act merely on vague statements, such as statements based on information and belief, or on statements which are obviously untrue, or, as contended in *The Brabo* (5), on statements that the law as to the liability of the party sued here is difficult and complicated, and that the matter had better be left to be decided by the trial judge. Having regard to the general principles laid down in *The Hagen* (7), that will not suffice. In each case the plaintiff must, as I think, make out a *prima facie* case, and, if that case is based on facts which are put in issue, nevertheless leave should be given.

For these reasons, I think that SLADE, J., was wrong in refusing leave on the ground that he was not satisfied that there was any express term of the agreement about payment of the pension in London, and that he misdirected himself in the exercise of the discretion vested in him. I also think that the judge was wrong when he said:

"Still less am I satisfied that, if there were any such manifestation of intention, it was a contractual obligation to pay and to pay only in this country."

The verbal contract, as alleged in the plaintiff's affidavit, was that he should receive payment of his pension in the country in which he might be living at the time it accrued. In 1938 the defendants knew that the plaintiff was living in England. On Nov. 11, 1938, they sent him, at the Cumberland Hotel in London, a credit note in respect of his pension for the period from August to November, 1938, and in February, 1939, they wrote to the plaintiff at 93, Redington Road, Hampstead, a house which the plaintiff had bought as his residence and which he still owns. The defendants have also exhibited in their affidavits letters written by the plaintiff to the defendants in April, May, July and August, 1939, all from the same address, 93, Redington Road, Hampstead. If the verbal agreement as regards payment of his pension was made, as alleged by the plaintiff, I think that the agreement must be taken as an agreement



to pay in London, if the plaintiff was living in London to the knowledge of the defendants. For these reasons, I think that leave should be given to the plaintiff to serve notice of his writ in respect of his claim for breach of contract to pay his pension. This will involve a trial in London, and the attendance of such witnesses as the defendants see fit to send to London to contest the plaintiff's claim.

As regards the claim under the service contract, I do not think that the plaintiff has made out a clear *prima facie* agreement that there has been a breach of that contract for payments in London, but I would give leave to serve notice of the writ, which includes his claim in respect of the alleged breach of the service agreement, but would limit the leave by including words such as:

"... with regard to the claim under the service agreement, leave is limited to the extent that the plaintiff undertakes that, if it appears that his claim under the service agreement was not payable within the jurisdiction, he is not to obtain judgment on that head of claim."

As regards the question of *forum conveniens*, I think that it will be much easier for the defendants to get their witnesses here than it will be for the plaintiff to go there to attend the trial of his claim. There are good reasons for this view, which are set out in the documents filed on behalf of the plaintiff. To quote the words of MORTON, L.J. ([1946] 2 All E.R. 667) in *Malik's case* (2): "... there were strong grounds of justice for allowing the plaintiff to bring his action here." I would, therefore, allow the appeal.

**SINGLETON, L.J.:** On May 15, 1946, the plaintiff obtained leave to serve the defendants (a company incorporated according to the laws of Czechoslovakia) with notice of the writ out of the jurisdiction. The defendants entered a conditional appearance and moved to set aside service of the writ and all subsequent proceedings. They succeeded before the master, and the order of the master was upheld by SLADE, J. The plaintiff appeals to this court and contends that the case falls within R.S.C., Ord. 11, r. 1 (e), and r. 4, and that he ought to be allowed to serve the writ out of the jurisdiction. By the writ the plaintiff claims sums of money said to be due (a) under a pension agreement, and (b) as salary under a service agreement. He also claims damages for breach of contract. His case, put shortly, is that both pension and salary were, in the events which happened, payable to him in London, and that non-payment was a breach of contract and that the breach (or breaches) took place within the jurisdiction of the court, namely, in London. In support of the original application, the plaintiff filed two affidavits, one sworn by himself on Apr. 17, 1946, and one by Dr. Bobasch, a Czech lawyer. The defendants have filed a number of affidavits, and further affidavits have been filed by or on behalf of the plaintiff. I do not propose to go into these in detail. It is, however, necessary to consider carefully the circumstances in which it is claimed that payments had to be made to the plaintiff in London.

The plaintiff held high office with the defendants, whose undertaking is now nationalised. In 1929 the question of his pension was discussed, and ultimately the defendants wrote him a letter, dated Jan. 18, 1929, on which the plaintiff relies. The concluding paragraph of this letter is:

"Should the value of the Czech crown be reduced by more than ten per cent. of its present gold value, the difference in value will be made good to you and/or your successors in the particular case."

In September, 1936, the plaintiff gave notice of his intention to retire by Dec. 31, 1937, and, as he deposes, to leave Czechoslovakia. He says that he was asked by Dr. Fuchs and Mr. Keesing to stay on for a period, and that in January, 1938, he informed Dr. Fuchs (who appears to have done the negotiating on behalf of the defendants) that he intended to go to America. Dr. Fuchs

told him that the defendants were anxious that after his retirement his services should be available to them in Europe, and asked whether he would enter into an agreement with the defendants under which it would be necessary for him to reside in Zurich, Paris or London. The plaintiff ultimately agreed, and the letter of Mar. 25, 1938, was written to him. Under this he was to be consultant in the defendant's re-organisation, and was to be available to the defendants' combine for a period of thirty days during each year. He was to be paid an annual fee of £2,000 sterling. The plaintiff retired in or about March, 1938, and he became entitled to a pension of 120,000 Czech crowns (increased to 171,408 through the fall in gold value of the Czech crown), and, as from May 1, 1938, he was entitled to salary as consultant. He went to Zurich for a short time but soon came to England and bought, and lived in, a house, No. 93 Redington Road, Hampstead. Czechoslovakia was occupied by the Germans in March, 1939, and war broke out on Sept. 3, 1939. After the outbreak of war he acquired a place in Scotland for his family and took a flat in London for himself. His Hampstead house was requisitioned. At the time of his retirement he had an account, or accounts, with the defendants on which he owed them money as the result of his having borrowed from them in order to build a house, and amounts which became due to him were credited by the defendants to his account or accounts, so that payments of pension or salary were not made to him direct either in Zurich or in London. His indebtedness to the defendants was cleared off, he says, in 1940, though it may have been a little later.

In his original affidavit of Apr. 17, 1946, the plaintiff relied on the letters of Jan. 18, 1929, and Mar. 25, 1938, and he was supported by an affidavit of Dr. Bobasch, who referred to art. 905 of the Czechoslovakian General Civil Code (which provides that, in case of doubt as to place of payment, the debtor has to transmit the money owed by him to the creditor at the latter's residence), and who said that, if the facts deposed to in the plaintiff's affidavit were correctly stated, it was the duty of the defendants, according to Czech law, to pay in England, and that failure to do so constituted a breach of contract according to the law of that country. The position has changed in some degree. To one of the defendants' affidavits there is exhibited a letter of Nov. 23, 1938. That letter was written by the plaintiff in the course of a dispute in regard to the correct manner of calculation of his pension, and it contains the following passage (as translated):

"The gold clause was requested with the express argumentation that I am going to oversea and that the matter was for me to receive the full gold value in case that nominal value of the Kc. [Czechoslovak crown] stated by law deviate from the effective rate of exchange as per international rate of exchange."

The plaintiff had not kept a copy of this letter. In his second affidavit, sworn on June 9, 1948, he says that, when he saw this letter, it brought to his mind details of a conversation he had with Dr. Sonnenschein, the defendants' general manager, in January, 1929, and of the agreement at which they arrived which resulted in the letter of Jan. 18, 1929. Paragraph 3 of the plaintiff's second affidavit is in these terms:

"When I negotiated the pension agreement of Jan. 18, 1929, with the defendants I stated that I intended to enjoy my pension abroad, although I did not then know in which country, and it was expressly agreed by Dr. A. Sonnenschein, who was the general manager of the defendants and was acting on their behalf, that I should receive payment of my pension in the country in which I might be living at the time it accrued. It was for this reason that at my request the clause providing for the payment of the full gold value was inserted in the said agreement, in order to protect

me while living abroad against any possible devaluation of the Czech currency. This was stated by me in my letter of Nov. 23, 1938, contained in exhibit A to the said affidavit of Hofirek, which was written at a time when the defendants were controlled and managed by persons who had knowledge of the agreement reached and it was not disputed by the defendants in their letter in reply, which is the letter dated Feb. 17, 1939, in exhibit 'E.K.1' to my said former affidavit. It was only when I saw the said letter dated Nov. 23, 1938, that I remembered the said agreement with Dr. Sonnenschein. In addition the heading of my pension account, as set out in para. 5 of the said affidavit of Hofirek, confirms the agreement to this effect for it contains the words 'Ausl. Kc.' which means 'foreign Czech crowns.' I am familiar with the practice of bookkeepers and accountants in Czechoslovakia and I say that according to the universal practice in that country those words are used to indicate accounts payment of which is to be made abroad."

This is of great importance. It is not easy for the defendants to refute it now, for Dr. Sonnenschein died on Sept. 26, 1939. Still, they could have communicated with him in regard to the letter of Nov. 23, 1938—we do not know whether they did so or not, but the letter raised questions on which it would have been a natural thing for them to do. The main question for consideration seems to me to be whether the court ought to accept the plaintiff's account of that which took place between him and Dr. Sonnenschein and, in particular, of the statement

" . . . it was expressly agreed by Dr. A. Sonnenschein, who was the general manager of the defendants and was acting on their behalf, that I should receive payment of my pension in the country in which I might be living at the time it accrued. It was for this reason that at my request the clause providing for the payment of the full gold value was inserted . . . "

Speaking for myself, I think it is the most natural thing in the world that sight of his letter of Nov. 23, 1938, should bring to the mind of the plaintiff the circumstances in which he wrote it, and how and why he put into it the words:

"The gold clause was requested with the express argumentation that I am going to oversea . . . "

It seems to me to bear out the conversation which he says he had with Dr. Sonnenschein in 1929. In this respect I find myself differing from SLADE, J., who stated in his judgment that he was not satisfied

" . . . that there was any express term of the agreement or any manifestation of intention which ought, according to Czech law, to be treated as though it were part of the agreement."

I assume that this means that the learned judge did not accept para. 3 of the second affidavit sworn by the plaintiff. I take the view that there is no reason why the court should not accept it. Indeed, I think we ought to accept it. It does not appear to me to be the weaker, or less likely to be true, because it appears for the first time in the second affidavit of the plaintiff. No question of failure to make full disclosure arises. No one can be expected to remember accurately the details of a conversation, or the precise terms of an agreement, made ten or twenty years earlier, and the production of a document such as the letter of Nov. 23, 1938, may well lead to a much more complete account. It may, of course, give rise to a false account, but there is nothing to lead me to the view that it has done so in this case. It was open to the defendants, if there was doubt as to the plaintiff's veracity, to apply that he should attend for cross-examination on his affidavit, but no such application was made.



The plaintiff's evidence is assisted (a) by the gold clause in the letter of Jan. 18, 1929, (b) by the fact that he was to be paid in sterling under the consultant agreement of March, 1938, and (c) to a less degree by the fact that the pension account in the defendants' records is marked "Ausl. Kc." If one accepts the plaintiff's account of his conversation with Dr. Sonnenschein and his uncontradicted account of his conversations with Dr. Fuchs and Mr. Keesing, it is clear that the defendants knew of his intention to live abroad—indeed, in regard to the consultant agreement they wished him to live in one of three named places in Europe. In his second affidavit Dr. Bobasch sets out art. 914 of the Czechoslovak Civil Code. Paragraph 3 of that affidavit is:

"In Czech law the intentions of the parties at the time of contracting and the agreements then made by them form part of the contract and are enforceable as such even though they are not expressly included in the written document which may be drawn up subsequently as a record of the contract. This is considered to be a matter of interpretation in accordance with art. 914 of the Czechoslovak Civil Code, which provides: 'In the interpretation of contracts one should not adhere to the literal meaning of expressions, but should examine the intention of the parties and interpret the contract in a manner consistent with fair dealing.' It follows from this principle that, if at the time the plaintiff's pension agreement was made the parties contemplated that he would live abroad when he drew the pension and intended that it should be paid to him where he might live, it would be so payable. The defendants would therefore be in breach of contract if they failed to pay him his pension at his place of residence and in accordance with the rates of exchange prevailing there."

I do not find that Dr. Bobasch's statement of the law in this respect is in dispute.

Counsel for the plaintiff put his case on the pension claim as depending on a verbal agreement of which the letter of Jan. 18, 1929, was evidence in support. Accepting, as I do, the plaintiff's sworn testimony, I consider that the intention of the parties in 1929 was that the pension should be paid abroad at the place at which the plaintiff should be living and that according to Czech law there was an agreement to that effect. That agreement was certainly not weakened by the 1938 agreement, rather otherwise. At that time the defendants wished the plaintiff to live either in Zurich, Paris or London, and they agreed to pay him his remuneration quarterly in sterling. Again, applying art. 914 of the Czechoslovak Civil Code, I think that there was agreement to pay him at the one of those three places at which he should be residing—and since 1938 that place has been London and the defendants have had his address.

Having regard to the view I have expressed, it is not necessary for me to deal with the arguments addressed to the court on art. 905 of the Czechoslovak Civil Code. Mr. Pelc, a Czech lawyer, who swore two affidavits on behalf of the defendants, raises a point to the effect that an agreement to oust the application of art. 905 could be constituted by the crediting of the payments to the plaintiff's account in Czechoslovakia without objection by him. I doubt whether the crediting of amounts over a short period during which the plaintiff was indebted to the defendants could have any such effect. In any event, such a course of action could not avoid the agreement to pay abroad (or in London) which, in my view, was the true position.

I respectfully agree with SLADE, J., in his statement of the law. There are two entirely separate questions for consideration. In the first place, it is for the plaintiff to show that he has a case fit and proper to be tried with a reasonable chance of success. It is not for the court on this application to try the case or to be sure that the plaintiff will succeed on his claim. I refer to the speech of LORD PORTER ([1949] 1 All E.R. 298, 299) in *Tyne Improve-*

*ment Comrs. v. Armement Anversois S.A., The Brabo* (5). LORD PORTER'S view is summarised at the end of the headnote ([1949] A.C. 327) in these words:

"... though leave should be given when a substantial question of fact is in issue and possibly also when there is an exceptionally difficult and doubtful point of law."

I do not propose to go into this part of the case further than to say that it is clear that there are substantial questions of fact in issue on which the plaintiff may well succeed, and that involved questions in regard to the law of Czechoslovakia arise. *Prima facie*, the plaintiff is entitled to payment of the pension, and it would appear that there is money due on the consultant's agreement even though it was put an end to by the outbreak of war. Secondly, it is for the plaintiff to show that the breach of contract, if there was one, took place within the jurisdiction. It is only on this application that this point falls to be decided, and, unless the plaintiff can show it to the satisfaction of the court, under R.S.C., Ord. 11, r. 4, he ought not to be given leave to serve his writ out of the jurisdiction in a case under R.S.C., Ord. 11, r. 1 (e). Something arising within the jurisdiction—in this case the breach—is essential to the plaintiff's application.

In *Malik's* case (2) the facts were quite different from those of the case now before the court and leave was refused. LORD GODDARD, C.J., in the course of his judgment, said ([1946] 2 All E.R. 665):

"Therefore, the court has to be satisfied on the affidavits that the action is brought in respect of a breach committed within the jurisdiction."

Later in his judgment he said (*ibid.* 666):

"Certainly, since I have known anything about the practice the court has always asked itself the single question: Is it shown clearly on the affidavits that the breach occurred within the jurisdiction or is it not so shown? If it is shown that the breach occurred within the jurisdiction, leave can be given. If it is not so shown, as I have always understood it, leave cannot be given."

MORTON, L.J., said (*ibid.* 667):

"I agree that this appeal should be dismissed because it is not shown that a breach of contract has been committed within the jurisdiction. That being so, this court has no discretion to allow service of notice of the writ out of the jurisdiction."

These expressions of opinion are in complete accord with the view of the House of Lords in *Comber v. Leyland* (8), and of the Privy Council in *Hemeltryck v. William Lyall Shipbuilding Co.* (6), *per* LORD BUCKMASTER ([1921] 1 A.C. 701).

Let me add this. I take the view that the plaintiff has shown that a breach, or breaches, of contract took place within the jurisdiction. I do not disguise from myself that it may be extraordinarily difficult in some cases to be certain of this on evidence given by affidavits. A different complexion might be put on the matter when witnesses are heard and when they are cross-examined. I do not think that that ought to stand in the way of leave being given in a case such as this, if it is felt that there is no sound reason shown for disbelieving that to which the plaintiff has deposed, especially so when no application to cross-examine him has been made. Though, for the reasons I have given, I think that leave ought to be given unconditionally, I am not unmindful of the fact that the course suggested by BUCKNILL, L.J., of giving conditional leave—a course which was approved by this court in 1886 in *Thomas v. Dowager Duchess of Hamilton* (3)—is one which would preserve the defendants' rights completely and would at the same time enable the plaintiff to have his claim heard. I do not think that in any event that course would result in hardship to the defendants, scattered as the witnesses appear to be.

A I take a different view of the facts from that which SLADE, J., took. It is essential to make up one's mind whether one accepts the statement of the plaintiff. If one does—as I do—effect must be given to it. The only real criticism which I venture to make of the judgment of the learned judge arises from his rejection of, or his passing over, that part of the plaintiff's second affidavit which deals with the conversation and oral agreement said to have been made with Dr. Sonnenschein, and in his failure to apply that along with the written documents, in accordance with art. 914 of the Czechoslovak Civil Code. It may be said that this is largely a matter of discretion, though I look on it rather as failure to give due, or any, weight to the uncontradicted evidence of a witness against whose honour, so far as I know, no one can say one word. The same applies in a less degree to the conversations with Dr. Fuchs and Mr. Keesing.

B On the question of *forum conveniens* and the general discretion of the court, I hold the view that on the evidence the case is a proper one for service out of the jurisdiction. That was the view which MORTON, L.J., formed in *Malik's* case (2). I consider that the facts in the present case point even more strongly to this as being the right course. In my opinion, the plaintiff brings himself within the provisions of R.S.C., Ord. 11, and I would allow the appeal.

C DENNING, L.J. (read by SINGLETON, L.J.): The first question in this case raises a nice problem in the doctrine of precedent. Is this court bound to accept the test laid down by LORD GODDARD, C.J., in *Malik v. Narodni Banka Ceskoslovenska* (2), or is what he said merely *obiter dictum*? In my opinion, the test was part of the *ratio decidendi*. The court was there faced with two rival tests and chose one of them, which it then applied to the facts, and reached a certain conclusion. The selection of the right test was, therefore, one of the links in the chain of reasoning, and I do not think it would be right for us to dismiss it as mere *obiter dictum*, *i.e.*, as a statement made merely by the way: see *per* TALBOT, J. ([1934] 2 K.B. 154) in *Flower v. Ebbw Vale Steel, Iron and Coal Co.* (9). It is said that, if the court had chosen the other test, they would still have come to the same conclusion. I am not so sure of that, because I have not seen the evidence which was before them, but, even if they would have done, it does not mean that their test is of no authority. It may not be absolutely binding on us, but we ought to follow it unless there are strong reasons for not doing so. One such strong reason would be any comments or reasoning by the House of Lords tending to throw doubt on it. It was, indeed, suggested to us that the House of Lords in *The Brabo* (5) had laid down a different test, and, if the headnote ([1949] A.C. 327) were correct, it would look as if LORD PORTER had done so. But, when his speech is read carefully, it becomes clear that his remarks were confined to the question when an action could be said to be "properly brought" within R.S.C., Ord. 11, r. 1 (g), and have no application to R.S.C., Ord. 11, r. 1 (e).

G Another strong reason would arise if it could be demonstrated that the test laid down in *Malik's* case (2) was wrong, but I do not think that that has been demonstrated. That case was concerned, as this case is also, with a contract made by foreigners in a foreign country and governed by the law of that foreign country, and one of the parties to it now seeks to compel the other to come to this country to litigate it against his wish. As matter of high policy, I do not think that in such a case these courts should lend their aid to this course unless they are satisfied that they have jurisdiction to do so. Even if we disapprove of the way that justice is administered in the foreign country, that is no justification for our usurping a jurisdiction which does not properly belong to us. The only possible ground that is put forward for saying that this court has jurisdiction is that it is said that the contracts were to be performed in this country and were broken here. If the written contracts had contained a term requiring performance here, that would be a safe ground on



which to act. But when the written contracts are examined, it is seen that in this case, as in *Malik's* case (2), there is no term in either contract requiring it to be performed here. Resort is, therefore, had to implications and inferences and oral conversations. This is not very promising material with which to build a safe foundation for an extended jurisdiction, and I should not myself think that the case is a "proper one for service out of the jurisdiction" within R.S.C., Ord. 11, r. 4, unless I was satisfied that the foundation was safe. At any rate, that was the view of this court in *Malik's* case (2), and I am certainly not prepared to say that they were wrong. In my opinion, therefore, in cases such as *Malik's* case (2) and the present case, this court should accept and apply the test laid down by LORD GODDARD, C.J. A

The next question is whether there is sufficient material to satisfy the court that the contract was to be performed here. It is said that the moneys due under the pension agreement and the service agreement were payable to the plaintiff at the place where he was living, and, as he was living here, they were payable here. On the point much reliance was placed on the law of Czechoslovakia, but on the evidence I agree with TUCKER, L.J. ([1946] 2 All E.R. 667) in *Malik's* case (2) that it is very similar to English law on the subject. If there is no stipulation as to the place of payment, it is in general, there as here, the duty of the debtor to seek out the creditor at whatever place he happens to be. In English law, however, that is subject to the qualification that, if the contract is an English one, and the creditor was within the realm when it was made, then the debtor is not in general bound to follow him to a foreign country to pay him: see *Fessard v. Mugnier* (10) per ERLE, C.J. (18 C.B.N.S. 305). The debtor would, no doubt, satisfy his obligation by holding the amount here in readiness for the creditor's return, or by placing it to his credit here, or by remitting it on request to the foreign address of the creditor, at the creditor's risk and expense. If he failed to do any of these things, the breach would be committed in this country and not abroad, because the duty is not to pay abroad, but to pay here or to remit from here. As I read the evidence, there is nothing in the General Civil Code of Czechoslovakia which deals expressly with the position where the creditor, after making the contract in Czechoslovakia, goes abroad; but art. 905 of the Code does say that, if the creditor changes his residence, the debtor is to remit the money to the new residence *at the creditor's risk and expense*. That looks as if, even if the creditor goes to a new residence in Czechoslovakia, the debtor is not bound to follow the creditor to the new residence but only bound to remit to him there. The evidence is that the same rule applies where the creditor goes abroad, so that it looks as if the debtor is not bound to follow the creditor abroad but only to remit to him there. Moreover, art. 1425 of the Code says that, if a debt cannot be paid because the creditor is absent, the debtor can get a good discharge by depositing the money in court. These provisions show, to my mind, that the debtor is not bound to follow the creditor abroad. At any rate, I see no evidence sufficient to rebut the presumption that the law of Czechoslovakia is the same as English law on the point. B C D E F G

Nor do I think that the plaintiff derives any assistance from the presence of the gold clause in the pensions agreement or the fact that after 1938 his account was kept in *Ausland Kronen* or that the 1938 service agreement provided for payment in sterling. Those features certainly show that he wanted to safeguard himself from depreciation of the Czechoslovakian currency. They also support his story that he intended to live abroad and told the company of his intention. But they do not show that the company agreed to follow him to a foreign country to pay him. All those features are quite consistent with the view that the duty of the company was to *remit from* Czechoslovakia to him abroad. Their duty was done in Czechoslovakia, when they posted the money to him, or otherwise remitted it to him. Thereafter it was at his risk and expense. If they were bound to pay him in England, or any other country H

where he happened to be, it would mean that they would have to see that the money actually reached him abroad, which would mean that whilst in transit it would be at their own risk and expense, but art. 905 of their Code shows that that is not their law. This distinction—between *paying* in another country and *remitting* to that other country—has frequently been recognised and forms the basis of the decision in *Comber v. Leyland* (8), and *St. Pierre v. South American Stores (Gath & Chaves), Ltd. and Chilean Stores (Gath & Chaves), Ltd.* (11). I am confirmed in this view by the practice of the parties. It is quite plain that never in the course of these agreements did the company follow him abroad to pay him. They credited his account in Czechoslovakia and made remittances from that account in accordance with his instructions. It is most significant that in 1939, when they stopped payment under the service agreement, his only complaint was that they had not placed the amounts to his credit in Czechoslovakia: see his letters from April to August, 1939. The whole course of conduct of the parties shows, to my mind, that the obligation of the company was to credit him in Czechoslovakia and to remit from there—quite the reverse of the position in *Rein v. Stein* (12). The plaintiff sought to overcome this difficulty by saying that he was indebted to the company on contra-account and that the credits were made in Czechoslovakia in order to discharge the contra-account. That explanation, however, will not work, because the accounts and letters show that the credits were used not merely to discharge the contra-account, but also to make remittances from Czechoslovakia to relatives and others in Czechoslovakia and abroad.

All these points failing, therefore, the plaintiff relies on an oral agreement that he should receive payment of his pension in the country in which he might be living at the time that it accrued. This is, as SINGLETON, L.J., has said, the main point for consideration. I cannot regard it as a safe foundation for an extended jurisdiction for these reasons. (i) It was not mentioned in the writ or in the affidavit on which the application was based. It is an indulgence, therefore, to allow him to set it up at all: see *Bremer Oeltransport G.m.b.H. v. Drewry* (13), *per* SLESSER, L.J. ([1933] 1 K.B. 765). (ii) It is impossible to suppose that the plaintiff can have any accurate recollection about it, for, even according to him, it was made twenty years ago in the course of a conversation with a man who is now dead and unable to contradict the plaintiff's account of it. He has no memorandum of it and he admitted that in April, 1946, when he brought this action, he had forgotten its existence. He remembered it later in the action after May, 1947, *i.e.*, after *Malik's* case (2) had been decided, and when it was very much in his interest to find, if he could, a firm contract to pay him here. (iii) According to English law, the alleged oral agreement would be inadmissible in evidence. The plaintiff says that it was made in the course of the negotiations before the terms were set down in writing. The company's letter of Jan. 18, 1929, by the very wording of it, shows that that letter was intended to record in writing that which had been agreed. It says that:

“ . . . the agreements hitherto in force are annulled and the following covenants shall apply in place and stead thereof.”

It was, I should have thought, plainly a written contract: see *L'Estrange v. F. Graucob, Ltd.* (14); and, accordingly, in English law no evidence of prior negotiations would be admissible to add to it or to vary it. This is no technical rule. It is based on sound sense, because when people, after preliminary negotiations, set down their agreement in writing, they record those terms by which they intend to be bound and put aside the rest. The writing is the grand criterion of what terms were intended to be contractual and what were not. This applies with especial force in this case because the previous oral agreement is said to have been made in the course of negotiations between the plaintiff, who was the managing director of the company, and Mr. Sonnenschein,

who was the general manager. Can anyone suppose that this oral agreement was put before the board of management of the company? The letter presumably was put before the board, because it contained the contractual terms, but it is very unlikely that the oral conversations were put before the board. There was, and is, no record of them, and I cannot believe that they contained any contractual terms. (iv) If I am right in thinking that in English law no evidence of this oral agreement can be admitted, it means that it cannot be admitted at the trial of this action, if it is allowed to proceed. The rule of our law which says that documents are exclusive evidence of the transaction which they embody is a rule of evidence, and, as such, it is to be applied by our courts even when they deal with foreign contracts, because, by private international law, the court of trial applies its own rules of evidence, just as it applies its own mode of trial: see *Yates v. Thomson* (15), *Bain v. Whitehaven and Furness Ry. Co.* (16), and *Leroux v. Brown* (17). In contrast, I must point out that our rules for the interpretation of contracts—by which we usually exclude oral evidence, except to explain technical terms—are not, strictly speaking, rules of evidence at all—because they deal with construction and not proof. The distinction is well pointed out in STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, in the notes to arts. 97 and 98 (notes xiv and xv). When it comes, therefore, to the interpretation of a foreign contract, our courts apply the foreign law, and, if by the foreign law—as by art. 914 of the Czechoslovak Civil Code—oral evidence is admissible to interpret the document, it will be admitted here: see *St. Pierre's case* (11). The present case, however, is one, not of interpretation, but of adding a term to a written contract, and our rules of evidence apply so as to prevent that addition. (v) Even if the oral evidence is admitted, I am not satisfied that there was any agreement which required the company to follow the plaintiff into whatever country he may be living. Much would depend on the precise words used. It would need very strong words to put on the company an obligation, not only to remit from Czechoslovakia, but also to pay in any other country. I do not think that the words to which the plaintiff speaks are sufficient for the purpose.

For these reasons, I am of opinion that the evidence is either not admissible or, if admissible, is valueless. I am, therefore, not satisfied that the case is a proper one for service out of the jurisdiction. I can appreciate the desire of the plaintiff to get payment from the assets in this country, and, if there really was a promise to pay him here, all well and good, we ought to make the foreigner pay him here. But, if there was no such promise—if the supposed promise is only an afterthought put forward to bolster up his case—then, however good his object, it is vitiated by the means he has employed to achieve it. This court has never allowed a good end to justify a bad means, and I trust it never will. I find myself, therefore, in full agreement with SLADE, J., and I would dismiss the appeal. Even if leave is to be given, I should have thought that the case was open to such doubt that there should at least be a condition precluding the plaintiff from recovering except in regard to such breaches, if any, as are proved to have occurred within the jurisdiction: see *Thomas v. Dowager Duchess of Hamilton* (3). I would prefer, however, to refuse leave altogether, because I agree with LORD GODDARD, C.J., that it is undesirable to attach such a condition. The question whether there has been a breach within the jurisdiction is a preliminary point going to jurisdiction only, and it should be decided here and now before the expense of a trial is incurred.

*Appeal allowed with costs, with a condition, in regard to the claim under the service agreement, that, if it appeared that the claim was not payable within the jurisdiction, the plaintiff was not to obtain judgment on that head of claim.*

Solicitors: *Rubinstein, Nash & Co.* (for the plaintiff); *Blyth, Dutton, Wright & Bennett* (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]



KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* DEELEY.

[COURT OF APPEAL (Cohen and Asquith, L.JJ., and Roxburgh, J.), February 14, 15, 1950.]

*Rent Restriction—Sub-letting—Dwelling-house let at rent less than two-thirds of rateable value—Sub-letting at rent more than two-thirds—Expiry of head-lease—Right of landlords to possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (7), s. 15 (3).*

A A dwelling-house which had a rateable value which brought it within the Rent Restrictions Acts, 1920 to 1949, was let to a tenant for a term of seventeen years at a rent which was less than two-thirds of the rateable value so that the tenancy was excluded from the protection of the Acts by s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The tenant had sub-let the premises to a sub-tenant at a rent in excess of two-thirds of the rateable value. On the expiry of the head-lease the landlord claimed possession, but the sub-tenant relied on the protection afforded by s. 15 (3) of the Act of 1920 which provides: "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

D HELD: the rent paid by the tenant under the lease being less than two-thirds of the rateable value, by s. 12 (7) of the Act of 1920 that Act applied in respect of the dwelling-house as if the lease had not existed; as the tenant had never held a tenancy to which the Act applied, it could not be said that her tenancy had "determined," within the meaning of s. 15 (3); and, therefore, the sub-tenant could not bring himself within the provisions of that sub-section when the head-lease expired and was not protected against eviction.

[AS TO THE POSITION OF SUB-TENANTS UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 333, 334, para. 399; and FOR CASES, see DIGEST, Vol. 31, pp. 581, 582, Nos. 7303-7310, and 2nd Digest Supp.]

F Cases referred to:

- (1) *Brookes v. Liffen*, [1928] 2 K.B. 347; 97 L.J.K.B. 326; 138 L.T. 676; 92 J.P. 102; Digest Supp.
- (2) *Wright v. Arnold*, [1946] 2 All E.R. 616; [1947] K.B. 280; [1947] L.J.R. 341; 176 L.T. 45; 2nd Digest Supp.
- (3) *Cow v. Casey*, [1949] 1 All E.R. 197; [1949] 1 K.B. 474; [1949] L.J.R. 565.
- G (4) *Watson v. Saunders-Roe, Ltd.*, [1947] K.B. 437; [1947] L.J.R. 563; 176 L.T. 521; 2nd Digest Supp.

APPEAL by a sub-tenant from an order of His Honour JUDGE DRUCQUER, made at Westminster County Court on Nov. 11, 1949, for possession of a dwelling-house in favour of the landlords. The facts appear in the judgment of ASQUITH, L.J.

H *Sofer* for the sub-tenant.

*Pearl and Basil Austin* for the landlords.

COHEN, L.J. : I will ask ASQUITH, L.J., to deliver the first judgment.

ASQUITH, L.J. : This is the sub-tenant's appeal against an order for possession of certain premises near Hanover Square, London, made by His Honour JUDGE DRUCQUER, at Westminster County Court. The facts are, in substance, unchallenged. On Dec. 9, 1931, the landlords let the premises to

a Miss Strutt for seventeen years from Dec. 25, 1931, at an annual rent of £20 a year, payable quarterly. In November, 1943, Miss Strutt assigned her lease to a Mr. Ellis who, in July, 1946, re-assigned the lease to a Mr. Wade. During her term Miss Strutt had sub-let the premises to the sub-tenant at £35 a year, rising ultimately to £75. On Dec. 25, 1948, the head-lease of which Wade was then the assignee expired by effluxion of time. The landlords claim possession from the sub-tenant who sets up s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejection, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

The sub-lease in question in this case had been made in breach of the covenant not to under-let, but no point is now taken on that. No point is taken that it was not a lawful sub-letting within s. 15 (3) because, since the material time, it is conceded that this breach has been waived by acceptance of rent.

The question raised in the appeal is whether the sub-tenant can claim to retain possession by virtue of s. 15 (3) having regard to the terms of s. 12 (7). The county court judge has held that he cannot. At common law, of course, a sub-lessee's interest would automatically be extinguished when the head-lease from which it was carved had expired, and, if it is not extinguished in this case, this can only be by the operation of s. 15 (3). Can the sub-tenant bring himself within the terms of that provision? The protection which the sub-section accords to a sub-tenant is only available in cases where, as is said in the first two lines of the sub-section, "the interest of a tenant of a dwelling-house to which this Act applies is determined." "The tenant" here clearly means the head tenant. It can mean nothing else in a case like the present where there are only three *dramatis personae*, the landlord, the head tenant, and the sub-tenant. It is conceded that the dwelling-house is a dwelling-house to which the Act applies, but what the sub-tenant has further to establish is that the person from whom he took the sub-lease of such a dwelling-house (i) had the "interest of a tenant of a dwelling-house," and (ii) that that interest had determined." Now "the interest of a tenant of a dwelling-house" is simply his tenancy. What else can it be? The wording of s. 15 (3) supports that view, because, while it speaks in the first line of "the interest of a tenant of a dwelling-house," in the last line it uses the words "the same terms as he would have held from the tenant if the tenancy had continued," obviously drawing no distinction between the word "tenancy" and "interest of a tenant." The draftsman seems to treat them as synonyms.

Section 12 (7) of the Act of 1920 makes provision as to certain tenancies. Omitting immaterial words, it reads thus:

"Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

I think it is fairly clear that the object of that provision was to deal with a case in which the head-lease on foot at the material date—Aug. 4, 1914—was at a ground rent or some abnormally low rent. In such a case, unless provision were made to the contrary, that very low rent would become the standard rent. The object was to prevent it becoming the standard rent, for this would be most unfair to the head landlord, but, on the other hand, to provide that, if there were a sub-tenancy, not at a ground rent, but at a commercial rack

rent, the sub-tenant should be able to treat the rent at which he held as the standard rent, and the head rent should be ignored in fixing that standard rent. That, I think, is plainly the object of the sub-section, but its wording may well be such that it begets a number of other consequences which were, perhaps, un contemplated and unintended by the draftsman.

A In the present case the rent payable by the head lessee, Miss Strutt, and her two successive assigns, was less than two-thirds of the rateable value. The Act, therefore, applies in respect of the dwelling-house as if the head-lease had never existed. If the head tenancy had never existed, the condition precedent to the application of s. 15 (3), *viz.*, the determination of the interest of the tenant, the head-lessee, must necessarily go unfulfilled. The *de facto* head tenant must be deemed never in law to have had the "interest of a tenant of the dwelling-house," and, if she never had such an interest, the interest in question cannot have been "determined," for a thing cannot die if it has never been born. This seems to me an insurmountable obstacle in the way of the otherwise most attractive argument presented by counsel for the sub-tenant. I agree with him that the result I have indicated is almost certainly unintended. I agree with him that it is unjust, and that it does nothing to promote the objects of this legislation which are too well-known to need re-statement here, but it seems to me to be an ineluctable conclusion when one considers the wording of these two provisions. True, s. 12 (7) is, in itself, a perfectly reasonable provision to prevent low ground rents under building leases which were being paid at the material date, Aug. 4, 1914, from being stereotyped as the standard rent. D The observations of SCRUTTON, L.J., in *Brookes v. Liffen* (1) make this point very clear. The effect of the impact of s. 12 (7) on s. 15 (3) is most unreasonable. There is no reason why the sub-lessee at a rack rent from a head lessee who pays a ground rent to his landlord should be any the less entitled to protection than a sub-lessee who holds from a head lessee who pays a rack rent to his landlord. The one sub-tenant is as meritorious as the other, but the wording of the two sub-sections leads to a distinction between them as arbitrary as that which ordains that, of two women grinding at the mill, "the one should be taken and the other left."

E Counsel for the sub-tenant cited a number of authorities including *Wright v. Arnold* (2), and *Cow v. Casey* (3). Those two cases, so far as relevant, decide that where premises, part of which has been sub-let, are not a dwelling-house to which the Act applies at all, for instance, if the rateable value is over £100, then s. 15 (3) confers no protection on the sub-tenant. F Counsel for the sub-tenant appeared to me to deduce from this that if the premises *were* a dwelling-house to which the Act applies, that was all that mattered and the protection of s. 15 (3) would automatically be attracted. That, in my judgment, is not so. There are two distinct pre-requisites set out in the first two lines of s. 15 (3) G for the application of that sub-section. First, the dwelling-house must be one to which the Act applies, and, secondly, the head lessee must have the interest of a tenant in that dwelling-house, *i.e.*, he must have a tenancy. If such a tenancy is at a rent which is less than two-thirds of the rateable value, it must be deemed not to exist and never to have existed. Therefore, no one had the interest of a tenant at any time in these premises, nor could any such interest have been determined, nor, consequently, could s. 15 (3) apply. H If the language of LORD GREENE, M.R., in *Cow v. Casey* (3), is carefully examined, I think it will appear that he had these two cumulative and distinct requirements of s. 15 (3) in mind and that he was not merely inquiring whether the requirement that the dwelling-house should be one to which the Act applies was satisfied. Take, for instance, this passage, where he says ([1949] 1 All E.R. 198):

"... the sub-section is clearly limited to a case where the head-tenant whose tenancy is determined is tenant of a dwelling-house to which the



Rent Acts apply. Here the company was not a tenant of a dwelling-house to which the Acts apply. It was tenant of a dwelling-house to which the Acts did not apply."

Counsel for the sub-tenant, to my mind, extracts no material reinforcement in meeting this central objection from other cases which he cited, such as *Watson v. Saunders-Roe* (4). In that case the main issue, though not the sole issue, was whether the premises were lawfully sub-let. In the present case, *ex concessis* they were. Nor do I think the attempted trichotomy of the first two lines of s. 15 (3) (which certainly derives no support from their punctuation) carries counsel for the sub-tenant any further. A

Reliance was also placed on the wording, which differs somewhat from that of s. 15 (3), of s. 2 (3) of the Landlord and Tenant (Rent Control) Act, 1949, but the language of the material provisions of the Act of 1920 seems to me too clear for any subtle construction, and I do not see how it can be altered or any light thrown on it by the terms of the later statute. Finally, counsel for the sub-tenant painted an alarming picture of the consequences which might ensue if the county court judge's construction were upheld. Such an argument is, in its nature, inconclusive, but for what it is worth it was to the effect that long building leases at ground rents in London will be falling in in great numbers in the next decade. Many lessees at ground rents have let to sub-tenants at commercial rack rents. When the head-leases of the builders fall in, if the judge's view is affirmed and the sub-tenants become expellable, the landlords will be free, having expelled them, to re-let at exorbitant rents untrammelled by the restrictions of the Acts. I do not feel this bug-bear has any reality. The effect of s. 15 (3) and s. 12 (7) combined would, no doubt, be, if the view I have taken of them is right, that the existing sub-tenants could in those cases be ejected, but, if they were ejected, the rents at which they had held would become the standard rents of the houses in question. There would be no question of the landlords being able to re-let at any rent they could obtain. For these reasons, in my view, the appeal fails and must be dismissed. B

COHEN, L.J.: I agree. E

ROXBURGH, J.: I agree on all points except one, as to which I should like to reserve my view, and that is whether the result at which we have arrived is wholly unintended (a matter which cannot affect the question of construction). Many of these leases at ground rents are long leases, at the end of which premises require re-building, and it may well be that Parliament thought it right that a landlord who wanted to re-build at the end of a long ground lease should not be encumbered by sub-tenants who had a statutory right to remain in occupation. I am not saying that that is so. I merely wish to reserve my view on that matter. F

*Appeal dismissed with costs.*

Solicitors: *Tarlo, Lyons & Co.* (for the sub-tenant); *Montagu's*, and *Cox & Cardale* (for the landlords).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.] G

## HAYWARD AND ANOTHER v. PULLINGER & PARTNERS, LTD.

[KING'S BENCH DIVISION (Devlin, J.), February 16, 17, 20, 21, 22, 1950.]

*Pleading—Damage—Special damage—Wrongful dismissal—Remuneration during period of alleged contractual notice.*

**A** In an action for wrongful dismissal the plaintiffs, in their statement of claim, pleaded an oral agreement of employment and that it was an implied term thereof that the plaintiffs' service should be terminable only by reasonable notice, which, they alleged, was six months. The plaintiffs then alleged that they had been summarily dismissed without notice, and in the prayer claimed, *inter alia*, "damages for wrongful dismissal."

**B** It appeared that the damage in respect of which they sought to recover was the loss of salary and commission which they would have earned during the period of notice to which they claimed to be entitled, if it had been given.

HELD: the damage complained of was special damage, and, as it had not been specifically pleaded, the statement of claim was defective.

*Monk v. Redwing Aircraft Co., Ltd.* ([1942] 1 All E.R. 133), *followed*.

**C** [AS TO SPECIAL DAMAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 84, 85, 145, paras. 103, 186; and FOR CASES, see DIGEST, Vol. 17, pp. 153, 154, Nos. 549-553.]

Case referred to:

(1) *Monk v. Redwing Aircraft Co., Ltd.*, [1942] 1 All E.R. 133; [1942] 1 K.B. 182; 111 L.J.K.B. 277; 166 L.T. 42; 2nd Digest Supp.

**D** ACTION for damages for wrongful dismissal.

In their statement of claim the plaintiffs alleged the contract and its breach, and included a claim for damages for wrongful dismissal in the prayer, but there was no separate paragraph specifically alleging damage through loss of salary and commission. At the trial the defendants objected that this damage was special damage and no evidence could be given of it as it was not specifically pleaded.

*Harold Brown* for the plaintiffs.

*F. D. L. McIntyre* for the defendants.

**F** **DEVLIN, J.:** The plaintiffs desire to claim, by way of damages for wrongful dismissal, the loss of the salary and commission they would have earned during the period of reasonable notice if it had been given. Counsel for the defendants objects, and has asked me to rule on the objection, that it is not open to the plaintiffs on their form of pleading to ask for damages in that way. The pleading alleges the contract and the breach. It does not contain any paragraph specifically alleging damage, but in the prayer there is a claim for damages for wrongful dismissal. It is conceded by counsel for the plaintiffs, and I think rightly, that he cannot recover in respect of any special damage unless that special damage is pleaded. The only question, therefore, which I have to determine is whether damages of the nature described are general or special. In my judgment, it is clear from the case which has been cited to me by counsel for the defendants, the decision of the Court of Appeal in *Monk v. Redwing Aircraft Co., Ltd.* (1), that damage of this nature is special damage, and, accordingly, I think that the statement of claim is defective in that it does not cover a claim for special damage of this sort. Counsel for the plaintiffs has relied on the precedent that is set out in *BULLEN AND LEAKE*, 9th ed., p. 253, but I think, at any rate since the decision of the Court of Appeal to which I have referred, that it is clear that that precedent no longer governs the matter. It is, of course, extremely common, when damage is alleged in general terms, for an application to be made to obtain particulars of the special damage, if any, relied on, but there can be no obligation

to ask for such particulars, and I think the true position is that, unless they are contained in the statement of claim, evidence leading to damage in respect of which damages are claimed cannot technically be relied on at the trial. I am dealing purely with the technical position. I have not to consider at this stage whether anybody has been prejudiced as a result of the pleading in its present form. Counsel for the plaintiffs has indicated that, if I rule against him, he will apply for leave to amend, and I shall consider such matters on that application. A

Solicitors: *Grinling, Harris & Hale*, agents for *Marsh & Ferriman*, Worthing (for the plaintiffs); *J. N. Mason & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law.*]

## Re BLATHWAYT'S WILL TRUSTS. BLATHWAYT AND OTHERS *v.* BLATHWAYT AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), February 22, 1950.] B

*Will—Forfeiture—Gift to C. for life with remainder to first and other sons in tail male, and remainders over—Forfeiture of C.'s life interest, while C. a bachelor—Acceleration of second life estate—Accelerated life estate not determined by birth of son to C.*

By his will, dated Aug. 7, 1934, the testator settled certain property on trust for C. for life, with remainder on trust for the first and other sons of C. successively, in order of seniority, in tail male, with remainder on trust for J. for life, with remainders over. The will contained a forfeiture clause whereby "if any person who under the trusts hereof shall become entitled as tenant for life or tenant in tail male by purchase to the possession" of the settled property "be or become a Roman Catholic . . . the estate hereby limited to him shall cease and determine and be utterly void" and the settled property "shall thereupon go to the person next entitled under the trusts hereinbefore declared in the same manner as if the person whose estate shall so cease determine and become void being a tenant for life were then dead or being a tenant in tail male were then dead without issue inheritable under the estate tail." D  
The testator died on Nov. 2, 1936, and in 1939, C., the tenant for life, who was then a bachelor, became a Roman Catholic, thereby forfeiting his interest in the property. By an order of the court, dated June 5, 1940, it was declared that the life interest of J. in the settled property was accelerated. In 1948 C. married, and a son, M., was born to him on June 8, 1949. The question was whether J.'s life interest in the settled property determined by reason of the birth of M. E  
F

HELD: on the true construction of the will, and in the events which had happened, J. was the person next entitled to the settled property in 1939, when C. forfeited his life interest therein, and J.'s interest in the property was not determined by the birth of M. G

*Re Brooke* ([1923] 2 Ch. 265), and *Re Conyngham* ([1921] 1 Ch. 491), distinguished. H

[AS TO EFFECT OF FAILURE OF PRIOR LIFE INTEREST, see HALSBURY, Hailsham Edn., Vol. 34, pp. 132-134, paras. 171, 172; and FOR CASES, see DIGEST, Vol. 44, pp. 429-432, Nos. 2584-2596.]

Cases referred to:

- (1) *Re Brooke*, [1923] 2 Ch. 265; 92 L.J.Ch. 504; 129 L.T. 379; 44 Digest 431, 2592.



(2) *Re Conyngham*, [1921] 1 Ch. 491; 90 L.J.Ch. 364; 125 L.T. 300; 44 Digest 431, 2591.

ADJOURNED SUMMONS to determine a question arising under the will of the testator, Robert Wynter Blathwayt.

A By his will the testator settled certain property on trust for Christopher Blathwayt for life, with remainder on trust for Christopher's first and other sons successively in tail male, with remainder on trust for the first defendant, Justin Blathwayt, for life, with remainders over. Under a forfeiture clause in the will Christopher, the first tenant for life, forfeited his interest in the settled property in 1939, while still a bachelor, and by an order of FARWELL, J., dated June 5, 1940, it was declared that the life interest of the first defendant in the property was accelerated subject to determination in the event of the birth of a son to Christopher. Christopher subsequently married, and on June 8, 1949, a son (the second defendant, Mark Blathwayt) was born to him. The question now was whether the first defendant's interest in the settled property determined on and by reason of the birth of the second defendant. The facts appear in the judgment of WYNN-PARRY, J.

C *Wilfrid Hunt* for the trustees.

*Pascoe Hayward, K.C.*, and *T. A. C. Burgess* for the first defendant, Justin Blathwayt.

*McMullen* for the second defendant, Mark Blathwayt.

D WYNN-PARRY, J.: As this matter has developed, the only question with which I have to deal to-day is one purely of construction arising on certain passages in the will of the testator, who died on Nov. 2, 1936. The will was made on Aug. 7, 1934, and the first relevant clause is cl. 6, by which the testator devised and bequeathed to his trustees all his "freehold lands and hereditaments situate or arising in the counties of Somerset and Gloucester or elsewhere (hereinafter collectively referred to as 'my principal estate')," which, by the operation of cl. 5, included the residue of his personal estate

E "... upon the trusts and with and subject to the powers and provisions following namely: (a) upon trust for Christopher George Wynter Blathwayt (the elder son of my late cousin Henry Wynter Blathwayt) during his life with remainder (b) upon trust for his first and other sons successively in order of seniority in tail male with remainder (c) upon trust for Justin Robert Wynter Blathwayt (the younger son of my said late cousin) during his life ..."

F Then follow certain remainders over, to which it is unnecessary to refer. By cl. 9, the testator declared as follows:

G "I further declare that if any person who under the trusts hereof shall become entitled as tenant for life or tenant in tail male by purchase to the possession of my principal estate shall (a) be or become a Roman Catholic or (b) disuse the surname and arms of Blathwayt then and in either of such cases the estate hereby limited to him shall cease and determine and be utterly void and my principal estate shall thereupon go to the person next entitled under the trusts hereinbefore declared in the same manner as if the person whose estate shall so cease determine and become void being a tenant for life were then dead or being a tenant in tail male were then dead without issue inheritable under the estate tail ..."

H In November, 1939, Christopher George Wynter Blathwayt, the first tenant for life, who was then a bachelor, was received into the Roman Catholic Church, and, by an order made on June 5, 1940, by FARWELL, J., on an originating summons, it was declared that

"... upon the true construction of the ... will [of the testator] and in the event which has happened namely of the defendant Christopher George

Wynter Blathwayt being received into the Roman Catholic Church . . . he had forfeited his life interest in the property settled by the . . . will."

It was further declared that the life interest of Justin Robert Wynter Blathwayt in the settled property was accelerated

" . . . subject to determination in the event of the birth of a son to the defendant Christopher George Wynter Blathwayt and the defendant Justin Robert Wynter Blathwayt is entitled to the income thereof and to the usual vesting deed."

The parties to that summons were the trustees of the will, as plaintiffs, and Christopher Blathwayt and Justin Blathwayt, as defendants.

On Apr. 10, 1948, Christopher Blathwayt married, his wife being also a Roman Catholic. On June 8, 1949, they had a son, the infant defendant to this summons, Mark Henry Wynter Blathwayt. It is a fact, as has been agreed for the purposes of this summons, that on June 26, 1949, that infant was baptised into the Roman Catholic Church, but, for the purposes of the question which arises to-day, that is not a material fact. The only question which I am now asked to answer, is: "Whether upon and by reason of the birth on June 8, 1949, of the infant defendant the life interest" of Justin Blathwayt in the settled estates determined. It is clear that there is established by the authorities a *prima facie* rule of construction, viz., that, where a gap occurs in a succession of interests, a subsequent interest can be accelerated temporarily. An example of that general rule is to be found in *Re Brooke* (1), but the rule is one of construction, its object being to give effect, so far as is possible, to the intention of the testator, as manifested by the language which he has used in his will. It appears that until now, the cases which have come before the court have been cases where there has been a competition between the beneficiaries under the settlement, on the one hand, and those interested on an intestacy, on the other. This case appears to me to be somewhat different because the possibility of a gap is created by the very language of the will, and the testator, who has created the possibility of that gap, has designed to provide for the filling of it. He provides in cl. 9 that, if any person who under the trusts of the will has become entitled as tenant for life (which is the case before me) shall be or become a Roman Catholic—the event which happened—then the estate thereby limited to him should cease and determine and be utterly void, and the settled estate should thereupon go to the person next entitled under the trusts thereinbefore declared. Having regard to the dates of the events to which I have referred, the person fulfilling the description as the "person next entitled under the trusts hereinbefore declared" is Justin Blathwayt. If it is clear that that is the true construction of the clause—and, in my view, it is so clear—then that general rule, which is only the rule of construction, must give way to the express and clear provision in the will.

In my judgment, looking for the moment merely at the will, I would answer the question which I have to decide in the negative. I have, however, to deal with the position created by the form of the second declaration in the order of FARWELL, J., because the order not only declared that the life interest of Justin Blathwayt was accelerated, but added the qualification "subject to determination in the event of the birth of a son to the defendant Christopher George Wynter Blathwayt . . ." There is no report extant of the judgment of the learned judge, but some light is thrown on the matter by the form of the summons. Question 1 asked whether in the event which had happened, namely of Christopher Blathwayt being received into the Roman Catholic Church, he had forfeited his life interest, and no difficulty arises on that. But question 2 was in this form:

"In the event of the answer to question 1 being in the affirmative whether upon the true construction of the said will and of s. 175 of the Law of

Property Act, 1925, and pending the birth of a son to the first defendant (a) the life interest of the second defendant [Justin Blathwayt] in the said settled property is accelerated subject to determination in the event of the birth of a son to the first defendant [Christopher Blathwayt] and the second defendant is entitled to the income thereof and to the usual vesting deed or (b) s. 175 aforesaid is applicable and the plaintiffs should accumulate the income of the said settled property for a period of twenty-one years from the death of the testator or until the previous birth of a son to the first defendant . . . ”

Thus the real question was whether there was an acceleration of the life interest of Justin Blathwayt, or whether s. 175 of the Law of Property Act, 1925, applied, and accumulation should be directed. The question of the length of the accelerated interest of Justin Blathwayt was, at the date of the summons, a future question.

It appears that the only case which was cited to FARWELL, J., was *Re Conyngham* (2). It is clear that the debate in that case was between the heir-at-law and a subsequent interest claiming acceleration, so that it does not bear directly on the question which I have to consider (*viz.*, whether the life interest of Justin has determined by reason of the birth of a son to Christopher), which was, as I have said, a future question at the date of the hearing before FARWELL, J. Further, as the only defendants to the previous summons were Christopher Blathwayt and Justin Blathwayt (the infant, Mark Blathwayt, not then being alive), the second declaration in the order of June, 1940, is not, and it is admitted that it is not, *res judicata* as between the parties to this summons. On the somewhat unsatisfactory state of one's knowledge, I cannot feel justified in coming to the conclusion that the question which has been debated before me to-day, and on which I have to pronounce, was debated before FARWELL, J., or that he intended to pronounce on the question whether or not the fact of the birth of the child to Christopher Blathwayt would operate to destroy the accelerated interest of Justin Blathwayt. Therefore, I feel free to place my own construction on cl. 9 of the will in the events which have happened, and to make the declaration in the sense in which I earlier stated that I was inclined to make it, namely, in effect, by answering question 1 of the summons in the negative. Had I taken a different view on this question, somewhat difficult and complicated questions would have arisen. But it appears, and it is accepted by counsel for both the defendants, that those considerations would really relate to what can properly be regarded as a future question. It is for that reason that I have been asked to do no more to-day than to express an opinion one way or the other on question 1 of the summons. I say nothing in regard to the interests arising on the death of Christopher, or in regard to what would then happen, but merely say that the interest of Justin did not determine on the birth of Christopher's son, Mark.

*Declaration accordingly. Costs of all parties, as between solicitor and client, to be paid out of the trust estate.*

Solicitors: *Thorold, Brodie, Bonham-Carter & Mason* (for the trustees); *Rider, Heaton, Meredith & Mills*, agents for *Osborne, Ward, Vassall, Abbot & Co.*, Bristol (for the first defendant); *Park Nelson & Co.* (for the second defendant).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

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## LUCAS v. LINEHAM.

[COURT OF APPEAL (Cohen and Asquith, L.JJ., and Roxburgh, J.), February 8, 17, 1950.]

*Rent Restriction—Possession—Claim as landlord for own occupation—Grantee of head-lease subject to tenant's tenancy—Grantor a purchaser after Sept. 1, 1939—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (h) (as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I).*

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h) (as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I), provides that an order may be made for possession, without suitable alternative accommodation being available, where "the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after Sept. 1, 1939), for occupation as a residence for—(i) himself . . ."

In 1932 M. Co. purchased a dwelling-house, and, on Aug. 14, 1946, let it for three years to A. On July 21, 1947, M. Co. sold the freehold reversion to Mrs. B. On Aug. 14, 1949, A.'s lease expired, and it was accepted that he thereupon became a statutory tenant of the house. By an agreement dated Aug. 30, 1949, Mrs. B. granted a lease of the house for three years to her husband, B., subject to A.'s statutory tenancy. B. now claimed possession of the house for his own occupation under para. (h) without proof of suitable alternative accommodation for A.

HELD: B., having derived title from Mrs. B. who had "become landlord by purchasing the dwelling-house . . . after Sept. 1, 1939" and who, therefore, could not rely on para. (h), was in no better position than Mrs. B. and also could not rely on para. (h).

*Littlechild v. Holt* ([1949] 1 All E.R. 933), explained and applied.

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-332, paras. 392-396; and FOR CASES, see DIGEST, Vol. 31, pp. 576-581, Nos. 7256-7297.]

Cases referred to:

- (1) *Epps v. Rothnie*, [1946] 1 All E.R. 146; [1945] K.B. 562; 114 L.J.K.B. 511; 173 L.T. 353; 2nd Digest Supp.
- (2) *Fowle v. Bell*, [1946] 2 All E.R. 668; [1947] K.B. 242; [1947] L.J.R. 115; 2nd Digest Supp.
- (3) *Powell v. Cleland*, [1947] 2 All E.R. 672; [1948] 1 K.B. 262; [1948] L.J.R. 250; 2nd Digest Supp.
- (4) *Littlechild v. Holt*, [1949] 1 All E.R. 933; [1950] 1 K.B. 1; [1949] L.J.R. 1299.
- (5) *Baker v. Lewis*, [1946] 2 All E.R. 592; [1947] K.B. 186; [1947] L.J.R. 468; 175 L.T. 490; 2nd Digest Supp.

APPEAL by a tenant from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Croydon County Court and dated Oct. 27, 1949, whereby possession was ordered to be given to the landlord, subject to a suspension of seven months. The facts appear in the judgment of the court.

*Eastham and Sherwood* for the tenant.

*Perrett* for the landlord.

*Cur. adv. vult.*

Feb. 17. ASQUITH, L.J., read the following judgment of the court. This is the defendant's appeal from a judgment of His Honour JUDGE SIR GERALD HURST, K.C., at Croydon County Court, whereby he granted an order for possession of certain premises subject to a suspension for seven months. The

premises in question appear to have been bought in 1932 by a gentleman called Davey trading as Marwick & Co. On Aug. 14, 1946, Marwick & Co., by a written lease, let them for three years to the defendant. On Aug. 14, 1949, that lease expired by effluxion of time, and the defendant became a statutory tenant, if he had not done so earlier. Meanwhile, on July 21, 1947, Marwick & Co. had sold the premises to a Mrs. Lucas, wife of the plaintiff. By an agreement of Aug. 30, 1949, Mrs. Lucas granted a lease for three years to her husband, the plaintiff (hereinafter called "the landlord") subject to the defendant's statutory tenancy.

The landlord desired possession of the premises for occupation by himself, and, accordingly, he brought proceedings claiming an order for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h). That Act provides that an order for possession can be made without suitable alternative accommodation being available if any of the conditions set out in paras. (a) to (h) of the schedule are satisfied. The schedule, so far as relevant, provides (as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I):

"A court shall . . . have power to make or give an order or judgment for the recovery of possession of any dwelling-house . . . without proof of suitable alternative accommodation . . . if—(h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after Sept. 1, 1939) for occupation as a residence for—(i) himself . . . Provided that an order or judgment shall not be made or given on any ground specified in para. (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it."

The defendant (hereinafter called "the tenant") does not question the learned county court judge's finding of fact that it would cause the landlord greater hardship in this case to refuse an order for possession (due regard being had to the seven months' suspension) than it would cause to the tenant to grant such an order, nor does he dispute that, if the landlord can in other respects bring himself within para. (h), it was reasonable to make the order. What the tenant argued below and in this court was that the landlord was disabled from taking advantage of this provision. He relied for this purpose on the words in para. (h) itself which exclude from the class of landlords who can avail themselves of it any landlord "who has become a landlord by purchasing the dwelling-house or any interest therein after Sept. 1, 1939." The tenant does not argue that the landlord falls directly within the class of persons disabled by these words, *i.e.*, that the landlord was himself a "purchaser." The argument is that the landlord derived his title as landlord from a person who was so disabled, and is, therefore, tainted with the disability of his predecessor in title. Before, however, considering whether the disqualification can be transmitted in the manner suggested, it is necessary to consider the nature of the disqualification itself and the class whom it primarily affects. The words attaching the disqualification have on several occasions been considered by this court. The decisions may be taken in chronological order. Mostly they decide who does *not* fall within the disqualified category.

In *Epps v. Rothnie* (1) the Court of Appeal decided that a purchaser after the material date—Sept. 1, 1939—of premises which were unoccupied at the time of the purchase, who lets them later to the defendant, does not fall within the exception and is not disabled from claiming possession under para. (h), for, since the premises were unlet at the date of the purchase, the purchaser cannot be a landlord "who has become landlord by purchasing." In *Fowle v. Bell* (2),

this principle was extended so as to exclude from the disqualified class of landlords persons who, purchasing the dwelling-house after the material date, nevertheless purchase it at a time when the sitting tenant is someone other than the defendant, but subsequently, on the premises falling vacant, let them to the defendant.

*Powell v. Cleland* (3) is a case which proceeded on facts practically identical with those of the present case. A limited company acquired premises at some unascertained time before 1941. In 1941 the company let them to the defendant, Mrs. Cleland, who became a statutory tenant. In 1946 the company executed (in favour of the plaintiff, Powell) a reversionary lease dependent on the defendant's statutory tenancy, as in the present case. It was not doubted that Powell thereby became the "landlord" of Mrs. Cleland. The question was whether Powell was a landlord who had "become landlord by purchasing the dwelling-house or any interest therein after Sept. 1, 1939," and was, therefore, disqualified from relying on para. (h) of the schedule. The Court of Appeal held he was not because he had not purchased the premises or any interest therein. The material part of the headnote reads as follows ([1948] 1 K.B. 262):

"The word 'purchasing' in para. (h) is used with the ordinary, popular but precise meaning of that word—*viz.*, the buying of a dwelling-house or of any already existing interest therein. It does not in that paragraph connote the acquisition for money or money's worth of some interest which only comes into existence by the very transaction. The meaning of the word cannot be derived from the definitions of the word 'purchaser' contained in the several Property Acts of 1925, since (1) those definitions are not in each case the same and there is no reason for selecting one rather than another, and (2) the Property Acts of 1925 and the Rent Restriction Acts are not *in pari materia*. Accordingly, where the landlord of a quarterly tenant of a dwelling-house, who has become a statutory tenant under the Rent Restrictions Acts, grants a lease of the dwelling-house to X. from year to year (subject to the rights of the sitting tenant), at a rent, but without payment of any premium or other monetary consideration, so that X. becomes lessee of the reversion expectant on the statutory tenancy and the landlord of that tenant within the meaning of the Rent Restrictions Acts, and X., claiming that he reasonably requires the house for occupation as a residence for himself, sues the tenant to recover possession of the house, X. has not become landlord by 'purchasing' the dwelling-house or any interest therein within the meaning of para. (h)."

The court thus held that "purchasing" meant "buying" in the popular sense, and was not a term apt to describe acquiring a lease of a reversion dependent on an existing tenancy, unless, indeed, a premium—that is, a purchase price—was paid for the reversionary lease.

The procedure adopted in the present case is precisely that which might be expected to be adopted by a plaintiff who has, or whose legal advisers have, imbibed the lessons of *Powell v. Cleland* (3), and who, by following the same procedure, hope to achieve the same result. One thing is clear and was, very reasonably, conceded on behalf of the tenant, namely, that *Powell v. Cleland* (3) precludes him from contending that the plaintiff in this case is himself what may be called for short a "disqualified purchaser" within the exception to para. (h). The way he puts his case is somewhat different, and it depends on a later decision of the Court of Appeal, *Littlechild v. Holt* (4). In that case a Mr. Littlechild in 1944 bought a house occupied by a Mr. Mills, a statutory tenant. Littlechild was, therefore, himself a "disqualified purchaser," and could not have availed himself of para. (h) to obtain possession without offering suitable alternative accommodation. He, nevertheless, sought to bring such an action against the defendant, who was Mr. Mills' successor in title as tenant. Littlechild died before judgment, but his widow obtained letters of administration



and was enabled to continue the action. It was held that the widow was in no better position as a plaintiff than her late husband, and inherited or shared his disability to rely on para. (h). In the course of the leading judgment, LORD GODDARD, C.J., said ([1950] 1 K.B. 5):

A “The question then arises—and this is the point on which this court disagrees with the county court judge—whether Mrs. Littlechild is in a better position than her husband would have been. It certainly would be a very remarkable hiatus in the Act if she were. This provision that a landlord who has become landlord by purchasing the house after Dec. 6, 1937 [the material date for the house in question] cannot obtain an order for the recovery of possession of a dwelling-house without proof of suitable alternative accommodation was inserted in the Act for the protection of the tenant. The ‘tenant’ is, of course, a convenient expression, but it is B the expression used all the way through the Acts as meaning the person who is holding the property. It would certainly be somewhat remarkable if the tenant were protected against a landlord, who himself had sought to recover possession of the house, but was not protected because the landlord had died and his interest had passed over on an intestacy or by will to his wife C or to some other person. The sitting tenant admittedly has that protection as long as the person who bought the property since Dec. 6, 1937, remains the landlord of the property, but the moment he has disposed of his interest in the property otherwise than by sale, it is said that the new landlord has this right, which the former landlord had not got.”

D The learned Lord Chief Justice then goes on to distinguish *Baker v. Lewis* (5) and *Fowle v. Bell* (2) thus (*ibid.*, 6):

“The persons who succeeded to the property by will in those cases took the property from a person whose title had not the clog upon it (if I may use that expression) that was on Mr. Littlechild’s title in this case.”

E There was nothing to show (in other words) that the testator in either of these cases was a “disqualified purchaser” within para. (h). The Lord Chief Justice continued (*ibid.*):

“But in this case, the landlord from whom Mrs. Littlechild acquired title was in the position that his title was, as I have already said, clogged: he could not apply for an order for possession because of this provision in F para. (h) . . .”

This conclusion of the learned Lord Chief Justice appears to base itself on principle—the principle *non dat qui non habet*. What follows is, in our view, a makeweight and an afterthought, not the basis of the whole decision. The learned Lord Chief Justice goes on to claim support for his conclusion from the terms of s. 12 (1) (f), but, in our view, as has just been indicated, the terms of G his judgment imply that he would have decided the case in the same sense if s. 12 (1) (f) had not existed. Nor would BIRKETT, J.’s judgment seem to rest on that provision, though the judgment of DENNING, L.J., may in part do so. We will revert to s. 12 (1) (f) in a moment.

H We think that this decision, which binds us, governs the present case and precludes the landlord from succeeding. In both cases the landlord, though not a disqualified purchaser, himself derived title from a predecessor who was a disqualified purchaser. The fact that the landlord derived it in *Littlechild’s* case (4) by transmission on the intestacy of such a purchaser, and in the present case by having taken a reversionary lease from such a purchaser can make no difference. If Mrs. Littlechild was affected by the clog (as the Lord Chief Justice calls it), so also was Mr. Lucas.

The argument for the landlord assumed that the decision in *Littlechild’s* case (4) rested essentially on the operation of the Increase of Rent and Mortgage

Interest (Restrictions) Act, 1920, s. 12 (1) (f). We have seen reason to doubt whether this is so; but we will consider the argument which the landlord builds on that assumption. Section 12 (1) (f) provides:

"The expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mortgagor' include any person from time to time deriving title under the original landlord, tenant, mortgagee or mortgagor."

The landlord relies on the word "original" before the word "landlord." The person deriving title is to be identified, he argues, with the original landlord in the sense of the person who first let to the defendant. Suppose X. was the first lessor to the defendant, and Y. succeeded to X. by purchasing the freehold from X. over the head of the defendant sitting tenant after the disqualifying date, and then suppose that the plaintiff succeeded to Y. by will, or otherwise without "purchasing," then, so the argument for the landlord runs, although Y. is a disqualified purchaser, it is not his status, but that of X., the original lessor, which is material to the landlord's rights under para. (h). Marwick & Co., in this case on this argument were the "original lessors," and Marwick & Co. were not affected with any disability—hence neither is the landlord, and it matters not what was the position of the intermediate landlord, Mrs. Lucas. It is quite clear, however, that the Lord Chief Justice assumed that the words "original landlord" aptly described the intermediate landlord, the immediate predecessor in title of the plaintiff. He did not go back to, or consider in any way, the position of the person who in the first instance let to Mr. Mills. He speaks (*ibid.*, 7) of the "original landlord, Mr. Littlechild," but Mr. Littlechild was certainly not the "original landlord" in the sense in which counsel for the landlord in this case invited us to construe that term. The same applies to the judgment of DENNING, L.J., but we would repeat that in any case it seems more than doubtful whether any argument founded on s. 12 (1) (f) was necessary to the decision in that case. Any such argument indeed involves a somewhat radical re-writing of the terms of para. (h). The paragraph would have to be re-written as though, after the words "required by the landlord, not being a landlord who has become" there followed the words "or whose original landlord became landlord by purchasing"—a complicated result and one which would be easier to reach if s. 12 (1) (f) had read "the expression 'landlord' includes a predecessor in title of the existing landlord" than on its existing wording, namely, "the expression 'landlord' includes any person from time to time deriving title under the original landlord." However, these difficulties do not arise, as, if we are right in concluding (i) that s. 12 (1) (f) was not necessary to the decision in *Littlechild's* case (4), or (ii) that if it was, it is a decision that the "original landlord" is, or includes, the intermediate landlord, the immediate predecessor in title of the plaintiff landlord. For these reasons, we think the appeal should be allowed.

*Appeal allowed with costs in the Court of Appeal, and on Scale "B" in the county court.*

Solicitors: *Kinch & Richardson*, agents for *Copley Singleton & Billson*, Croydon (for the tenant); *Lloyd & Davey* (for the landlord).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

UNDERHILL AND ANOTHER v. MINISTRY OF FOOD. <sup>a</sup>

[CHANCERY DIVISION (Romer, J.), February 21, 1950.]

*Crown—Relief against the Crown—Interlocutory proceedings—Declaration in lieu of injunction—Crown Proceedings Act, 1947 (c. 44), s. 21 (1) (a).*

A The plaintiffs, suing on behalf of themselves and the members of an association of manufacturers of unrationed sweets, by motion sought an order that the Ministry of Food, the defendants in the action, might be restrained, until the trial of the action or further order, from putting into effect, or purporting to put into effect, or further publishing their intention to put into effect, the proposal, announced in a certain notice published in the Press, to bring within the rationing system under the Chocolate, Sugar Confectionery and Cocoa Products Order, 1949, and the Rationing (Personal Points) Order, 1949, sweets made from unallocated ingredients not previously subject to the controls of the rationing system, or, alternatively, for a declaration that the Ministry were not entitled until trial or further order to put into effect, or to purport to put into effect, or to publish their intention to put into effect, the said proposal. It was conceded at the hearing that the plaintiffs could not be granted an interlocutory injunction.

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D HELD: the reference in the Crown Proceedings Act, 1947, s. 21 (1) (a), to a declaration of the rights of the parties in lieu of an injunction related to a final declaration, and had no application where interlocutory relief was sought, and, therefore, the court had no jurisdiction under that section to make the order asked for.

[FOR THE CROWN PROCEEDINGS ACT, 1947, s. 21, see HALSBURY'S STATUTES, Second Edn., p. 61.]

## MOTION.

E The plaintiffs brought the action on behalf of themselves and other members of the Free (Food) Manufacturers Association, the members of which manufactured sweets from ingredients not hitherto subject to controls provided for under the rationing system, consequent on the announcement, on Jan. 20, 1950, by the Ministry of Food that in the near future such sweets would be brought within the rationing system. The plaintiffs now sought an interlocutory injunction to restrain the Ministry from carrying out its proposal, or, in lieu, a declaration that the Ministry was not entitled to carry it out. The Ministry took the point that the court had no jurisdiction to make the order.

F *Beyfus, K.C.*, and *Sebag Shaw* for the plaintiffs.

*Denys Buckley* for the Ministry.

G ROMER, J.: This is a motion brought before the court in an action against the Ministry of Food, in which Mr. Dennis Underhill and Mr. James Waywell are plaintiffs, and sue on behalf of themselves and on behalf of the Free (Food) Manufacturers Association, of which I am told there are about forty-three members. The motion asks for an order:

H " . . . that the defendants may be restrained until the trial of this action or further order from putting into effect or purporting to put into effect or further publishing their intention to put into effect the proposal announced by them in a Press notice dated Jan. 24, 1950, to bring within the rationing system under the Chocolate, Sugar Confectionery and Cocoa Products Order, 1949 (S.I., 1949, No. 781), and the Rationing (Personal Points) Order, 1949 (S.I., 1949, No. 1523), as from Feb. 26, 1950, sweets made from unallocated ingredients and hitherto not subject to the controls provided by the said rationing system or alternatively for a declaration that the defendants are not entitled until trial or further order to put



into effect or to purport to put into effect or to publish their intention to put into effect the said proposal."

Counsel for the plaintiffs, in opening the case, said that he was going to ask for the alternative form of relief, namely, a declaration instead of an injunction, because of the provisions of the Crown Proceedings Act, 1947, s. 21. So far as material, that section provides:

"(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Provided that:— (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties . . . (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

Having regard to that it is quite plain that, in so far as the motion was founded on a claim for an injunction, this court would have no jurisdiction to entertain it. So I am asked in effect to make an interim declaration of the plaintiffs' rights.

The Press notice which is referred to in the notice of motion was issued on Jan. 24, 1950, and is as follows:

"The Ministry of Food announced on Jan. 20 that sweets which are made from unallocated ingredients and which are substantially similar to the types of confectionery hitherto rationed would, in the near future, be brought within the rationing system. Manufacturers of such sweets now being sold free of control are asked to submit by Jan. 31 for classification samples of their products together with full specifications of the ingredients to the Director, Chocolate and Sugar Confectionery Division, Ministry of Food, London Road, Stanmore, Middlesex. Chocolate or sugar confectionery, even though made from unallocated materials, may not be manufactured as from Feb. 26 except under licence from the Ministry of Food, and may not be sold from that date except in accordance with the provisions of the Rationing (Personal Points) Order, 1949. The products must also be clearly described in accordance with art. 5 of the Chocolate, Sugar Confectionery and Cocoa Products Order, 1949. A licence to manufacture will be issued to the manufacturer of any product classified as chocolate or sugar confectionery if he is not already licensed under the Chocolate, Sugar Confectionery and Cocoa Products Order, 1949. The licence will be limited to the production of sweets made wholly from unallocated ingredients. Present arrangements do not contemplate the fixing of maximum consumer prices for such products."

Since that Press notice certain other documents have emanated from the Ministry of Food with a view to implementing the proposal. For example, a form was sent to all retailers and wholesalers of personal points foods and to institutions which purchase sweets in bulk, and a circular letter was also sent to the manufacturers concerned and others. It is the intention of the Ministry to put that proposal into effect unless anything falls from this court by way of a declaration, in the light of which they might consider it desirable to adopt a different course.

In brief, the plaintiffs have three points on which they rely. In the first place, they say that the proposal is *ultra vires* the defendants' relevant powers, *i.e.*,

the powers which are conferred on them by the Supplies and Services (Transitional Powers) Act, 1945, s. 1. So far as relevant that section is as follows:

"(1) If it appears to His Majesty to be necessary or expedient that any Defence Regulation to which this section applies should have effect for the purpose of so maintaining controlling and regulating supplies and services as—(a) to secure a sufficiency of those essential to the wellbeing of the community or their equitable distribution or their availability at fair prices . . . he may by Order in Council direct that the regulation shall have effect by virtue of this Act whether or not it is for the time being necessary or expedient for the purposes specified in s. 1 (1) of the Emergency Powers (Defence) Act, 1939."

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The plaintiffs say that the Minister is acting outside his powers under those provisions because he must know, and does know, that, if his present proposal is carried into effect, the manufacturers of the products concerned will cease to manufacture them, and that, even if they do not, the public will not buy them, and accordingly there will be none of these products to distribute. The plaintiffs say in general that, having regard to the matters to which their evidence is directed, the Minister cannot fairly have arrived at a conclusion which is justified under these statutory provisions. They say that the established facts are such that the position is not brought within the purview of s. 1 (1) (a) of the Act of 1945. Secondly, they desire to impugn the Minister's good faith in arriving at the intention which he proposes to put into effect. Thirdly, the plaintiffs say that under the doctrine of estoppel they are entitled to the relief which they are seeking to-day. The alleged estoppel arises out of certain assurances or representations made to the plaintiffs, or some of them, by some representative or representatives of the Ministry. It is to those matters that the affidavit evidence, which is voluminous, has been directed. I may say at once that, so far as the second point which the plaintiffs rely on is concerned, viz., the want of good faith on the part of the defendants, it is a matter which clearly cannot be gone into on affidavit evidence and will have to be pursued, if pursued at all, at the trial of the action, when the matter can be gone into in the light of such oral evidence as may be adduced. Consequently, I only mention the second point in order to leave it for present purposes.

At the outset, counsel for the Ministry of Food says that this court has no jurisdiction to do what it is invited to do, i.e., to make a kind of interim declaration in substitution for the interlocutory injunction which clearly it has no power to grant. He says that when the Crown Proceedings Act, 1947, s. 21, refers to the court making a declaration, it refers to a final declaration, and it is an unheard of suggestion that an interlocutory declaration should be made which might be in precisely the opposite sense of the final declaration made at the trial. He says, and I think rightly says, that what is usually done on the hearing of an interlocutory application is to grant some form of temporary remedy which will keep matters *in statu quo* until the rights of the parties are ultimately found and declared, and that, accordingly, the reference to making a declaration of rights means a declaration at the trial as distinct from a declaration on some interlocutory application. Accordingly, he says that, just as I cannot grant an interlocutory injunction against the defendants, even if in all respects a *prima facie* case has been made out, I cannot as an alternative make an interim declaration either. In my judgment, that submission is right. I do not think that this court has jurisdiction under s. 21 of the Act to make something in the nature of an interim declaration of right which would have no legal effect, and which, as I say, might be the very opposite of the final declaration of right made at the trial after hearing all the evidence and after all the matters in issue had been gone into at length. Therefore, just as I am of opinion—and this, of course, was conceded—that I cannot

grant by way of injunction the relief which is asked for in the first part of the notice of motion, equally I cannot grant the declaration "until trial or further order", as the notice of motion says, in accordance with the second part of that notice.

[HIS LORDSHIP said that that was sufficient to dispose of the motion, but, having regard to the elaborate arguments advanced, he would make some further observations. Having considered the arguments, HIS LORDSHIP said that the Ministry's proposal could not be *ultra vires*, in view of the terms of s. 1 of the Act of 1945, unless it was *mala fide*, and that he was unable to see how the plaintiff's claim could be based on estoppel.]

*No order on the motion. Costs to be costs in the action.*

Solicitors: *Theodore Goddard & Co.* (for the plaintiffs); *Treasury Solicitor* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

## KAYE AND OTHERS *v.* LEVINSON AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins, L.J., and Hodson, J.), February 20, 21, 1950.]

*Pleading—Time for delivery—Order dismissing action unless statement of claim be served on or before specified date—Delivery after 4 p.m. on specified date—R.S.C., Ord. 64, r. 11.*

On an application by the plaintiffs for an extension of time for delivery of the statement of claim in an action, the judge made an order, dated Nov. 21, 1949, that, unless the statement of claim was delivered on or before Nov. 28, 1949, the action was to stand dismissed. The statement of claim was delivered at 5.45 p.m. on Monday, Nov. 28, 1949, and it was contended by the defendants that delivery was not made within the time specified in the judge's order, as it was not made before 4 p.m. in accordance with R.S.C., Ord. 64, r. 11 (as amended by R.S.C. (No. 2), 1939, which substituted 4 p.m. for 6 p.m.). The plaintiffs contended that the computation of time prescribed by R.S.C., Ord. 64, r. 11, did not necessarily apply to the dismissal of an action for want of prosecution, as that was not one of the purposes specified in the rule.

**HELD:** an order, which involved a dismissal *in limine* of an action unless a condition was complied with, should state the condition in clear and unambiguous terms; as it was open to doubt whether the order of Nov. 21, 1949, would be complied with by the delivery of the statement of claim at any time on Nov. 28, 1949, or whether it was essential for the purposes of the order that delivery should be made before 4 p.m. of that day, in accordance with R.S.C., Ord. 64, r. 11 (as amended), there was an ambiguity in the terms of the order, and it was undesirable that it should stand; and, therefore, the court would exercise the jurisdiction which it had to vary the order and would extend the time for delivery of the statement of claim.

*Abalian v. Innous* ([1936] 2 All E.R. 834), *applied*.

[AS TO DISMISSAL OF ACTION, see HALSBURY, Hailsham Edn., Vol. 19, p. 212, para. 510; and FOR CASES, see DIGEST, Vol. 30, p. 139, paras. 160-165.]

Cases referred to:

- (1) *Abalian v. Innous*, [1936] 2 All E.R. 834; Digest Supp.
- (2) *Browne v. Reid*, (1892), 30 L.R. Ir. 619.



APPEAL by the plaintiffs from an order of WYNN-PARRY, J., made in chambers, and dated Nov. 21, 1949, on an application by the plaintiffs for an extension of time for delivery of the statement of claim in an action commenced on June 2, 1949.

At the request of the defendants the learned judge made an order that, unless the plaintiffs delivered their statement of claim on or before Nov. 28, 1949, the action was to stand dismissed. The statement of claim was delivered at 5.45 p.m. on Nov. 28, and the defendants refused to accept it on the ground that, under R.S.C., Ord. 64, r. 11, the time for delivery had expired at 4 p.m. on that day. On Dec. 2, the plaintiffs applied to WYNN-PARRY, J., to extend the time for delivery of pleadings, but the learned judge held that he had no jurisdiction to do so, because, under the terms of his order of Nov. 21, the action stood dismissed, but he enlarged the time for appealing from the order. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

*Richmount* for the plaintiffs.

*Levy, K.C.*, and *H. J. Astell Burt* for the defendants.

SIR RAYMOND EVERSHED, M.R. : This is an appeal by leave from an order of WYNN-PARRY, J., dated Nov. 21, 1949. The order was in these terms:

"Upon the application of the plaintiffs by summons dated Nov. 8, 1949 . . . it is ordered that unless the plaintiffs do deliver their statement of claim on or before Nov. 28, 1949, this action do stand dismissed out of this court with costs to be taxed by the taxing master and paid by the plaintiffs to the defendants."

There was a further direction in regard to costs. It appears that the statement of claim was delivered, in the sense of being handed in at the office of the defendants' solicitors, at 5.45 p.m. on Nov. 28, 1949. Attention, however, has been drawn to the fact that by certain rules it appears that, at least for some purposes, good delivery of a pleading can only be effected on a weekday other than a Saturday (and Nov. 28 was a Monday), if the delivery occurs before 4 p.m. The change to 4 o'clock from what previously had been 6 o'clock was a war-time measure (introduced by R.S.C. (No. 2), 1939), which still remains part of the rules.

The material rule is R.S.C., Ord. 64, r. 11, which is as follows:

"Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected before the hour of four in the afternoon, except on Saturdays, when it shall be effected before the hour of twelve noon. Service effected after four in the afternoon on any week-day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day."

Then there is a provision about Saturdays. Counsel for the defendants has also drawn attention to R.S.C., Ord. 67, r. 2, which says:

"All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite shall be sufficiently served if left within the prescribed hours, at the address for service of the person to be served as defined by Ords. 4 and 12 . . ."

One other rule may be looked at, R.S.C., Ord. 19, r. 10, which says:

"Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor . . ."

It is the fact, perhaps surprising to discover, that the phrase "now in use" means "in use in 1875" [the present r. 10 having been r. 6 of the original Ord. 19, contained in the Supreme Court of Judicature Act, 1875, sched. I.]

These rules are, plainly, not quite happily drafted. In particular, though the word "delivered" (which is the appropriate word as regards pleadings) is used in R.S.C., Ord. 19, r. 10, R.S.C., Ord. 64, r. 11, speaks of "service," and so also does R.S.C., Ord. 67, r. 2, but counsel for the plaintiffs has conceded that in their context both Ord. 64, r. 11, and Ord. 67, r. 2, in using the word "service" also comprehend "delivery," and I assume that that concession is well founded. The result, therefore, is that, for certain purposes, at any rate, delivery of pleadings after 4 p.m. on a particular day is treated as delivery not on that day but on the following day. The question, therefore, in the present case is whether, the statement of claim having been delivered in the way that I have stated at 5.45 p.m. on Nov. 28, the condition stated in the order of Nov. 21, 1949, was not satisfied, with the result that the action is dead. If, on a true view of the rules, the time 4 p.m. need not be inserted in the order of Nov. 21, 1949, then, of course, the action is not dead, and, as counsel for the defendants says, the whole of this appeal is unnecessary. On the other hand, if the action is dead, then, if the plaintiffs desire to prosecute the existing action, it is clear that they are bound to come to this court.

I must say something about the facts, because I want to make it plain that I am quite unmoved by any of the considerations which counsel for the plaintiffs has put forward by way of excusing the grave delay which has occurred since the issue of the writ on June 2, 1949. I accept entirely what he says about his own difficulty in framing a statement of claim, and, having read the writ, I am not in the least surprised. The writ contains twelve paragraphs of the most involved character. The defendants, who are a firm of solicitors, are accused of various malpractices, all of them fraudulent, and many of the paragraphs, I confess, remain to me still unintelligible. I assume, however, that, as a statement of claim does exist, counsel for the plaintiffs has found it possible to formulate in a statement of claim the necessary facts on which to found a prayer for the appropriate relief. I think, however, that counsel for the defendants is fully justified in saying that, having regard to the nature of the writ and the length of time since it was issued, it is natural and proper that he should rely, if he can, on the strict letter of the order which was made and that it cannot be imputed to his clients, as solicitors, that they are thereby seeking to rely on something technical so as to avoid the ventilation of the charges made against their good faith.

I return to the real question which we have to consider: What is the effect of the order of Nov. 21, 1949? The form of the order, which involved an anticipatory dismissal of the action on failure of performance of a condition, is, I think, one which should be used cautiously. It seems to me not entirely satisfactory that, if at any time it has to be decided whether the action has, or has not, been dismissed, it is necessary to prove facts which may be not always free from controversy. I do not doubt that the learned judge had power, under R.S.C., Ord. 64, r. 7, in the exercise of his discretion, to impose terms, and, in particular, to impose the term that, unless the statement of claim was delivered by a certain time, then the action should die. There are numerous instances of the discretion having been so exercised. One of them was in *Abalian v. Innous* (1), which was before this court in 1936. That case was very different in detail, but the substance of the matter was that an order had been made dismissing the action unless something were done within a certain time. In that case, as in this, the question was: Had the thing specified been done or not? In reference to that state of affairs, GREENE, L.J., used this language ([1936] 2 All E.R. 838), which I respectfully desire to adopt and re-affirm:

A "Speaking for myself, I think that any order dealing with the dismissal of an action unless something is done should be absolutely and perfectly precise in its terms. The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice. If an order is to be made in the form that, unless one party or another party does something, the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language, so that it may be possible for the party on whom the necessity of doing the act lies—which would normally be the plaintiff—to be in no doubt whatsoever as to the steps which he is to take if he is to avoid his action being dismissed. Looking at it in another way: where the defendant, in reliance on such order, goes to the court and asks it to say that, as a result of the order, the action stands dismissed and is no longer existent, he must be able to show first of all, that the language of the order is sufficiently precise, and, secondly, that the facts which the order contemplates have occurred."

C I do not think that the order of Nov. 21, 1949, satisfies the requirements which GREENE, L.J., indicated. I feel that there is very great force in the contention of counsel for the defendants that, when one looks at the rules and then at the order, the proper conclusion is that, when the judge said "delivery on Nov. 28," he meant "delivery at such a time on that date as the rules provide for the purposes there specified." I find it unnecessary to decide that question. But there is, I think, a formidable argument to be addressed in the other direction. One may test it, I think, by supposing that the learned judge had said: "on or before 6 p.m. on Nov. 28." No one, I think, could have suggested that an order in that form was repugnant on the face of it. The gist of the point put on behalf of the plaintiffs is briefly this. True, that for the purposes specified in R.S.C., Ord. 64, r. 11, service at 5.45 p.m. would be treated as service on Tuesday, Nov. 29, but the dismissal of the action for want of prosecution is not one of the purposes specified in R.S.C., Ord. 64, r. 11. That was the point which appealed to the Irish judges in *Browne v. Reid* (2), a somewhat similar case, referred to in the ANNUAL PRACTICE, 1949, p. 1461, in the note to R.S.C., Ord. 64, r. 11.

E If it were not for the doubt that I feel about the meaning of the order of Nov. 21, 1949, I think that there would be much to be said for the view on the facts of this case that it was better to let this action die, or remain dead, and that the plaintiffs should then issue a writ which might well be in a form improving on their previous performance, but the worst of that order is that it still leaves unresolved the doubt whether this action is, in truth, dead. In that state of affairs, I have on the whole come to the conclusion that it is more satisfactory that this court should exercise the discretion, which counsel for the defendants concedes it has, to vary the order in such a way as will make it clear that the statement of claim has, in truth, been delivered. After my brethren have delivered their judgments, we will consider how best the matter should be formulated. I am the more inclined to take that view by the language which, I gather from counsel for both parties, the learned judge himself used when this matter last came before him [on Dec. 2, 1949, on an application by the plaintiffs to extend the time for delivery of pleadings]. I think that, when he exercised his discretion by making the order of Nov. 21, 1949, it was not present to his mind that delivery would have to be by 4 p.m., and, from his own words, I gravely doubt whether he would have allowed the action to be treated as dismissed in the present circumstances, had he felt himself free to hold otherwise. As counsel for the defendants has justly pointed out, counsel for the plaintiffs can, strictly, only come here on the footing that the action is dead, otherwise there is no need for him to come. If it be so, nobody is to blame but himself. It was open to him to contest the proposition that it was dead. He could have said that the order had been complied with. He has,



however, been disposed to accept the view that the action is dead in order to found jurisdiction in this court. As I have already said, however, I do not think it necessary to express a concluded opinion, because I think, the matter being in doubt, the court has jurisdiction in its discretion to vary the form of the order to remove all doubt and that in the special circumstances it ought to exercise that discretion. Bearing all these matters in mind (including, not the least, the grave delay since the issue of the writ and my sympathy with the position in which the defendants have been put ever since June 2, 1949), I think that, in making the order that I have suggested in the exercise of my discretion, I would, at the least, not allow the plaintiffs any costs of this appeal.

**JENKINS, L.J.:** I agree. I confess that I have no sympathy at all for the plaintiffs who, as my Lord has said, have chosen to issue a writ against professional defendants, making serious charges of a most involved character. Having thought fit to do that, they have not thought it necessary to pursue their action with anything approaching the diligence which is reasonably to be expected. These circumstances suggest that the plaintiffs are willing to wound and yet afraid to strike. However that may be, the question before this court is whether in all the circumstances of the case the order made by WYNN-PARRY, J., on Nov. 21, 1949, should stand. In my judgment, it should not, for the following reasons. First, as my Lord has said, there is an ambiguity in the terms of the order. It is left open to doubt whether the order would be complied with by delivery of the statement of claim at any time on Nov. 28, 1949, or whether it was essential that delivery for the purposes of this order and its penal consequences must be made before 4 p.m. in accordance with R.S.C., Ord. 64, r. 11, as amended by R.S.C. (No. 2), 1939, to allow for war-time difficulties. I think that that ambiguity in itself makes it undesirable that this order should stand, on the principle referred to by my Lord that orders which involve a dismissal *in limine* of actions unless conditions are complied with should state those conditions in perfectly clear and unambiguous terms.

Secondly, I do not doubt that a judge, in a proper case, has discretion, when extending time, to impose a condition to the effect that, if the thing to be done is not done within the extended time, the action shall stand dismissed. I think that that appears from the terms of R.S.C., Ord. 64, r. 7, and it is only reasonable that it should be so. After all, the judge could, if so minded, refuse altogether to extend time, and that would automatically result in the action being dismissed, subject to the defendants taking the appropriate formal step. There is, in my view, no serious doubt in regard to the jurisdiction to make an order in the form of the order which WYNN-PARRY, J., made on Nov. 21, 1949. At the same time, I think that it is, on the whole, the more usual practice in such cases to make a final order extending the time with an intimation that no further extension will be granted. If a plaintiff in default does not comply with that order, then it is open to the defendant to apply to dismiss the action. If that more usual course had been taken in the present case, I venture to think that the present difficulty would not have arisen. The plaintiffs, at long last, succeeded in delivering their statement of claim on Nov. 28, 1949, but after 4 p.m. I ask myself whether, in those circumstances, the defendants would have had any prospect at all of getting an order dismissing the action merely because on one construction of the order of WYNN-PARRY, J., the statement of claim was delivered too late, inasmuch as delivery, while effected on the day specified, took place rather less than two hours after the close of the statutory hours for service on that day. In my judgment, the court would have refused an application to dismiss the action on that ground and would have treated the delivery of the statement of claim on Nov. 28, 1949, as a sufficient delivery.

Thirdly and finally, I think that the circumstances in which the order was made were not entirely satisfactory, as the learned judge himself seems to have thought. It was the plaintiffs who applied for an extension of time, and the

A learned judge did not have before him any application by the defendants to dismiss the action. It seems that there was some discussion in regard to the order which the learned judge finally made, in which he made the plaintiffs' solicitors personally liable for the costs of the application. Counsel for the plaintiffs seems to have been pre-occupied with that suggestion, and not to have appreciated that the learned judge was being asked by counsel for the defendants to insert in the order this provision as to the dismissal of the action. I think that, if counsel for the plaintiffs had appreciated the fact that the learned judge was being asked to do that, it may very well be that, had the point been specifically argued before the learned judge, he would have taken the more usual course to which I have adverted instead of including, as he did, the provision in regard to dismissal in the order extending the time. For these reasons, as well as those which have been given by my Lord, I agree with him that the appeal in this case should be allowed on suitable terms as to costs, which I think should be by no means more favourable to the plaintiffs than is absolutely necessary.

HODSON, J.: I agree that there is an ambiguity in the order of Nov. 21, 1949. At the same time, unless this court expresses a view in regard to the matter, it seems to me impossible to determine whether the appeal lies or not, because, unless the action was in fact dismissed by that order, there is no appeal. For my part I would, therefore, think it desirable to say that it appears to me that on the construction of the relevant orders, R.S.C., Ord. 64, r. 11, and R.S.C., Ord. 67, r. 2, the action has, in fact, been dismissed. I would for my part, notwithstanding the argument based on the judgment of HOLMES, J. (30 L.R.Ir. 622), in *Browne v. Reid* (2), have taken the view that the action was dismissed. R.S.C., Ord. 64, r. 11, contains in the first sentence these words:

"Service of pleadings . . . shall be effected before the hour of four in the afternoon, except on Saturdays . . ."

It has been conceded that service includes delivery. R.S.C., Ord. 67, r. 2, begins:

E "All writs, notices, pleadings . . . of which personal service is not requisite shall be sufficiently served if left within the prescribed hours . . ."

It would, in my opinion, appear that, as the statement of claim was delivered after the expiration of the prescribed hours, it was not delivered effectively on Nov. 28, 1949, so that the action is dismissed. But the circumstances in which that came about, for the reasons which my Lord has given, appear to me to be unsatisfactory, and I think that the time for delivery of the statement of claim ought to be extended on stringent terms.

F *Appeal allowed. Time for delivery of the statement of claim extended until 4 p.m. on Feb. 22, 1950. Costs of appeal to be the defendants' costs in the action.*

Solicitors: *S. Rutter & Co.* (for the plaintiffs); *D. B. Levinson & Shane* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

REDPATH *v.* REDPATH AND MILLIGAN.

[COURT OF APPEAL (Bucknill and Somervell, L.J.J., and Vaisey, J.), February 28, 1950.]

*Divorce—Adultery—Onus of proof—Charge of adultery by husband—Plea by wife that adultery committed without her consent during a rape on her by the co-respondent.*

If, in a husband's suit for divorce on the ground of his wife's adultery, the husband proves that an act of intercourse between the wife and the co-respondent has taken place, the burden then shifts to the wife to prove that that act occurred against her will and in the course of a rape committed on her by the co-respondent. A

[AS TO PROOF OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-665, paras. 973-978 ; and FOR CASES, see DIGEST, Vol. 27, pp. 294-303. Nos. 2708-2801.] B

APPEAL by the husband against a decision of PILCHER, J.

The husband, John Redpath, sought a divorce from his wife on the ground of her adultery with the co-respondent, Milligan. By her answer the wife denied the adultery and prayed for a divorce from her husband on the ground of his desertion. PILCHER, J., dismissed the husband's petition and also the wife's prayer. C

The parties were married on Sept. 24, 1938. In June, 1944, while the husband was abroad serving in the army, the wife arrived at her parents' house at night with her hair dishevelled, with mud on her dress and stockings, and crying, and she informed her parents that she had been raped by the co-respondent. The police were informed, and the co-respondent was charged at Chelmsford Assizes with the rape, but he was acquitted. In April, 1948, the husband filed his petition, alleging that on the occasion mentioned in June, 1944, the wife committed adultery with the co-respondent. D

PILCHER, J., dismissed the charge of adultery on the ground that, once the act of intercourse had been proved, the burden was on the husband to prove that the wife was a willing participator. He said: E

"I am quite satisfied that it is not sufficient for a husband in this type of case, where the issue is whether the wife committed adultery or whether she was raped, to prove that an act of intercourse took place and then to leave it to the wife to satisfy the court that that act of intercourse was against her will. The onus starts with the husband and is not discharged until he has proved an act of intercourse in which his wife was a willing participator . . . The onus of satisfying me that this was an act of adultery, not an act of rape, being on the husband, I am not satisfied that it is discharged in this case. So that disposes of that particular allegation of adultery." F

The husband appealed. The case is only reported on the point dealt with in the headnote. G

*Bayne-Powell* for the husband.

The wife did not appear.

BUCKNILL, L.J., dealing with this point in the course of his judgment, said: Sexual intercourse is normally a consensual act, that is to say, it requires the consenting minds and bodies of both parties. In my view, once the act of intercourse is established, the burden is on the wife to show that that act was one to which she was forced against her will. I do not think a husband can be expected to prove the state of the wife's mind when the sexual intercourse took place. On the other hand, under s. 4 (2) of the Matrimonial Causes Act, 1937, the court has to be satisfied that adultery has been committed. If at the end of the case there is a doubt in the judge's mind H



whether adultery has taken place or whether it is a case of rape, it is his duty to dismiss the petition. In the present case I think the learned judge has put an unnecessary burden of proof on the husband and that that has, in part, led him to arrive at a wrong decision. In all the circumstances I am satisfied that the wife committed adultery and that PILCHER, J., was in error in finding that adultery had not been proved.

- A **SOMERVELL, L.J. :** I agree. Although, of course, the onus is always on the petitioner to satisfy the court that adultery has been committed I think that the learned judge in this case put too great an onus on the husband, namely, the onus of establishing that the wife was a consenting party to the act of intercourse with the co-respondent. I am not sure that there would be any single principle of onus which one could usefully lay down. I agree with what my Lord has said, if I may say so, on that point. One can consider
- B a case at one end of the scale. If, while a husband is overseas during any possible period of conception, a child is born, the proof of that in ordinary circumstances would be regarded as sufficient evidence to satisfy the court that adultery had been committed. That would be the conclusion if that was the only evidence. Intercourse having been established, consent would be
- C presumed. If, however, the wife sought to say that the birth of the child was the result of intercourse having taken place by force—the result of rape—the onus would be on her to bring evidence to satisfy the court that that was so. In the present case the learned judge, I think, came to the conclusion to which he did because of his view that the husband had not discharged the onus which was on him. The onus of proof in a case may shift from side to side as
- D evidence is given in one direction or the other, but the learned judge regarded the husband as still having on him a very difficult onus to discharge.

- VAISEY, J. :** This is, to my mind, rather a difficult case. On the evidence, however, I am satisfied that the onus of proving the commission of an act of adultery on the part of the wife has been sufficiently discharged by the husband. I am in full agreement with everything which has fallen
- E from my Lords, but I venture with some temerity to add one or two observations of my own. In my judgment, an act of sexual intercourse is *prima facie* consensual, and thus we get a presumption which has to be rebutted by evidence if it is sought to show that a particular act of intercourse was involuntary on the part of the woman. What evidence? Principally, of necessity, the woman's own evidence. In the present case, the learned judge
- F has found himself unable to accept the wife as a witness of truth. Her evidence of the alleged rape would, therefore, appear to be, if not excluded, at least very severely discounted. The other evidence seems to me on the whole to be insufficient to displace the presumption to which I have referred. If I am right on this matter of presumption, it would seem to me to follow that what I think a most important sentence in the learned judge's judgment is, if I may
- G say so with the greatest respect, not quite happily expressed. He said:

"Now I have heard not only the evidence for the petitioner but also the evidence for the respondent, and it is from all this that I have to make up my mind whether I am satisfied that the fact that the wife's admitted intercourse in June, 1944, was voluntary is established."

- H I myself would have posed the question thus:

"Am I satisfied that the wife's admitted intercourse was involuntary?"

The ultimate problem is, on either view, the same. It is the approach that is different and, in my view, vitally different. I agree with my Lords in thinking that this appeal should succeed.

*Appeal allowed.*

Solicitor for husband: *Seton Pollock*, Law Society Services Department.

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

MANNING v. MANNING. FELLOWS v. FELLOWS.

[COURT OF APPEAL (Bucknill and Singleton, L.J.J., and Hodson, J.), February 14, 15, 1950.]

*Divorce—Connivance—Encouragement of situations likely to lead to adultery—Only motive to obtain conclusive evidence.*

In 1947 Mr. and Mrs. M., a married couple, became friendly with Mr. and Mrs. F., another married couple, and the following summer the two families took their holidays together. On this occasion a certain degree of familiarity developed between each husband and the other's wife, but neither husband resented the conduct of the other. In July, 1948, M. and Mrs. F., having begun to suspect an adulterous association between their respective spouses, consulted their solicitor and, thereafter, acted on his advice. In August, 1948, Mrs. M., realising that she was having an increasing affection for F., requested her husband to help her to break the association, but he refused to take any steps in the matter and permitted F. to continue to visit his house, frequently leaving the two alone together. About this time M. set up a microphone in his sitting-room with wires leading to the garage. On Sept. 21, 1948, by means of this device, M. and Mrs. F. overheard a conversation between their spouses suggesting that adultery was likely to take place. On entering the room and finding that nothing untoward had occurred, M. and Mrs. F. pretended to accept the explanation of the couple as to their presence together. On Oct. 2, having told his wife that he would be away for the night, M. went to the the garage and, as a result of what he then heard, he entered the room to find F. and Mrs. M. in the act of adultery. At no time up to this date had M. or Mrs. F. given any indication of their suspicions and they had continued to have intercourse with their respective spouses. On petitions by M. and Mrs. F. for divorce,

**HELD:** the petitioners had allowed and encouraged certain situations to arise which they knew were likely to lead to adultery; the fact that their motive in so acting was to obtain conclusive evidence of the offence was immaterial; the principle *volenti non fit injuria* applied; and they had connived at the adultery and were not entitled to relief.

[AS TO CONNIVANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and FOR CASES, see DIGEST, Vol. 27, pp. 326-332, Nos. 3052-3122.]

[**EDITORIAL NOTE:** This case should be compared with *Mudge v. Mudge*, post, p. 607.]

Cases referred to:

- (1) *Gipps v. Gipps and Hume*, (1864), 11 H.L. Cas. 1; 4 New Rep. 303; 33 L.J.P.M. & A. 161; 10 L.T. 735; 27 Digest 327, 3064.
- (2) *Glennie v. Glennie and Bowles*, (1862), 32 L.J.P.M. & A. 17; 27 Digest 329, 3087.
- (3) *Rogers v. Rogers*, (1830), 3 Hag. Ecc. 57; 27 Digest 327, 3061.
- (4) *Forster v. Forster*, (1790), 1 Hag. Con. 144; 27 Digest 355, 3403.

APPEALS by the petitioners from orders made by WILLMER, J., dated June 21, 1949, dismissing petitions for divorce on the ground that the petitioners had connived in the adultery of which he found the respondents guilty. Counsel for the petitioners contended that the creation by them of situations in which adultery was likely to take place did not constitute connivance when the only purpose of such action was to obtain conclusive evidence of adultery. The facts appear in the judgment of BUCKNILL, L.J.

Henry Burton for the petitioners.

Thomas Dewar for the respondent, Manning.

Kenneth Burke for the respondent, Fellows.

**BUCKNILL, L.J. :** These are two appeals from orders of WILLMER, J., made on June 21, 1949. The two petitions were, in the one case by Mr. Manning asking for a divorce on the ground of his wife's adultery with Mr. Fellows, and in the other case by Mrs. Fellows asking for a decree of divorce on the ground of her husband's adultery with Mrs. Manning. The adultery in each case was admitted and the only issue before the learned judge was whether the two petitioners had connived at their spouses' adultery.

**A** There is only one allegation of adultery in the two petitions, namely, on the night of Oct. 2-3, 1948, at Mr. Manning's house. The learned judge summed up the evidence in the following words:

**B** "Having regard to this conclusion I have not the slightest hesitation in finding that the act of adultery complained of was conducted to by the conduct of the two petitioners. Further than that, I feel bound to conclude that the conduct of Mr. Manning and Mrs. Fellows falls clearly within the definition of connivance as contained in the authorities to which I have referred. These two petitioners, suspecting their spouses of forming an adulterous association, and knowing that that association would almost inevitably lead to adultery, if, indeed, adultery had not already taken place, not only made no effort to stop the association, not only acquiesced in its continuance, but actually took part in promoting and encouraging it, for the purpose of secretly spying on their spouses to obtain evidence for divorce, while at the same time deceiving them by maintaining a false facade of normal married life. From such petitioners this court is bound to withhold relief, and my judgment accordingly is that both

**C** petitions must be dismissed."

**D**

I asked counsel for the petitioners whether he quarrelled with that finding of fact of the learned judge, and he said that he was prepared to accept it for the purposes of his argument which was that there cannot be connivance if the action of the petitioner is taken merely to obtain conclusive proof of adultery, but there must be proof that the two spouses intended to promote the adultery for some corrupt purpose. In support of his argument that there was no corrupt behaviour by the petitioners, he pointed out that Mr. Manning, at any rate, was acting throughout, from July 27, 1948, when he and Mrs. Fellows consulted their solicitor, on the advice of the solicitor, and that his only desire was to find out whether the wife was unfaithful and, if so, to obtain conclusive evidence for a divorce. The point that Mr. Manning was acting on the advice of his solicitor seems to me to be irrelevant, because it may be that the solicitor gave erroneous advice. As regards Mr. Manning's only desire being to find out whether the wife was unfaithful, again I think that his desire is immaterial. The question is whether he encouraged and promoted the adultery which took place on the night of Oct. 2, 1948.

**E**

**F**

There are certain aspects of the case which, to my mind, show conclusively that there was connivance on the part of both Mr. Manning and Mrs. Fellows. The Mannings were married in 1940. Mr. Manning is now thirty-two and his wife is twenty-eight years of age, and there are two children, a boy, born in 1943, and a girl, born in 1947. Mr. Fellows is thirty-nine years of age. He was married to his wife (who is now thirty-eight) in 1934, and there are no children of that marriage. Mr. Manning is a detective in the Manchester Police Force.

**G** Mr. Fellows is a wholesale florist. Mr. Manning met Mr. Fellows in October, 1947, and the two families became friends. In the following summer they all went on a caravan holiday to Abersoch. A conversation was proved to have taken place after the holiday between Mr. Fellows and a man called Brown, in the course of which Mr. Fellows said he had seduced Mrs. Manning twice during the holiday. Mrs. Fellows overheard this and she reported it to Mr. Manning. There was a dispute whether Mr. Manning taxed his wife with this alleged intrigue. She denied it absolutely, and it is fair to her to say that the judge said that she was

**H**



a good witness and impressed him favourably. By July 27, 1948, the suspicion of Mr. Manning and Mrs. Fellows had risen to such an extent that they consulted their solicitor, and, according to them, thereafter acted on his advice. At the beginning of August, Mr. Bowden, who was Mrs. Manning's father, saw his daughter and warned her to cease her friendship with Mr. Fellows. The husband, Mr. Manning, was present at that time. Mrs. Manning told her father, in effect, to mind his own business. About that time there was an important conversation between Mr. and Mrs. Manning, and the learned judge deals with that in this way. He says :

"I find as a fact that she did, as she says, request her husband to be allowed to drop the friendship with the Fellows. The fact that this request was refused confirms me in concluding that from a time certainly as early as August Mr. Manning and Mrs. Fellows, so far from attempting to stop the association between their spouses, not only acquiesced in its continuance, but did all they could to foster and encourage it, while at the same time taking pains to conceal from their spouses what they already knew and suspected."

Mrs. Manning shows that Mr. Manning had some reason to think that his wife was falling in love with Mr. Fellows, that Mrs. Manning herself realised the danger, and that she appealed to her husband to help her to stop the association, which he could have done easily by telling Mr. Fellows to discontinue his visits to the house. Instead of that, Mr. Manning and Mrs. Fellows, I think deliberately, set about trying to obtain evidence against the wife, and even to promote it in the sense that they made opportunities for adultery to take place. In pursuance of that plan, they set out to behave as though nothing had happened to excite suspicion. Mr. Manning set up in his sitting-room a microphone, which he hid in the piano, with wires leading to the garage. On Sept. 21, 1948, Mr. Manning, Mrs. Fellows and a detective sat in the garage with ear-phones and heard a conversation between Mrs. Manning and Mr. Fellows of a highly indecent character. They entered the room but only found that the appearance of Mrs. Manning was rather dishevelled. Thereupon Mr. Manning and Mrs. Fellows acted as if nothing had happened and pretended to believe Mrs. Manning's account that she and Mr. Fellows had fallen asleep while looking at some photographs. By doing that they allayed any suspicion which otherwise might have arisen in the minds of Mrs. Manning and Mr. Fellows. Furthermore, they took every opportunity to go out together so as to leave Mrs. Manning and Mr. Fellows alone, and, indeed, so far as the Fellows were concerned, Mrs. Fellows, in order to allay any suspicion, continued to have intercourse with her husband right up to Oct. 2.

On Oct. 2, Mr. Manning said that he was going to stay the night with his father and Mrs. Fellows said that she was going to nurse her sick father. The result of that was to leave the way clear for Mrs. Manning and her lover, but instead of going to see his father Mr. Manning took some colleagues in the police force to the garage and listened. They rushed into the sitting-room and caught Mrs. Manning and Mr. Fellows in the act of adultery. That seems to me to be a very good illustration of a deliberate encouragement and promotion of adultery on the part of Mr. Manning and, to a lesser extent, on the part of Mrs. Fellows, and that the finding of the learned judge is abundantly justified on the evidence.

Is the submission established that, even on those facts, connivance had not been made out? It has not been suggested here that the learned judge has misdirected himself as to the law. He has based himself on the statement made in the House of Lords by LORD WESTBURY, L.C., in *Gipps v. Gipps and Hume* (1), where LORD WESTBURY, L.C. said (11 H.L. Cas. 14):

"The word 'conniving' is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur."

- A It may be said that when one is considering the meaning of the word "connivance," it does not help very much to say that it includes the case of a husband acquiescing in the adulterous intercourse by wilfully abstaining from taking any steps to prevent it, because one then says: "What does 'acquiesce' mean?" and "What does 'wilful' mean?" The principle which
- B underlies the doctrine of connivance which was cited by WILLMER, J., was laid down by SIR CRESSWELL CRESSWELL in *Glennie v. Glennie & Bowles* (2), in which he said (32 L.J.P.M. & A. 20):

- C "I think that to establish connivance it is requisite, not that the party conniving should be actually an accessory before the fact, so as to have taken any active measures to bring about the result of adultery, but that he should be cognisant that such a result would follow from certain transactions that he approved of and consented to; and, therefore, on the principle *volenti non fit injuria*, he cannot complain of any act he passively assented to."

- D It seems to me that when one looks at the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (2), which follows very closely the words of the Matrimonial Causes Act, 1857, s. 31, which set up the Divorce Court, there are three degrees of blameworthy conduct on the part of the petitioning spouse. In the first place he must not be an "accessory" to the adultery. That is at one end of the scale, and I take "accessory" to mean an active promoter of the adultery. At the other end of the scale there is "conduct conducing" to the adultery, which may be mere slackness, inattention and neglect of such a kind as to contribute to the adultery. Somewhere between those two extremes lies the rather undefined area of "connivance," conduct which seems to me to be largely a question of fact. No useful purpose is served in considering what in one case did constitute connivance and in another case did not, but if it is something worse than mere neglect conducing to adultery and yet not as bad as being an accessory to it, I think that the learned judge is entitled to say:
- F "Well, this, in my opinion, is connivance within the definition as given by LORD WESTBURY, which has, I think, been generally accepted, and I hold that there was connivance in fact and in law." That is what the learned judge has done in this case, and I myself see no ground on which this court could say he was wrong. For these reasons, in my judgment, these appeals should be dismissed.

- G SINGLETON, L.J. [after stating the facts]: The submission to this court of counsel for the petitioners was that there was no connivance in law, because, on the true view of that which had taken place, each of the petitioners was merely endeavouring to find evidence to support a petition. Counsel referred the court to a number of old authorities, one of which was *Rogers v. Rogers* (3), in which SIR JOHN NICHOLL said (3 Hag. Ecc. 58):

- H "Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has allowed to take place. *Volenti non fit injuria* is the principle on which the rule has been founded."

\* The report has a footnote (*ibid.*) to this effect:

"In *Forster v. Forster* (4) SIR WILLIAM SCOTT says (1 Hag. Con. 146):  
 "A fourth defence is, that he has connived at, encouraged, and promoted,

his own dishonour; for in that case the general rule of law comes in—"*Volenti non fit injuria*"—no injury has been done, and therefore there is nothing to redress."

The finding of the learned judge makes it clear that this is not a case in which the petitioners were merely seeking evidence on which each of them could base a petition. If the concluding paragraph of the judgment is examined it shows without doubt that there was something more than that. The learned judge, who saw the witnesses and was able to form his view of them, and had before him the letters, which gave some support to the case of Mrs. Manning, said:

"These two petitioners, suspecting their spouses of forming an adulterous association, and knowing that that association would almost inevitably lead to adultery, if indeed adultery had not already taken place, not only made no effort to stop the association, not only acquiesced in its continuance, but actually took part in promoting and encouraging it, for the purpose of secretly spying on their spouses to obtain evidence for divorce, while at the same time deceiving them by maintaining a false facade of normal married life. From such petitioners this court is bound to withhold relief, and my judgment accordingly is that both petitions must be dismissed."

That passage shows that the learned judge found, first, that both petitioners knew that the association between Mrs. Manning and Mr. Fellows would almost inevitably lead to adultery—Mrs. Manning had twice asked her husband to break off the friendship with the Fellows but he declined to do so. Secondly, that the petitioners (Mr. Manning first and foremost) made no effort to stop the association. Thirdly, that they acquiesced in its continuance; and, further, that they actually took part in promoting and encouraging it. The learned judge's findings of fact are not seriously attacked—they cannot be, in the circumstances. If a husband promotes and encourages the adultery of his wife, relief ought not to be granted to that husband. I agree that the appeals fail.

**HODSON, J.:** It is important to bear in mind that this case, as pleaded and fought, concerned an act of adultery on Oct. 2, 1948. It is clear from the findings of the learned judge that he was abundantly justified in coming to the conclusion that that act of adultery was connived at. He uses the phrase that the guilty parties were lulled into a sense of security, and I think they were lulled in three ways: (i) by the fact that their respective spouses continued to have intercourse with them till very near the crucial date after, according to them, they had become practically certain that adultery had been committed and were trying to get evidence; (ii) on Sept. 21, 1948, when the petitioners had heard a conversation which, taken at its face value, plainly meant that these people were admitting adultery, they pretended to both of them that they accepted their explanations and did not suspect anything; and (iii) (and this affects Mr. Manning only) Mrs. Manning had in August, 1948, asked her husband to stop the association which existed between herself and Mr. Fellows, realising the danger which she ran, a request which was ignored by Mr. Manning. Although that affects Mr. Manning only, both these petitioners were continuing to promote and encourage the association by continuing the regular meetings with the families which had been taking place over the period of the friendship. I do not think the petitioners can, therefore, succeed on this appeal by arguing that the position is different because adultery must almost certainly have taken place before Oct. 2, and, therefore, the petitioners, if merely seeking to establish adultery, could not be guilty of a corrupt intention. The issue whether adultery took place before Oct. 2 has never been tried, and it was not pleaded. Moreover, the learned judge at the trial refused an application for an amendment and the respondent Mrs. Manning was not asked any questions about previous adultery. The adultery, if any, committed by these people before Oct. 2 has not been



made the subject-matter of any plea of connivance, and the decision in this case has no bearing on it. I agree that the appeals fail and should be dismissed.

*Appeal in Manning v. Manning dismissed, petitioner to pay respondent Fellows' costs only.*

*Appeal in Fellows v. Fellows dismissed; no order as to costs.*

A Solicitors: *Field, Roscoe & Co.*, agents for *Frank Leigh & Johnson*, Manchester (for the petitioners); *T. C. Boyes*, agent for *Frank Douglas*, Law Society Services Divorce Department, Manchester (for the respondent Manning); *Hewitt, Woollacott & Chown*, agents for *Heath, Sons & Broome*, Manchester (for the respondent Fellows).

[*Reported by C. StJ. NICHOLSON, ESQ., Barrister-at-Law.*]

B

## MUDGE v. MUDGE AND HONEYSETT (GOODWIN cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), February 6, 7, 1950.]

C Divorce—Connivance—“*Passive acquiescence*”—*Wife watched by husband—Act of adultery observed—No intervention by husband.*

D A husband, who was living apart from his wife, had reason to believe that she was living in adultery. On the night of Dec. 8, 1948, he and certain detectives concealed themselves outside the house where the wife was living and on looking through the window they saw her and the co-respondent in the act of adultery. The husband having filed a petition for divorce on the ground of the adultery in question, the wife, by her answer, denied the charge and also pleaded that, if she had committed adultery, the husband had connived at it in that he had failed to intervene and prevent the commission of the act.

E HELD: the position was the same as if the husband had not kept watch personally, but had merely sent agents to watch his wife; the husband had not lulled his wife into a sense of security to enable himself to obtain evidence against her; he had not passively acquiesced in her adultery with the intention of promoting its initiation or encouraging its continuance; and, therefore, he was not guilty of connivance.

F [AS TO CONNIVANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and FOR CASES, see DIGEST, Vol. 27, pp. 326-332, Nos. 3052-3122.]

Cases referred to:

- (1) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 2nd Digest Supp.
- G (2) *Rogers v. Rogers*, (1830), 3 Hag. Ecc. 57; 27 Digest 327, 3061.
- (3) *Walker v. Walker*, (1796), cited 3 Hag. Ecc. 59.
- (4) *Pearl v. Pearl and Lees*, [1943] 4 D.L.R. 387; O.R. 720; 2nd Digest Supp.

PETITION by the husband for divorce on the ground of adultery.

H By her answer, the wife denied having committed adultery and alleged that the husband, by concealing himself in a position from which he could observe the alleged act of adultery and failing to take steps to prevent its commission, had been guilty of connivance.

*Theodore Turner, K.C.*, *Van Oss*, and *P. Bennett* for the husband.

*Melford Stevenson, K.C.*, *Andrew Lyell*, and *W. Scrivens* for the wife.

HODSON, J.: The husband, Raymond Mudge, is seeking a divorce from his wife, Mary Lavinia Mudge, on the ground of her adultery with one Douglas Honeysett who has not taken any part in the proceedings. By her answer the

wife, in the first place, denied adultery, but by an amendment she added to the denial a statement that, if she had committed adultery, the husband had connived at and was accessory to the adultery in that, on the night of Dec. 9, 1948, he was present at the house "Foxpitts," West Farley, Maidstone, Kent, where the wife was living, and at all material times kept out of sight or hearing of the wife and the co-respondent, and neglected or failed to prevent the wife committing adultery with the co-respondent.

Adultery by the wife has been clearly proved. So far as connivance is concerned, there are difficulties in laying down general propositions about what is or is not connivance. The fact that the husband was watching on the night in question, in company with detectives, is not disputed, nor is it disputed that, while he was watching through the window, adultery, if it took place, occurred between the wife and the co-respondent. It is said that a man who does nothing in those circumstances to stop his wife committing adultery is conniving at her adultery by passive acquiescence. To my mind, the situation would have been exactly the same if the husband had not been there himself, but had merely sent agents to have his wife watched, he being suspicious of his wife's chastity and having reason to believe that she had committed adultery in the past.

The question, therefore, is: By simply doing nothing to stop his wife committing adultery did he connive at her adultery? The most recent case on the subject of connivance is *Churchman v. Churchman* (1) in which LORD MERRIMAN, P., said ([1945] 2 All E.R. 194):

"... it is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first."

Later he said (*ibid.*, 195):

"Much of the difficulty in dealing with the question of connivance arises from the fact that in the past judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery; and that the court should not allow its judgment to be affected by importing, as principles of universal application, pronouncements made with regard to wholly different circumstances, and so be led to a conclusion contrary to the justice of the case."

It is desirable to read that passage before referring to some of the language used in older cases which is said to lay a foundation for the argument that a man who does nothing and watches to see whether his suspicions are confirmed is guilty of connivance.

The phrase "passive acquiescence" appears in the judgment of SIR JOHN NICHOLL in *Rogers v. Rogers* (2). He says (3 Hag. Ecc. 59):

"Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that [the wife] would be guilty of the crime; but on the other hand it has always been held that there must be a consent. The injury must be *volenti* ... Thus in *Walker v. Walker* (3), LORD STOWELL [stated]: 'The defence is not a denial of the fact, but that which, if established, is said to be equivalent in law. It is said, that the husband connived; but they do not impute active means, but a passive consent. I take the position laid down by Dr.

ARNOLD, to be the true doctrine—that passive consent is sufficient; but there must be a consent, an acquiescence of his will; not mere negligence; not too high a confidence, or a misplaced confidence:—there must be evidence that he was passively concurrent; that he saw the train laid for the corruption of his wife; that he saw it with pleasure, and gave a degree of passive concurrence to it’.”

- A Some comment has been made in a later case about the apparent irrelevance of the emotion aroused in the petitioner by what he sees, but the use of the term “passive acquiescence,” if one leaves out of account the reference to intention, may, perhaps, be misleading. If a man does nothing, without lulling into a sense of security the wife about whom he is suspicious, but watches her, he is not by any means necessarily guilty of passive acquiescence with a corrupt
- B intent which would satisfy the language of LORD MERRIMAN in *Churchman v. Churchman* (1). In the present case the wife was not lulled into a false sense of security, because she had no knowledge of the observation of her husband and, as I have already indicated, it seems to me to make no difference whether the watching or the passivity was that of the husband himself or that of his agents. *Qui facit per alium facit per se*. In *Pearl v. Pearl and Lees* (4), a
- C Canadian case, the opposite conclusion was reached in circumstances very like the present, but I cannot see that the actual method by which the husband watches—whether he instals himself inside the house or outside the house, or whether he employs others to do the watching for him—can make any difference, although, I would add, I agree with LAIDLAW, J.A., who was shocked by the circumstances of the case with which he had to deal. It is obviously revolting
- D to consider circumstances where a man is driven to keep watch in order to see whether or not his wife has fallen, but it does not follow that because the circumstances of the particular case are unattractive the standard of duty which the law imposes varies. The law does not always set such a high standard in the conduct of persons as may conceivably be set by ethics, and if I were to hold that a man who acted as the husband did in the present case and watched his wife to
- E see whether his suspicions were well founded or unfounded was guilty of connivance, I should be doing the equivalent of what has never been done in this country, *viz.*, rejecting the petition of a person who, while not doing the watching himself, employs other people to do it for him.
- F For these reasons I see no ground for the allegation that the husband has either connived at or been an accessory to his wife’s adultery, and, therefore, I reject the prayer of the answer and there must be a decree *nisi* in favour of the husband.

*Decree nisi.*

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wood, McLellan & Williams*, Chatham (for the husband and party cited); *Isadore Goldman & Son*, agents for *E. A. Morling & Sons*, Maidstone (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

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## R. v. EVANS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Sellers, JJ.), February 20, 1950.]

*Criminal Law—Evidence—Confession—Confession of two crimes—Admissibility on trial for one crime—Murder—Charges of murder of wife and child—Trial on charge relating to child—Admissibility of confession of murder of wife.* A

Following the apparent disappearance of his wife and child the appellant made several statements to the police in the last of which he confessed that he had murdered both of them. At the trial separate indictments were preferred against the appellant, charging him with the murders, and the prosecution elected to proceed on the charge of murdering the child. When the prosecution sought to put in evidence the appellant's confession that he had murdered his wife and child the defence objected that it was inadmissible. B

HELD: that the evidence was relevant and, therefore, admissible.

*Per curiam:* In the opinion of the court, the real test we have to apply is: Was the evidence relevant, *i.e.*, did the statements which the appellant made with regard to the death of his wife bear on the question whether he was guilty or not guilty of the death of the child? In our opinion, it is impossible to say that the evidence was not relevant. Indeed, it was highly relevant in a case where, as here, two bodies, the body of the mother and the child, were found together in a house in which the appellant had been living. If the bodies of a mother and an infant child are found lying together, murdered, in a place, surely the evidence with regard to the death of the mother must be relevant to the question how the death of the child occurred and by whom the deaths were caused. C D

[AS TO THE ADMISSIBILITY OF RELEVANT FACTS IN EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 183-185, paras. 267-270; and FOR CASES, see DIGEST, Vol. 14, pp. 371-374, Nos. 3924-3942.] E

Cases referred to:

- (1) *R. v. Birdseye*, (1830), 4 C. & P. 386; 14 Digest 368, 3898.
  - (2) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 14 Digest 371, 3924.
  - (3) *R. v. Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 14 Digest 371, 3921.
  - (4) *R. v. Rodley*, [1913] 3 K.B. 468; 82 L.J.K.B. 1070; 109 L.T. 476; 77 J.P. 465; 14 Digest 373, 3935.
  - (5) *R. v. Davis*, [1937] 3 All E.R. 537; Digest Supp.
- F

APPEAL against conviction at the Central Criminal Court before LEWIS, J., of murder.

The appellant was convicted of the murder of his infant daughter. Evidence was given that he had confessed to having murdered both his wife and the child, and at the trial objection was taken to the admission of that part of the confession which related to the death of the wife. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J. G

*Malcolm Morris* for the appellant.

*Christmas Humphreys* and *Elam* for the Crown. H

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted at the Central Criminal Court before LEWIS, J., of the murder of his infant daughter. A variety of grounds of appeal have been urged on his behalf, but there is only one point with which it is necessary to deal at any length, and that is whether or not evidence with regard to state-

ments which he made with regard to the death of his wife and his admission that he had caused her death was admissible in the case.

A One cannot deal with this sort of question in an academic manner because it depends entirely on the nature of the case. The appellant and his wife and child were living in a house in which there were also living a Mr. and Mrs. Christie. At some time on the material date in November, 1949, the wife and child apparently disappeared from the house. I say "apparently" because their bodies were afterwards found there. They disappeared after Christie had heard during the night in the flat where the appellant lived noises of a description which caused him to get up and look out of the window to see if he could see what was happening. The explanation of the noises became only too apparent later. Next day, or the day after, Christie saw the appellant and B was told by him that Mrs. Evans had gone to Bristol with the child. On Christie's expressing some surprise that she had not even said "goodbye"—because, apparently, they were living on terms of friendship—the appellant explained that she had to go off in a hurry and that she would write. The appellant himself went away, but some days afterwards he came back and said that his wife was still down at Bristol or South Wales, it matters not where. C Mrs. Evans and the child were never seen alive again. The metropolitan police, who had been informed, communicated with the police in South Wales where the appellant had gone, and he was subsequently arrested at Merthyr Tydfil. From that time on he proceeded to make various statements to account for the disappearance of his wife.

D When the appellant was arrested he proceeded to make a variety of statements, the first of which was this. Owing to his wife being pregnant, he said, he had discussed the matter with a stranger who had given him a bottle of pills for her to take, that she took the pills, and that the next day he found her lying dead on her bed; he first took her body to the flat below, which was at that time vacant, the owner being away ill; and later that night after Mr. and Mrs. Christie had gone to bed, he took the body downstairs and put it E head first down the drain in the front of the house. Later that day he told the police that that story was untrue and he wanted to make another statement. On Nov. 30, which was the same day as he made the first statement, he said that Christie, who lived with his own wife on the ground floor, offered to perform an operation for abortion on his (the appellant's) wife, but he refused to have anything to do with the suggestion. However, the appellant's wife told F the appellant that she had arranged with Christie to perform this operation, and that it was to be done on the morning of Nov. 8. On the appellant's return from work that day Christie met him at the door, took him upstairs, and showed him his wife lying dead on her bed. Then Christie took the body down to the flat below and left it there, and told the appellant he would put the body down one of the drains to avoid trouble. The appellant stayed upstairs and fed G and looked after the baby, and then went to bed himself. The next morning he went to work, and during his absence Christie arranged for a young couple in East Acton to take charge of the child. Christie said this couple would come for the baby the next morning, which they did. That would show that this baby was alive for a whole day after the mother was dead. As I have already said, so far as the evidence goes, no one saw the child alive. On his return from work, Christie told him that the baby had been taken away, and that he had H put Mrs. Evans' body down the drain. Christie then advised him to sell his furniture and leave the district. The appellant followed his advice and went and stayed with his aunt in Wales where he remained. It is material now to say that the bodies of the wife and child were found together concealed in the boiler-room of this house where the appellant lived.

When the appellant was taken into custody by the metropolitan police after his arrest in Wales, he made a further statement. This time he said that on

Nov. 8 he had strangled his wife with a piece of rope and had taken the body down to the flat below, and that after the Christies had gone to bed he took the body down into the yard and hid it in the wash-house, where it was found. The statement describes how, on Nov. 10, he came home and strangled the baby and hid her in the wash-house. Whether he strangled her on Nov. 8 or Nov. 10 is not, in the opinion of the court, in the least material. He said he strangled her on Nov. 10. I have already pointed out that the wife disappeared and the child disappeared, as far as any evidence goes, at the same time, but it does not matter which story is true on that particular issue. The appellant who had previously said that his wife's body had been put into a drain (by which I suppose he meant a sewer outside), and that Christie had taken the body and put it into the drain because he had performed an operation for abortion, now admitted that he strangled his wife—and her death was due to strangulation and not an operation for abortion—and that he put her body in the very place where her body was found, and alongside her body was found the body of the child which also, he said, he had strangled. Finally, he made a statement in which he described how he killed his wife and what he did with her body, and how he later murdered the child in his own room, and so on.

He was charged with the murder both of his wife and child and brought before an examining magistrate. The depositions were taken with regard to both charges, and the magistrate committed him for trial on both charges. Although two charges of murder can be included in one indictment this court has strongly expressed the view that not more than one murder should be included in one indictment. Accordingly, two indictments were preferred against the appellant, one for the murder of the wife and the other for murder of the child. The prosecution, electing, as they had the right to elect, decided that they would proceed with the indictment charging the murder of the child. Before the case was open to the jury, a submission was made to LEWIS, J., that no evidence with regard to the murder of the wife could be given before the jury on the charge relating to the murder of the child. LEWIS, J., overruled that submission, and allowed to be given in evidence on that charge the statements which the appellant had made relating to the murder of his wife. It is argued by counsel for the appellant that that was wrong, that the prosecution had no right to lead that evidence, and, that LEWIS, J., should not have admitted it. He submitted that the evidence would only have been admissible to show system, as has been done in some well known murder cases, but no system was alleged here, nor, it was argued, was there any evidence that the two murders were committed at one and the same time, but, so far as there was any evidence, there was the statement of the man that he killed the child two days afterwards.

In the opinion of the court, the real test we have to apply is: Was the evidence relevant, that is to say, did the statements which the appellant made with regard to the death of his wife bear on the question whether he was guilty or not guilty of the death of the child? In our opinion, it is impossible to say that the evidence was not relevant. Indeed, it was highly relevant in a case where, as here, two bodies, the body of the mother and the child, were found together in a house in which the appellant had been living. To account for the bodies of his wife and child being found there, both strangled, the appellant gave three explanations to the police, in two of which he accused first a stranger and then Christie of being responsible for the killing of the mother. Then came the third story in which he confessed both to the murder of the wife and to that of the child. In those circumstances it was most material that evidence should be given as to what the appellant had said in accounting for the bodies being found. If the bodies of a mother and an infant child are found lying together, murdered, in a place, surely evidence with regard to the death of the mother must be relevant to the question how the death of the child



occurred and by whom the deaths were caused. It is not a question of system. It is a question of relevance, and this evidence was relevant to show that the third statement which the appellant made was a true confession, because (as, perhaps, it is hardly necessary to say) in the witness-box he went back on it and said the confession was not true. It is material for that purpose to see what he said with regard to the whole matter for which he had to account. It was no good in a case of this sort accounting for the body of the child and not that of the mother. The appellant himself said: "I murdered the mother, my wife, by strangling, and thereafter I murdered my daughter by strangling her."

In our opinion, LEWIS, J., was right in admitting the evidence, because it was relevant and not on any such ground as that it would be very inconvenient to try to disentangle the sentences which dealt with the daughter and not the mother. It was one and the same story and, in our opinion, that evidence was clearly relevant. In our view, the appellant was properly convicted, there is no ground for interfering with the conviction, and the appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Freeborough & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

## Re JOHNSTON'S APPLICATION. JOHNSTON v. SHOBROOK.

[CHANCERY DIVISION (Harman, J.), February 3, 21, 1950.]

*War Damage—Value payment—Apportionment—Proprietary interest—"Incident" of proprietary interest—Option to lessee to purchase freehold reversion—War Damage Act, 1943 (c. 21), s. 12 (3).*

By a lease, dated Jan. 1, 1936, A., the freeholder of certain premises which were a "developed hereditament" within the War Damage Act, 1943, s. 5, demised them to B. for a term of eight years from Christmas, 1935. The lease contained a proviso entitling B., by notice in writing given before the expiration of the term, to purchase the freehold reversion for £2,750. On Mar. 22, 1941, the premises became a total loss owing to war damage, and as a result a value payment of £2,380 became payable. B. did not serve notice either of disclaimer or retention of the lease, and the option to purchase was not exercised. On a question as to the apportionment of the value payment between A. and B. as the owners of the proprietary interests,

HELD: the option to purchase the freehold reversion was an incident which B.'s proprietary interest had at the material date within the meaning of s. 12 (3) of the Act of 1943, and it must, therefore, be taken into account in making the apportionment.

[FOR THE WAR DAMAGE ACT, 1943, s. 12, see HALSBURY'S STATUTES, Vol. 36, pp. 350-352.]

Cases referred to:

- (1) *Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 30 Digest 473, 1357.
- (2) *Re Leeds & Bailey Breweries & Bradbury's Lease*, [1920] 2 Ch. 548; 89 L.J.Ch. 645; 124 L.T. 189; 30 Digest 472, 1355.
- (3) *Batchelor v. Murphy*, [1926] A.C. 63; 95 L.J.Ch. 89; 134 L.T. 161; *affg.* [1925] Ch. 220; *revsq.* [1924] 2 Ch. 253; 94 L.J.Ch. 177; 132 L.T. 449; 30 Digest 498, 1567.

CASE STATED pursuant to the War Damage (Valuation Appeals) Act, 1945, sched., para. 11, and R.S.C., Ord. 55c, r. 3, to determine whether an option to purchase the reversion in fee simple contained in a lease dated Jan. 1, 1936, was an incident which the proprietary interests in the demised premises had at the material date for the purposes of the apportionment of compensation payable under the War Damage Act, 1943. The tribunal set up under the Act of 1945 found that the option was such an incident, but stated this Case at the instance of the (then surviving) lessor.

*Richmount* for the lessor (represented by his legal personal representatives).  
*Russell, K.C.*, and *Slack* for the lessee.

*Cur. adv. vult.*

Feb. 21. **HARMAN, J.**, read the following judgment. This is a Case stated under R.S.C., Ord. 55c, r. 3, by the tribunal set up under the War Damage (Valuation Appeals) Act, 1945, which substituted that tribunal for the referee constituted under the War Damage Act, 1943, s. 32, for the purpose of determining questions arising in giving effect to certain of the provisions of that Act. The Case is stated at the instance of the then surviving freeholder of some property situate in Church Street, Plymouth, consisting of an office, shop, store and a warehouse with a yard. This kind of property is defined in s. 5 (2) of the Act of 1943 as "a developed hereditament." It became a total loss by war damage on Mar. 22, 1941, as a result of which a value payment is to be made under the Act of 1943 amounting to £2,380. It is as to the division of this sum that the dispute has arisen. Immediately before the material date the property was in the possession of the respondent lessee under a lease of Jan. 1, 1936, for the unexpired residue of a term of eight years from Christmas, 1935. The lease contained a proviso entitling the tenant, if so minded, by written notice given before the expiration of the term to purchase the reversion in fee simple on the term for £2,750. This option was never exercised, nor did the lessee serve any notice of disclaimer or of retention after the damage occurred. The lease expired in the ordinary course at Christmas, 1943. The site then reverted to the freeholders, then the two original lessors but now the representatives of the surviving lessor.

It is clear from s. 10 of the Act of 1943 that the relevant unit for the purposes of awarding the value payment was the developed hereditament as a whole, *i.e.*, the entire subject-matter of the demise, and that it was with this alone that the War Damage Commission was concerned and in respect of damage to which the sum I have mentioned has been paid without regard to the interests subsisting in the hereditament. These interests are in the Act styled "proprietary interests," of which, having regard to s. 123, there may be two, namely, the fee simple and the lease, this being a tenancy other than a short tenancy within the meaning of that section. It is further clear enough that, under s. 12 (2) (b) of the Act, the war damage payment is to be apportioned between these two proprietary interests, and the difference which has arisen concerns the method of apportionment, and is, in short, whether the option to which I have referred should be taken into account as the tribunal has decided, or whether, as the appellant lessor contends, it should be disregarded. The difference to the contending parties is considerable.

The answer to this question, which I have not found an easy one to resolve, depends on the construction of the Act of 1943, which was a consolidating Act, its main predecessor being the War Damage Act, 1941, described in its title as "An Act to make provision with respect to war damage to immovable property." Now, immediately before the material date, there were two interests in this immovable property, one the freehold subject to the option, and the other the leasehold with the benefit of the option. Either or both of these interests could be sold in the open market, and there can be no doubt that the existence of the option, which was at a favourable price, must have been an element which

decreased the freeholder's, but increased the leaseholder's, interest. When the war damage occurred, the freeholder suffered damage to his reversion, but, in effect, he got rid of the option, for it ceased to be favourable to the lessee, who, on the other hand, lost everything, for the two remaining years of the lease were valueless or worse having regard to the destruction of the buildings, while the option ceased to be worth exercising. On general principles, therefore, one would expect each party to be compensated according to what he had lost, and this would necessarily involve taking the option into account, even though it might be obvious that it would never be exercised once the damage had occurred.

I turn, therefore, to the Act to see whether it has the operation which I should expect. I start with this, that the option is not itself a proprietary interest within the definition section (s. 123). Apportionment is regulated by s. 12 (2) (b) which provides:

"... in any other case, the payment shall be apportioned between the several proprietary interests subsisting in the hereditament or in any part thereof at the material time which were depreciated in value by reason of the war damage in shares proportionate to the extent to which they were respectively so depreciated, and a right to receive the share of the payment apportioned to each of those proprietary interests and a like share of the interest on the payment shall vest in the person who was at the material time the owner of that proprietary interest, subject as aforesaid."

For the purpose of measuring the depreciation caused by the war damage, the relevant section is s. 12 (3), and it is, I think, agreed that the option, if it is to be taken into account, must come in as being, in the inelegant language of the sub-section, an incident which the leasehold interest had at the material time, and, accordingly, the question stated in the Case is in these terms:

"Whether the option to purchase the reversion in fee simple contained in the said lease dated Jan. 1, 1936, is an incident which the proprietary interests had at the material time."

What, then, is the meaning of the word "incident" as used in the Act of 1943? Apart from s. 12, it is to be found many times in the valuation provisions in sched. II to the Act where the cross-heading to para. 3 is: "Valuation of proprietary interests: incidents under Landlord and Tenant (War Damage) Acts, etc." In para. 3 (1) one finds again the expression "the like incidents as a proprietary interest therein had": in para. 3 (2) and (4) are mentioned "incidents arising" under certain Acts, and in the latter "incidents so arising which in fact attach to the interest." In para. 3 (5) certain "incidents" are to be disregarded, and here the word, apparently, refers to certain facts about the hereditament as, for instance, that it is, or is not, subject to a mortgage or a rentcharge, or to restrictions under certain enactments, or to a liability to become so subject. This is loose language, and it is urged on me by counsel for the lessee that the word is not used in any strict sense, and that any fact affecting the value of a proprietary interest is, for the purposes of this Act, described as an incident of that interest. This, he says, is an excellent description of the option here, the existence of the option being a fact constituting an incident which each proprietary interest had.

Counsel for the lessor, on the other hand, argued that the word should be more strictly interpreted. He submitted that an option contained in a lease to purchase the freehold reversion expectant on the term is no part of the lease, but is a collateral bargain independent of it. Such an option might have been granted to a lessee by an independent deed, or to a stranger to the lease, or there might exist an option without any lease at all. In none of these cases could it be described as an incident which the lease had, nor could it have ranked for a share of the value payment because it is not itself a proprietary interest. In



support of these propositions I was referred to authority, and, in particular, to *Woodall v. Clifton* (1). In that case, the assign of a lease for a term of ninety-nine years sought to enforce, against the assign of the lessor, an option to purchase the fee simple contained in the lease, and it was clear that, unless the burden of the option was so annexed to the reversion as to run with the land, it would not bind the assigns of the reversion and would also be void as infringing the rule against perpetuities. The Court of Appeal decided the case on the footing that the liability to perform the covenant did not run with the land, and ROMER, L.J., delivering the judgment of the court, said ([1905] 2 Ch. 279):

"The question in the present case is whether the statute was intended to cover, or can be construed as covering, such a covenant or proviso as we have now to consider, so as to make the liability to perform it run with the reversion. We have come to the conclusion that that question must be answered in the negative. The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing [32 Hen. 8, c. 34, dealing with grantees of reversions: repealed by the Law of Property Act, 1925, s. 207 and sched. VII.]

To the like effect is *Re Leeds and Batley Breweries, etc.* (2), of which I need only read the headnote, which is as follows:

"An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy. It is a provision outside of the terms which regulate the relations between the landlord as landlord and the tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease."

My attention was also drawn to certain further sections of the Act of 1943 with a view to showing that where the legislature intended the owner of a proprietary interest to be bound to share the value payment with, or pay it to, some other person, special provisions are found for that purpose. Thus, s. 24 gives rights over the value payment to a mortgagee, while s. 25 similarly protects the interest of an owner of a rentcharge. Section 27 deals with settled land, s. 29 gives rights to a devisee under a will, and s. 30 gives rights to a purchaser under a contract pending at the time of the damage. This last was particularly relied on on the ground that, if it was necessary to make special provision that the vendor under a pending contract should hold the value payment in trust for the purchaser, this must imply that, even where the equitable interest has passed by virtue of the contract, the vendor as estate owner of the proprietary interest in the freehold is, or might, but for the section, be entitled to retain the value payment. It was said to follow that, as under an option not exercised no contract exists and no equitable interest has passed, the grantor of the option, having the legal estate and the equitable interest, ought not to forfeit any part

of the value payment to the grantee of the option, there being no equity in the grantee to pass any of it to him. This, of course, is true where there is an option unconnected with a lease, but it does not solve the problem where the option and the lease are coupled together, so that, as here, the assign of the lease could have exercised the option without any express assignment to him of the benefit of it: see *Batchelor v. Murphy* (3). In that case SIR ERNEST POLLOCK, M.R., speaking of an option to purchase the freehold reversion on a lease, said ([1925] Ch. 226), after referring to the *Leeds and Batley Breweries'* case (2):

"... an option to purchase the reversion and so destroy the tenancy is not really one of the terms of the tenancy. It is a provision which is outside the terms which regulate the relations between landlord as landlord and tenant as tenant. It is in truth and in fact a collateral bargain. It is not one of the terms of the demise. It is incidental but collateral to the demise. In the present case—and this I think is the only outside matter which has any weight upon my mind—there is this. It is quite clear that if the Murphys had taken by assignment of the original lease of Oct. 17, 1913, they would have acquired this option. It would have passed to them under an assignment."

C SARGANT, L.J., in the same case said (*ibid.*, 231):

"Now it is to be noticed that if there had been a mere assignment by Clarkson to the Murphys, the necessary result would have been that the Murphys would have been entitled to the option of purchase given to Clarkson by the lease to him..."

Finally, it was submitted that an incident must be something affecting the legal estate in the freehold, for otherwise the sections just mentioned would have been unnecessary, as the word "incident" would have sufficiently protected the rights of the persons mentioned. I feel the force of these arguments, but, on the whole, in my judgment, it is not enough to outweigh what I should have considered the natural meaning of the section which must, I think, have been intended to apportion the compensation in proportion to the loss suffered. I have, therefore, come to the conclusion that the tribunal was right, and that this option was an incident which the proprietary interests had at the material date, or, in other words, that, on the true construction of s. 12 (3) of the Act of 1943, an incident must be taken to mean any factor connected with the proprietary interests which, immediately before the war damage, would have affected the value of each of them in the market. I, therefore, propose to answer the question in the case by declaring that the option to purchase the reversion in fee simple contained in the lease is an incident which the proprietary interest had at the material time. The appellants will pay the costs of the application as between party and party.

*Order accordingly.*

Solicitors: *Wedlake, Letts & Birds*, agents for *Gidley, Wilcocks & Maddock*, Plymouth (for the lessor); *Gregory, Rowcliffe & Co.*, agents for *Bond, Pearce, Elliott & Knappe*, Plymouth (for the lessee).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NOTE.TRESTAIN *v.* TRESTAIN.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.JJ.), February 7, 8, 9, 27, 1950.]

*Divorce—Maintenance—Assessment—Factors to be considered—Conduct of parties—Guidance by trial judge—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1).*

APPEAL by the wife from an order of MR. COMMISSIONER GRAZEBROOK, K.C., dated June 27, 1949.

*Moylan* for the husband.

The wife appeared in person.

Cases referred to:

- (1) *Ashcroft v. Ashcroft & Roberts*, [1902] P. 270; 71 L.J.P. 125; 87 L.T. 229; 27 Digest 501, 5360.
- (2) *Sydenham v. Sydenham & Illingworth*, [1949] 2 All E.R. 196; [1949] L.J.R. 1424.
- (3) *Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 2nd Digest Supp.
- (4) *Usmar v. Usmar*, [1949] P. 1; [1948] L.J.R. 1418; 2nd Digest Supp.

A wife petitioned for divorce on the ground of her husband's adultery, which he did not deny, but she later decided not to proceed with the suit and withdrew the petition. The husband then petitioned for divorce on the ground of his wife's cruelty, and asked for the exercise of the court's discretion in his favour by reason of his adultery. The learned commissioner by whom the petition was heard found the charges of cruelty proved, exercised his discretion in the husband's favour, and pronounced a decree of divorce. The wife appealed.

**HELD:** there was evidence on which the learned commissioner could find that the wife had been guilty of cruelty, and the Court of Appeal could not interfere with his decision.

*PER DENNING, L.J.* (in reference to the suggestion of the wife that she would be deprived of maintenance by reason of having a decree made against her): "There is nothing in the Supreme Court of Judicature (Consolidation) Act, 1925, which says that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing in it about discretion being exercised 'in favour of' one side or the other, or about 'a compassionate allowance.' All s. 190 (1) of that Act says is that, on a decree of divorce, the court may award maintenance to the wife, and, ever since 1902, it has been settled that this includes a wife against whom a decree has been made, and she is not bound to show special circumstances (*Ashcroft v. Ashcroft* [1902] P. 270). The court has, of course, to have regard to 'the conduct of the parties,' but the form of the decree is not conclusive on that. If, on an investigation of the facts, it appears ... that the conduct of the wife has been much less blameworthy than that of the husband, then, even though a decree has been pronounced against her, she is entitled to ask for maintenance as fully as if a decree had been pronounced in her favour, or at least as if it had been pronounced in favour of both parties. I wish that questions of maintenance could be dealt with by the judges who try these cases, but, no matter on whose petition they grant the divorce, they can at least—and they should, in my opinion—express their views on the conduct of the parties so as to assist those who have to deal with maintenance."

[**EDITORIAL NOTE.** On this matter see also *Sydenham v. Sydenham & Illingworth* ([1949] 2 All E.R. 196).]

Solicitors: *Reed & Reed* (for the husband).

C.N.B.



## HODGKINS v. HODGKINS.

[COURT OF APPEAL (Bucknill and Singleton, L.J.J., and Hodson, J.), February 16, 1950.]

*Nullity—Impotence—Sole evidence of petitioner—Need of corroboration.*

In 1935 the parties went through a ceremony of marriage, but the husband failed to consummate the marriage, and in February, 1949, he left the matrimonial home. On a petition by him for a decree of nullity on the ground of his own impotence, the only evidence as to his physical condition was the uncontradicted evidence of the husband himself and of a doctor. The learned commissioner disregarded the medical evidence and held that the uncorroborated evidence of the husband was insufficient on which to found a decree.

**HELD:** no higher standard of proof was required in a case of nullity than in one of divorce; in the present case, corroboration of the husband's evidence, although desirable, was not essential; and there should be a new trial.

*Dictum of LORD PENZANCE in U. (falsely called J.) v. J. (1867) (L.R. 1 P. & D. 461), applied.*

*Per HODSON, J.:* In this class of case corroboration is in practice required unless its absence can be satisfactorily accounted for. I think the position is the same with regard to nullity as it is with regard to cruelty.

[AS TO IMPOTENCE AS A GROUND FOR NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640-645, paras. 937-945; and FOR CASES, see DIGEST, Vol. 27, pp. 265-272, Nos. 2328-2407.]

Cases referred to:

- (1) *Morrow v. Morrow*, [1914] 2 I.R. 183; 27 Digest 301, 2780*v*.
- (2) *Robinson v. Robinson and Lane*, (1859), 1 Sw. & Tr. 362; 29 L.J.P.M. & A. 178; 31 L.T.O.S. 268; 33 L.T.O.S. 96; 27 Digest 300, 2777.
- (3) *U. (falsely called J.) v. J.*, (1867), L.R. 1 P. & D. 460; 37 L.J.P. & M. 7; 27 Digest 271, 2398.
- (4) *C. (otherwise H.) v. C.*, [1921] P. 399; 90 L.J.P. 345; 125 L.T. 768; 27 Digest 268, 2362.
- (5) *Harthan v. Harthan*, [1948] 2 All E.R. 639; 2nd Digest Supp.
- (6) *R. v. Millis*, (1844), 10 Cl. & Fin. 534; 27 Digest 43, 222.

**APPEAL** by the husband from an order of His Honour JUDGE WILLES sitting as a commissioner in divorce, dated July 27, 1949, dismissing his petition for nullity on the ground of his own impotence.

*Victor Russell* for the husband.

The wife was not represented.

**BUCKNILL, L.J.**, stated the facts and continued: We have looked at a number of authorities on the question how far a judge, though not legally bound, ought to accept the testimony given on oath in open court by a man, like the husband here, who is prepared to come into court and to admit that he is to some extent impotent, against whom there is nothing to show that he is an unreliable witness, and who gives his evidence straightforwardly. How far is a judge justified in rejecting the husband's evidence because he thinks that there are elements of doubt raised by the husband's conduct in not discussing such an unsavoury matter with somebody else? In PHIPSON ON EVIDENCE, 8th edn., p. 476, under the heading "Number of Witnesses, Corroboration" there appears the following:

"As a general rule, courts may act on the testimony of a single witness, even though uncorroborated; or upon duly proved documentary evidence

without such testimony at all . . . And where that testimony is unimpeached they should act on it (*Morrow v. Morrow* (1)), and need not leave its credit to the jury . . . But whenever there are circumstances of suspicion, or the testimony of a witness is challenged by cross-examination or otherwise, corroboration thereof is allowed; and in the several cases mentioned below corroboration is required either by law or well-established rule of practice."

The headnote to *Morrow v. Morrow* (1) states:

"There is no rule of law precluding a jury in an action for criminal conversation from acting on the uncorroborated evidence of the plaintiff's wife as to acts of adultery committed with the defendant."

As regards corroboration in general, CHERRY, C.J., said in that case ([1914] 2 I.R. 188):

"On the second point, I cannot find that any court has ever laid down as a rule of law that in an action for criminal conversation corroboration of the wife's evidence is necessary. It is most unusual to examine the wife as a witness to prove her own guilt; and the cases cited by Mr. MacLoone are authorities only for the proposition that the confession of the wife to the husband, or a third party, is not evidence as against the adulterer, it being merely hearsay as against him, and upon that ground not admissible at all. It is clearly established by *Robinson v. Robinson* (2) that in proceedings for divorce the admissions or confessions of the respondent are not admissible evidence against the co-respondent. That is a question of the admissibility of evidence, and not a question of corroboration. The same case decides that in a suit for the dissolution of a marriage the court may act on the confession of the wife alone. COCKBURN, C.J., puts that very strongly at p. 393. 'Now' (he says) 'the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself as to how far admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce. If this court had been a court of purely ecclesiastical jurisdiction, the 105th canon, which prohibits the granting of a divorce on the sole and unsupported testimony of the wife, would have precluded us from acting on this evidence. But, as this court is not a court of ecclesiastical jurisdiction, nor bound in cases of divorce *a vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible by which the fact of adultery is established; and if, therefore, there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the court to act on such admissions, although there might be a total absence of all other evidence to support them'."

The difficulty which arises in the present case is that it is a petition, not for divorce, but for nullity, and in cases of nullity the court has to act in accordance with the principles and rules on which the ecclesiastical courts acted and gave relief. That is laid down in s. 22 of the Matrimonial Causes Act, 1857, which was in the following terms:

"In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

That section was repealed by the Supreme Court of Judicature (Consolidation)

Act, 1925, s. 226 and sched. VI, but it was in substance re-enacted by s. 32 of that Act which says:

A "The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained."

So the court has to find out what was the practice in ecclesiastical courts in cases of nullity before the Act of 1857. In *RAYDEN ON DIVORCE*, 5th edn., p. 87, para. 87, it is stated:

B "Corroboration of the petitioner's evidence is probably not required as an absolute rule of law; but the court in practice requires it, unless the absence of corroborating witnesses can be satisfactorily accounted for."

The note to that paragraph says:

C "The ecclesiastical courts invariably required corroboration by an independent witness: see *BURNS, ECCLESIASTICAL LAW*, 9th edn., Vol. III, pp. 304 *et seq.*; but as to the inapplicability of the ecclesiastical rule in this respect to suits for dissolution of marriage or applications in courts of summary jurisdiction: see *Robinson v. Robinson and Lane* (2). *Query*, whether the ecclesiastical rule still applies to suits of judicial separation."

D We have considered the question how the Divorce Court dealt with the matter when the Act of 1857 was passed and the court had not only to exercise jurisdiction in granting for the first time divorces which no court except the High Court of Parliament had had power to do previously, but also had to deal with suits of nullity which ecclesiastical courts had dealt with before that time. It seems to me, whatever the ecclesiastical courts did before 1857, it is clear that the practice of the Divorce Court after 1857 was to adopt the same rule as to corroboration in cases of divorce and in cases of nullity. To my mind, it would be impracticable and unreasonable to say that a higher standard of proof was required in the case of nullity than in the case of divorce. That is borne out by what was said in *U. (falsely called J.) v. J.* (3), which was decided in 1867 by LORD PENZANCE, Judge Ordinary. The headnote states

E (L.R. 1 P. & D. 460):

F "In a suit by a wife for nullity, on the ground of the husband's impotence, the only evidence of the alleged impotence was that of the petitioner, which was contradicted by the respondent. The evidence of the medical witnesses and the report of the inspectors was not inconsistent with either case. The court declined to grant a decree on the unsupported

G testimony of the petitioner."

On the general point as to the kind of corroboration required, LORD PENZANCE said (*ibid.* 461):

H "To pronounce a marriage invalid on the unsupported oath of the party who seeks to be relieved from its obligations is a serious matter, within the province of the court, no doubt, but only to be done when the last trace of reasonable doubt as to the truth and *bona fides* of the case has been removed. If there be a direct conflict of testimony between the two parties who alone know the truth, as in this case, the difficulties are much increased."

It is clear from that judgment that corroboration is not required. It is not even required when the respondent denies the allegations of the petitioner, but, of course, the matter must be examined with the greatest care.



That judgment was referred to with approval by LORD BIRKENHEAD, L.C., in *C. (otherwise H.) v. C.* (4), which established that a man may be impotent as regards one woman, but not as regards another. In that case LORD BIRKENHEAD said ([1921] P. 400):

"The petitioner must remove all reasonable doubt, for she has undertaken the burden of proof, and it is important in such a case that she should be compelled to discharge the burden, for the charge made, though physical and not moral, is nevertheless a grave and wounding imputation that the respondent is lacking, at least *quoad hanc*, in the power of reproducing his species, a power which is commonly and rightly considered to be the most characteristic quality of manhood."

I cite that to reinforce my own view that it seems unlikely that a young man would come to the court and admit his impotence unless there was some truth in it. It is not suggested in the present case that the husband wanted to get rid of his wife or to marry somebody else. The fact that he has come to the court and admitted his impotence does seem to me to be worthy of some consideration in deciding whether his evidence is true or not. *Harthan v. Harthan* (5) decided that a man can obtain a decree of nullity on the ground of his own impotence, and it is doubtful whether in that case there was any more corroboration than in the present case.

I think that the husband in the present case has not got from the court what he is entitled to get, which, if his evidence is believed, is a decree. The judge could have said: "I disbelieve your evidence" and proceed to give some reasons, but he has done neither of those things. He has not said he disbelieved the husband's evidence. He simply says that he is not satisfied. If he did not disbelieve the witness, I think that in this case he should have been satisfied. That being so, I think that justice requires that there should be a new trial before another judge where these matters can be gone into more fully, and, perhaps, some evidence can be called to substantiate what the husband said. In my view, the appeal should be allowed and a new trial ordered.

**SINGLETON, L.J. :** I am of the same opinion. In *C. v. C.* (4), LORD BIRKENHEAD, L.C., sitting as a judge in the Probate, Divorce and Admiralty Division in 1921, said ([1921] P. 400):

"Doubts were formerly entertained whether an averment that a respondent is impotent *quoad hanc* is valid to support a decree of nullity.

Both before and after the Council of Trent, the doctrine of the church admitted, and indeed enjoined, nullity on such a ground."

Later in his judgment LORD BIRKENHEAD cited the passage which my Lord has read from *U. (falsely called J.) v. J.* (3). I think it is a matter for regret that in the report of LORD BIRKENHEAD's judgment in [1921] P. 403, and also in the report in 37 T.L.R. 759, certain words of LORD PENZANCE are left out from the citation. The citation begins:

"To pronounce a marriage invalid on the unsupported oath of the party who seeks to be relieved from its obligations is a serious matter . . ."

The words which should then appear are "within the province of the court, no doubt." That makes it clear, as my Lord has pointed out, that LORD PENZANCE in 1867 regarded corroboration as not necessary in a case of this nature. I feel sure that, if LORD BIRKENHEAD had thought that that was wrong when he made this citation, he would have said so. Therefore, I think it is right to say that, in a case of this nature, corroboration is not essential. At the same time every judge looks for corroboration. If there be no corroboration—and for myself I regard this as a case where substantially there is no corroboration—then the judge will exercise even greater care than he normally does to make sure that the case is proved before granting the relief which is prayed.

In *Harthan v. Harthan* (5) the headnote reads ([1948] 2 All E.R. 639):

“Provided that there are no circumstances which bar him or her, *e.g.*, knowledge of the defect at the date of the marriage, an impotent spouse is entitled to petition for a decree of nullity, and the right to do so is not conditional on the repudiation of the marriage by the other spouse.”

A In the present case the spouse who deposed to the fact that he was impotent claimed a decree of nullity on that ground. It was said that it was a peculiar thing that he had not discussed his condition with his father or with his friends. I should have thought it a most difficult subject for a man to discuss with his father, or with his friends. Certainly I should have thought that it is one of the last things that a man would like to depose to in the witness box. The learned commissioner seems to me to be satisfied that the husband was a man worthy  
B of credence, and to have accepted him as a man of honesty. At the end of his judgment, however, the learned commissioner said:

“I am not satisfied that this man is impotent and I refuse this decree.”

C It is a little difficult to ascertain precisely what the learned commissioner did find in this case. It would not be right for this court, as an appellate tribunal, to put itself in the place of the learned commissioner and to say that there must be a decree. The court has power under Ord. 58, r. 5, to order a new trial, and I believe that to be the right course in this case, for two reasons. The first is so that the husband and the wife may know what is the position. The second is so that, if it be necessary, the husband may have an opportunity of calling further evidence. I think he is entitled to that  
D opportunity, even if he closed his case beforehand, because it is uncertain on this judgment what the finding is. For these reasons, I agree that the appeal should be allowed and a new trial ordered.

HODSON, J.: In so far as the learned commissioner has founded himself on absence of corroboration, which is not clear, I would respectfully disagree with him, because I think that there is some corroboration of the  
E husband's physical condition in the evidence given by the doctor who was called. It is desirable, however, that this court should make it clear that, in this class of case, corroboration is in practice required unless its absence can be satisfactorily accounted for. I have used the words which appear in  
F *RAYDEN ON DIVORCE*, 5th edn., p. 87, in connection with cruelty, and I think the position is exactly the same with regard to nullity. It is quite true, as  
G SINGLETON, L.J., has just pointed out, that it may not be easy to get corroboration, particularly where a man is the petitioner and the suit is undefended, in a case of this kind. It may be that there are many cases heard where there is no corroboration, but the court in practice requires it if it is available. That seems to me important having regard to the peculiar nature of the jurisdiction exercised by the court, in that so often there is no contest and only witnesses from one side are produced.

Assuming that there is no corroboration in this case, I agree that, although the 105th canon laid down that corroboration was required by the ecclesiastical courts, it does not appear that that rule has been made part of the law of England. I have in mind what LORD HALE said in his *HISTORY OF THE COMMON LAW* in the passage quoted by TINDAL, C.J., in *R. v. Millis* (6)  
H (10 Cl. & Fin. 680):

“‘The rule . . . by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary Acts of Parliament or the common law and custom of England; for there are divers canons made in ancient times, and decretals of the Popes, that never were admitted here in England’.”

The cases already referred to show quite clearly that this court has acted in

the past on independent evidence apparently in direct contravention of the 105th canon, and I do not wish to be taken as saying that corroboration is necessary in law.

On the findings of the learned commissioner, I share the difficulty which my Lords have felt in appreciating why at the conclusion of his judgment he said: "I am not satisfied that this man is impotent." He had previously said in effect that he was not guilty of perjury, which must have meant that he was not wilfully lying. If not, what was he doing? It could not have been a case of want of recollection. It could hardly have been a case of a man giving evidence out of his imagination. Therefore, for my part, I am unable to understand why, having said in effect that the husband was a truthful man, he came to the conclusion that he was not satisfied he was impotent. I agree that there must be a new trial when it will be open to the husband at the further hearing to take steps to get evidence, if evidence is available, either of live witnesses or of documents, to support his case other than the rather slender medical evidence which he has already been able to call.

*Appeal allowed and new trial ordered.*

Solicitors: *Churchill, Clapham & Co.*, agents for *Alfred E. H. Sevier*, Derby (for the husband).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

## *Re* BOYS' WILL TRUSTS. WESTMINSTER BANK, LTD. AND ANOTHER *v.* BOYS AND OTHERS.

[CHANCERY DIVISION (Romer, J.), February 24, 1950.]

*Will—Investment clause—"Shares of public company"—Inclusion of stock.*

By his will a testator directed that all moneys to be invested under his will might, in addition to the investments allowed by law to trustees, be invested in or on, *inter alia*, "the debentures or debenture stock or shares of any public company which shall have paid dividends upon its ordinary capital for at least three years prior to the time of investment . . . but not in any stocks funds bonds shares or securities to bearer."

HELD: *prima facie* the reference to the shares of any public company included a reference to the stock of such a company, and, there being nothing in the context of the will to displace that construction, the trustees' power of investment extended to stock in a public company having the qualification indicated.

*Re McEacharn's Settlement Trusts* ([1939] Ch. 858), considered, and *dictum* of BENNETT, J., therein (*ibid.*, 859), applied.

[AS TO INVESTMENT OF TRUST FUNDS, see HALSBURY, Hailsham Edn., Vol. 33, pp. 232-244, paras. 415-430; and FOR CASES, see DIGEST, Vol. 43, pp. 926-928, Nos. 3640-3663.]

Cases referred to:

- (1) *Re McEacharn's Settlement Trusts*, [1939] Ch. 858; 108 L.J.Ch. 326; 161 L.T. 263; Digest Supp.
- (2) *Morrice v. Aylmer*, (1875), L.R. 7 H.L. 717; 45 L.J.Ch. 614; 34 L.T. 218; *affmg.*, (1874) 10 Ch.App. 148; 44 L.J.Ch. 212; 31 L.T. 660; 44 Digest 704, 5465.
- (3) *Henderson v. Henderson's Trustees*, (1900), 2 F. (Ct. of Sess.) 1295; 37 Sc. L.R. 976; 8 S.L.T. 164; 43 Digest 947 *e.*



(4) *Re Willis*, [1911] 2 Ch. 563; 81 L.J.Ch. 8; 105 L.T. 295; 43 Digest 936, 3747.

A ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testator, moneys liable to be invested under the will might be invested in or on (a) preference stock (b) ordinary stock of any public company which should have paid dividends on its ordinary capital for at least three years from the time of investment.

*J. V. Nesbitt* for the plaintiffs, the executors and trustee of the will of the testator.

*Bagnall* for the first three defendants, children of the testator.

B *Lionel Edwards* for the fourth and fifth defendants, grandchildren of the testator.

C **ROMER, J.:** The question raised by this summons involves quite a short point. It arises out of the investment clause in the will of the testator, Mr. John Chilcott Boys, which he made on Mar. 3, 1943. He died on Oct. 29, 1946. I am not concerned with the beneficial interests given by the will. It is enough to say that he provided for his children and remoter issue. There are at present children and remoter issue of the testator, and they are before the court. The investment clause is in this form:

D "All moneys liable to be invested under this my will may in addition to the investments allowed by law to trustees be invested in or upon the debentures debenture or rent charge stock of any railway dock harbour gas water or other company or body incorporated by special Act of the Imperial Parliament or the legislature of any British colony or dependency or by royal charter or in or upon the debentures or debenture stock or shares of any public company which shall have paid dividends upon its ordinary capital for at least three years prior to the time of investment or on the security of any life or contingent interest in any real or personal property together with an insurance on the life or other event but not in any stocks funds bonds shares or securities to bearer."

E Such difficulty as there is arises from the fact that the testator has not in express terms authorised an investment in the stock of any public company which shall have paid dividends on its ordinary capital for three years before the time of investment, the clause referring only to shares of such a company. Many companies have recently converted their shares into stock, and other companies are likely to do so in the future, and it will be a convenience and advantage to the beneficiaries under this will if the trustees can invest properly in the stock of a public company should they desire to do so and have power to do so.

F It appears to me that on the proper construction of this clause, and in the light of authority, that they have power to do so. It is suggested by counsel G for the children of the testator that, in fact, apart from authority, it is sufficiently plain here that the testator had in mind an investment either in the loan capital or share capital of the company which conforms with the qualification as to payment of dividends for three years past, and I think it is highly probable that that is so. But, apart from that, it seems to me that the result of the authorities is, as one would expect it to be in the absence of authority, that H there is no difference at all between the stock of a company and shares in a company. There may be a difference between the debentures and debenture stock of a company, but one can readily understand that so far as stocks and shares in a company are concerned, the rights of the holder of stock are precisely the same in every respect as the rights of the holder of shares. It is merely for the convenience of marketing investments that shares are from time to time converted into stock.

The only case I need refer to is the decision of BENNETT, J., in *Re McEacharn's*

*Settlement Trusts* (1). That also was a case where an investment clause under a settlement had to be construed. The investment clause, so far as material, was that the moneys might be invested "in or upon such stocks funds and securities" as the trustees should think fit, and the trustees at any time or times might with "such consent or at such discretion as aforesaid vary any investment or investments made as aforesaid for any other or others." From that it will be seen that the position was the converse of the present case, because investment in stocks was authorised, but no reference was made to shares. In the present case, investment in shares is authorised and no reference is made to stocks. The question in that case was whether the trustees had under that provision a power to invest funds in the fully paid shares of a limited company. BENNETT, J., said ([1939] Ch. 859):

"In my judgment the answer to the question should be in the affirmative. There is, in my opinion, no real distinction between stock of a limited company and fully paid shares of a limited company. The stock is merely capital of a company consolidated into a mass for purposes of convenience so far as a transfer of it is concerned. I think that the reasoning of LORD CAIRNS and JAMES, L.J., in *Morrice v. Aylmer* (2) affords a foundation on which I can base my decision in the present case. The decision of LORD PEARSON in *Henderson v. Henderson's Trustees* (3) seems to me to be in accordance with that decision."

He distinguishes the case from *Re Willis* (4) which came before EVE, J. There power was given to invest in preference stock, and EVE, J., held that, that being a reference to a specific type of investment, he was unable to say that the trustees could properly invest in preference shares as well, there being some distinction, though a small one, between the two forms of security. BENNETT, J., goes on to say (*ibid.*, 860):

"In the absence of a context showing that the meaning of the word is to be narrowed, the word 'stocks' ought in my judgment to be so interpreted as to include fully paid shares, and I so decide for the reasons which are set out in the judgment of LORD CAIRNS in *Morrice v. Aylmer* (2)."

It seems to me that the logical corollary of that is that where you have an express power to invest in shares, that is a reference to a form of investment which is not in any material or real respect different from stock, the two things being substantially identical. Accordingly, unless I find a context to the contrary, I ought to interpret this in the sense that the testator intended to include in shares the form of investment which is known as stock, and, in my judgment, there is no sufficient context to the contrary to displace that *prima facie* view. I, therefore, hold that, on the true construction of this will, the trustees may invest in preference stock or ordinary stock of any public company which shall have paid dividends on its ordinary capital for at least three years prior to the time of investment.

*Order accordingly. Costs of all parties to be taxed as between solicitor and client and paid out of the estate in the course of administration.*

Solicitors : *Guscotte, Wadham & Howard* (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

## CARTER v. GREEN.

[COURT OF APPEAL (Cohen and Asquith, L.J.J., and Roxburgh, J.), February 13, 14, 22, 1950.]

*Rent Restriction—Sub-letting—“Lawfully sub-let”—Sub-letting in breach of covenant—Acceptance by landlord of rent from head lessee after knowledge of breach—Qualified acceptance—Question of fact whether such acceptance to be treated as unequivocal act of affirmation of tenancy—“Unlawful sub-letting”—No right of re-entry—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3).*

A dwelling-house within the provisions of the Rent Restrictions Acts, 1920-1939, was let in 1940 at a weekly rent, the rent book containing the following covenant: “The tenant shall not assign his interest in or sub-let or part with possession of the premises or any part thereof . . . without written consent being previously obtained from the landlord.” In 1945, in breach of this covenant, the tenant sub-let part of the premises. In 1947 the tenancy became a statutory tenancy. It was found as a fact by the county court judge that the landlord became aware of the unlawful sub-letting before January, 1948, but continued to accept rent without in any way qualifying his acceptance until Oct. 6, 1948, when he wrote in the rent book: “The acceptance of the rent does not constitute a waiver of my objection to an unauthorised sub-letting.” On a claim by the landlord for possession the question arose whether the premises had been lawfully sub-let so as to entitle the sub-tenant to the protection of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

**HELD:** (i) an unqualified acceptance of rent was as much an affirmation of a statutory tenancy as it would be of a common law tenancy, but, if the acceptance of rent were qualified, it was a question of fact for the county court judge to determine whether that qualified acceptance must be treated in all the circumstances as an unequivocal act of affirmation of the tenancy.

(ii) on the evidence the landlord knew of the sub-letting before January, 1948, and received substantial payments of rent between that date and the date when he qualified his acceptance, and so, even if the sub-letting was originally unlawful, he had waived the illegality before bringing proceedings against the sub-tenant for possession.

*Principle in Oak Property Co., Ltd. v. Chapman* ([1947] 2 All E.R. 1), applied.

*Per curiam:* We incline to agree with the *obiter dictum* of MORTON, L.J., at the end of *Maley v. Fearn* ([1946] 2 All E.R. 585): “If a sub-letting is contrary to the terms of the tenancy, it may well be that it is an unlawful sub-letting, even although under the terms of the tenancy the sub-letting does not give rise to a right of re-entry.”

[AS TO THE POSITION OF SUB-TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 333, 334, para. 399; and FOR CASES, see DIGEST, Vol. 31, p. 576, Nos. 7251-7253 and Digest Supp.]

[AS TO WAIVER OF FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 254-257, paras. 287-289; and FOR CASES, see DIGEST, Vol. 31, pp. 479-502, Nos. 6427-6487.]

Cases referred to:

- (1) *Summers v. Donohue*, [1945] 1 All E.R. 599; [1945] K.B. 376; 114 L.J.K.B. 401; 172 L.T. 310; 2nd Digest Supp.
- (2) *Norman v. Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 115 L.J.K.B. 107; 174 L.T. 279; 2nd Digest Supp.
- (3) *Wright v. Arnold*, [1946] 2 All E.R. 616; [1947] K.B. 280; [1947] L.J.R. 241; 176 L.T. 453; 2nd Digest Supp.



- (4) *Watson v. Saunders-Roe, Ltd.*, [1947] K.B. 437; [1947] L.J.R. 563; 176 L.T. 521; 2nd Digest Supp.
- (5) *Maley v. Fearn*, [1946] 2 All E.R. 583; [1947] L.J.R. 276; 176 L.T. 203; 2nd Digest Supp.
- (6) *Oak Property Co., Ltd. v. Chapman*, [1947] 2 All E.R. 1; [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364; 2nd Digest Supp.
- (7) *Elliot v. Boynton*, [1924] 1 Ch. 236; 96 L.J.Ch. 122; 130 L.T. 497; 31 Digest 553, 7003.

APPEAL by the landlord from an order made by His Honour JUDGE DAYNES, K.C., at Dartford County Court on Nov. 10, 1949, whereby he refused to grant to the landlord possession of a dwelling-house within the Rent Restrictions Acts. The landlord contended that, in breach of a covenant against sub-letting, the tenant had sub-let part of the premises and that the acceptance of rent after knowledge of the breach was not a waiver of the objection to the sub-letting. The sub-tenant relied on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), and pleaded that his sub-tenancy was lawful. The facts appear in the judgment of the court.

*R. G. Dow* for the landlord.

*R. I. Threlfall* for the sub-tenant.

*Cur. adv. vult.*

Feb. 22. **COHEN, L.J.**, read the following judgment of the court. This appeal raises the oft recurring question whether a sub-tenant is a sub-tenant to whom the premises, or any part thereof, have been lawfully sub-let within the meaning of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The history of the matter is as follows. In November or December, 1940, the landlord let 67, High Street, Bexley, to a Mrs. Warren at a weekly rent of 25s. The terms of the tenancy are printed on the inner cover of the rent book and contain a provision to the following effect:

"The tenant shall not assign his interest in or sub-let or part with possession of the premises or any part thereof or take in lodgers or paying guests without written consent being previously obtained from the landlord."

In 1945 Mrs. Warren sub-let to the sub-tenant two rooms on the first floor of the premises together with a lavatory and kitchen on the ground floor. She did not obtain the consent of the landlord to the sub-letting, but the judge found that he became aware of it in the year 1947. The judge does not specify at what period in the year the landlord became aware of the sub-letting, but he rejected the sub-tenant's evidence which was that he did not become aware of it until October, 1948, when he made an entry in the rent book to which we shall refer later. In the meantime the rent was increased from 25s. to 35s. per week as from Apr. 5, 1947. There was no evidence how this increase came to be made, but it was agreed by counsel that, applying the principles laid down in *Summers v. Donohue* (1), we must assume that the increase had been properly made and that the appropriate notice had been given with the result that as from Apr. 5, 1947, the tenancy became a statutory tenancy.

The landlord, as we have said, became aware of the sub-tenant's tenancy before January 1, 1948. The rent was not regularly paid, but it is plain from the rent book that in April, 1948, the landlord received £17 10s. by way of rent reducing the arrears to £5 5s. It necessarily follows that rent had been paid and received by the landlord up to the beginning of March, 1948. He received sums totalling a further £10 10s. in June and July, 1948, a further £7 15s. on Aug. 5, £7 on Sept. 1, and £3 10s. on Sept. 27. On Oct. 6 he received a further £6 15s. and then for the first time qualified his acceptance of rent with the following endorsement on the rent book: "The acceptance of the rent does not constitute a waiver of my objection to an unauthorised sub-letting." As the sub-tenant in his evidence before the county court judge denied that the landlord

knew of the sub-letting before Oct. 6, 1948, the landlord naturally gave no evidence, and could give no evidence, that he had qualified his acceptance of the payments of rent he had received in the earlier part of the year 1948.

A Those being the facts established by the documents or found by the judge, the first question that he had to consider was whether or not, apart from any question of waiver, the premises were lawfully sub-let to the sub-tenant within the meaning of s. 15 (3). He answered that question in favour of the sub-tenant, and did not, therefore, find it necessary to consider in any detail the question whether, assuming the sub-letting to be originally unlawful, the defect was cured by subsequent waiver through the acceptance of rent. The judge supported his finding on the first point by three decisions, *Norman v. Simpson* (2), *Wright v. Arnold* (3) and *Watson v. Sanders-Roe* (4). These decisions, he said, compelled him to find that the sub-letting, which, in his opinion, was merely in breach of contract and not fortified by a proviso for re-entry on breach of covenant, was not unlawful within the meaning of the section. That conclusion is at first sight supported by some observations of MORTON, L.J. (as he then was) in *Norman v. Simpson* (2), where he said ([1946] 1 All E.R. 76):

C "It is not easy to see exactly what sub-tenants fall within the latter class, but we think the most reasonable explanation of the sub-section is that premises are in a state of being 'unlawfully sub-let' within the sub-section if the head lessor has a subsisting right of re-entry, and are in a state of being 'lawfully sub-let' when the head lessor has no such right."

D It is, however, to be observed that in *Norman v. Simpson* (2) as well as in the other two cases relied on by the judge there was, or was assumed by the court to be found in the contract, a proviso for re-entry and it was not necessary for the court to determine what the position would have been had the covenants not been fortified by such a proviso.

E That question was discussed by this court in *Maley v. Fearn* (5). In that case also, as the court inferred from the evidence, the term which prohibited sub-letting without consent amounted to a condition enforceable by re-entry. At the beginning of his judgment SOMERVELL, L.J., said ([1946] 2 All E.R. 585):

"As will be seen, in that statement the category of unlawful tenant is restricted to those whose sub-letting gives a right of re-entry."

He continues:

F "It is, I think, plain that in that case no argument was addressed to the court as to the stipulations which give rise to a right of re-entry for one reason or another and those which do not. If one looks at the extract from the lease, the covenant against sub-letting seems to be to all material extent in the same terms as the covenant which is referred to on p. 230 of WOODFALL ON LANDLORD AND TENANT as a covenant which does not constitute a condition, and, there being no express provision, so far as I can see, for re-entry, would not have itself afforded a right of re-entry. I have thought it right to refer to this because it seems to me that it would be wrong to take what was said by MORTON, L.J., as deciding that a sub-tenancy is not unlawful within the meaning of the Rent Restrictions Acts when it comes into existence in consequence of the breach of a covenant which does not give a right of re-entry."

H Moreover, MORTON, L.J., added some observations at the end of the judgments in which he said with regard to the passage in his judgment in *Norman v. Simpson* (2), which we have already cited ([1946] 2 All E.R. 585):

"I think that in the passage he has quoted (which was *obiter*) the definition of what is an unlawful sub-letting was given in too narrow terms. I am disposed to think (although again what I say is *obiter*) that, if a sub-letting is contrary to the terms of the tenancy, it may well be that it is

an unlawful sub-letting, even although under the terms of the tenancy the sub-letting does not give rise to a right of re-entry."

In the present case the county court judge says with regard to these *dicta* that he could not read them as implying that the decision in *Norman v. Simpson* (2) was erroneous or that it did not depend on the loss by the material time of an effective right of re-entry to which the breach had originally given rise. In one sense it is true that the decision in *Norman v. Simpson* (2) depended on the existence of an effective right of re-entry, but we think only in the sense that it made it unnecessary to consider what the position would have been had that right not existed. We incline to agree with the *obiter dictum* of MORTON, L.J., at the end of *Maley v. Fearn* (5), and should have been prepared, if necessary, to decide in the present case that the sub-letting to the sub-tenant was initially unlawful especially as we are unable to distinguish the terms of the tenancy in the present case from those in the tenancy which was under consideration by the court in *Maley v. Fearn* (5). It is not, however, necessary for us to express a concluded opinion on this point since we are clearly of opinion that the judge's decision ought to be upheld on the second ground which was argued before us, namely, that any unlawfulness was cured by the subsequent acceptance of rent with full knowledge of the facts.

This point was argued before us on the basis that at the time when the landlord accepted rent with knowledge of the fact Mrs. Warren's tenancy had become a statutory tenancy. Counsel for the landlord contended that on this basis the decision must be in his favour having regard to a principle laid down in *Oak Property Co., Ltd. v. Chapman* (6). A number of questions arose in that case, but the particular point with which we are now concerned was dealt with at [1947] 2 All E.R. 5-7. SOMERVELL, L.J., reading the judgment of the court, first stated the rule at common law under which acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent only with its affirmance. He pointed out that so unequivocal was the act of acceptance of rent that the landlord was held disentitled to get the best of both worlds by attempts to qualify his acceptance, that is, by stating that he accepted the rent without prejudice to his rights of forfeiture. He then went on to consider the position as regards a statutory tenancy saying:

"It must, in our judgment, be conceded that the principles of the common law above stated cannot apply, or cannot wholly apply, to a statutory tenancy. In the first place, the landlord of a statutory tenant has no right to avoid the tenancy. His only right is to invoke the jurisdiction of the court to make an order for possession and the tenancy continues until at least the date of the order. Secondly—and consequentially—the obligation of the tenant to pay rent and the right of the landlord to accept it continues notwithstanding the breach of covenant and notwithstanding the landlord's election to invoke the court's jurisdiction and the issue by him of his summons pursuant to his election. In our judgment, therefore, it may fairly be said that the acceptance of rent by a landlord after knowledge of a non-continuing breach of covenant by a tenant entitling the landlord to go to the court is not so unequivocal an act of affirmance of the tenancy as is acceptance of rent in like circumstances from a contractual tenant. On the other hand, it is, we think, important to bear in mind that, under the scheme of the Rent Restrictions Acts, the incidents of tenancy as understood by our law continue to apply to a statutory tenancy so far as they are consistent with the provisions of the Acts. From long usage the acceptance of rent by a landlord after knowledge of circumstances giving rise to a claim for possession has come to be regarded by landlords and tenants alike as evidence of an intention to affirm the tenancy. Moreover, the landlord has, in the case of a statutory tenancy, a choice—he may either rely on the



breach and go to the courts, or he may waive it—though his choice is not the same as that presented to the common law landlord. Finally (and to this extent *Elliott v. Boynton* (7), in our view, assists the sub-tenant), the continuance of the obligation to pay rent under a contractual tenancy accruing after the breach for some period is not itself inconsistent with the landlord's election to forfeit. If, therefore, it is not justifiable to treat the common law rule as entirely applicable to a statutory tenancy (as the county court judge implied), we think that the question whether, in any case, the acceptance of rent by the landlord is an unequivocal act of affirmance of the tenancy is a question of fact for the judge to determine in the circumstances of the case, and, if he decides that question of fact affirmatively, then the ordinary legal consequences would, *prima facie*, follow. Thus, we are strongly inclined to think that the strict common law rule in regard to a qualified acceptance of rent is not applicable to a statutory tenancy, and that a qualified acceptance of rent from a statutory tenant is not necessarily fatal to the landlord's rights to seek an order for possession. As at present advised, we think that the fair rule is that a landlord who has acquired full knowledge of a non-continuing breach of covenant by a statutory tenant entitling him to invoke the court's jurisdiction should be entitled thereafter to receive rent and should not, by reason of such receipt, be held to have waived the breach, provided that he makes it clear to the tenant at the time of, or prior to, the receipt that his receipt is without prejudice to his right to go to the court, and provided that he issues his summons for possession within such time as, having regard to all the circumstances of the case, the court hearing the summons regards as reasonable."

It is a little difficult to be certain how far the court was laying down that the question whether acceptance of rent by the landlord amounts to an affirmance of the tenancy is one of law, and how far it is one of fact. We think, however, it is reasonably clear that they were only deciding that the principles of the common law cannot wholly apply to a statutory tenancy, and the question is how far the court intended to hold that they do apply. We find guidance on this point in the statement that "we are strongly inclined to think that the strict common law rule in regard to a qualified acceptance of rent is not applicable to a statutory tenancy, and that a qualified acceptance of rent from a statutory tenant is not necessarily fatal to the landlord's rights to seek an order for possession." From this passage we infer that what the court meant was that an unqualified acceptance of rent is as much an affirmance of the statutory tenancy as it would be in the case of a common law tenancy, but that, if the acceptance of rent is qualified, it would be a question of fact for the county court judge to determine whether that qualified acceptance must be treated in all the circumstances as an unequivocal act of affirmance of the tenancy. This view is, we think, supported by what the court indicated as being a fair rule to guide the judge in reaching his conclusion on the facts.

If that be the true view, how ought we to apply the principle to the present case? Counsel for the landlord suggested that, as the judge had not gone really fully into this matter, or found definitely when rent was first received with knowledge of the contract, we ought to direct a new trial limited to that issue. We do not, however, think that we should be justified in putting the parties to the expense of a new trial. The judge has found quite plainly that the landlord had knowledge of the facts by the end of 1947. It is impossible for us, we think, to say that there was no evidence on which he could so find. Quite plainly the landlord would be in the greatest difficulty, in view of his evidence at the trial before the county court judge that he did not know of the sub-letting until Oct. 6, 1948, if he were to give evidence that he had qualified his acceptance of rent during the period between Jan. 1, 1948, and Oct. 6, 1948. In these

circumstances it seems to us that the position is that the judge has found that the landlord knew of the sub-letting before Jan. 1, 1948, and it is plain from the evidence that he received substantial payments of rent without in any way qualifying his receipt thereof between that date and Oct. 6, 1948. We think, therefore, that we are bound to conclude that, even if the sub-demise was originally unlawful, the landlord had waived the illegality before he commenced the present action and thus the sub-tenancy had become a lawful sub-tenancy. That being so the appeal fails and must be dismissed.

*Appeal dismissed with costs.*

Solicitors: *Kinch & Richardson*, agents for *T. G. Baynes & Sons*, Dartford (for the landlord); *Dollman & Pritchard*, agents for *R. G. F. Vickery & Co.*, Bexley Heath (for the sub-tenant).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

## AUSTIN MOTOR CO., LTD. v. BRITISH STEAMSHIP INVESTMENT TRUST, LTD. AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.J.J.), February 15, 1950.]

*Company—Dividend—Computation—Payment of dividend tax free up to 6s. in the £.*

The articles of a company provided: "The profits of the company available from time to time for distribution in respect of each year ... shall ... be applicable ... secondly to the payment of the cumulative preferential dividend on the £1,000,000 six per cent. 'B' cumulative preference shares at such rate that after deduction of income tax thereon at the current rate for the time being (irrespective of any allowance of rebate in the case of any particular shareholder) the amount remaining shall be the sum of six per cent. per annum on the capital for the time being paid up or credited as paid up on the said six per cent. 'B' cumulative preference shares, less the amount of any income tax for the time being payable in excess of six shillings in the pound computed on a gross sum of six pounds per cent. per annum on such capital, together with any outstanding arrears." In 1936 the "B" cumulative preference shares were converted into six per cent. "B" cumulative preference stock. At the material time the standard rate of tax was 9s. in the pound.

HELD: the intention of the articles was to produce the result commonly called a payment of dividend tax free up to six shillings in the pound. The proper method of carrying out that intention was to reduce the amount of the dividend of six per cent. by the amount of the excess of the standard rate of tax over six shillings in the pound, the net figure thus arrived at, being £5 2s. per £100 stock, and this dividend was equal to £9 5s. 5d. gross, or £5 2s. net.

[AS TO THE PAYMENT OF DIVIDENDS FREE OF TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 250, 251, paras. 507, 508; and FOR CASES, see DIGEST, Vol. 28, p. 110, No. 680 and Digest Supp.]

Case referred to:

(1) *Godfrey Phillips, Ltd. v. Investment Trust Corpn., Ltd.* unrep. Feb. 23, 1949.

APPEAL by the six per cent. "B" cumulative preference stockholders from an order of WYNN-PARRY, J., dated Nov. 9, 1949, concerning the construction of the articles of association of the Austin Motor Co., Ltd., as they related to the method of calculating the net dividend payable to those stockholders. The learned judge, considering himself bound by the decision of VAISEY, J., in *Godfrey*

*Phillips, Ltd. v. Investment Trust Corpn., Ltd.* (*supra*), expressed no opinion of his own on the construction of the article.

*Grant, K.C.*, and *Philip Sykes* for the six per cent. "B" cumulative preference stockholders.

*Talbot, K.C.*, and *W. Gordon Brown* for the preferred ordinary, ordinary, and "A" ordinary stockholders.

A *Cyril King, K.C.*, and *Kenneth Mackinnon* for the company.

SOMERVELL, L.J.: This originating summons raises a question of the construction of the articles of the Austin Motor Co., Ltd., and the answer to the question affects the rights *inter se* of the six per cent. "B" cumulative preference stockholders and the preferred ordinary, ordinary, and "A" ordinary stockholders. The words which we have to construe are these:

B "The profits of the company available from time to time for distribution in respect of each year ... shall ... be applicable ... secondly to the payment of the cumulative preferential dividend on the £1,000,000 six per cent. 'B' cumulative preference shares at such rate that after deduction of income tax thereon at the current rate for the time being (irrespective of any allowance of rebate in the case of any particular shareholder) the amount remaining shall be the sum of six per cent. per annum on the capital for the time being paid up or credited as paid up on the said six per cent. 'B' cumulative preference shares, less the amount of any income tax for the time being payable in excess of six shillings in the pound computed on a gross sum of six pounds per cent. per annum on such capital, together with any outstanding arrears."

D By resolutions of the company passed on Oct. 12, 1936, the issued shares of the company were all converted into stock.

E The method of construction for which counsel for the six per cent. "B" cumulative preference stockholders contends and which was adopted by the company for some years until there was a decision of the courts (to which I will refer later) is this. The earlier words which I have read point in the first instance to a gross sum which is to lead one, as it were, first to £6 per £100 and then to that £6 less a further figure. The method adopted is conveniently set out in a letter which was sent to the holders of this stock dated May 2, 1949. It starts with the six per cent. which is referred to about half way through the passage I have read. It then deducts from that the sum which has to result, F whatever the construction may be, from the words which follow the word "less." I will read those words again. As they are read by counsel for the six per cent. "B" cumulative preference stockholders they are read as pointing to one single sum or item: "less the amount of any income tax for the time being payable in excess of 6s. in the £ computed on a gross sum of £6 per cent." G Taking the figures with which we are concerned, the amount of income tax for the time being payable in excess of 6s. in the £ is 3s. in the £, the standard rate being 9s. That is computed under his system on the £6. It is said that the word "gross" is contrasted in this context with the word "net" and removes any doubt that might have arisen if it had not been there. It negatives, on this view, the possibility of what is called "grossing up" the £6 in order to find the figure on which the 3s. would operate. Therefore, on this system the 3s. in the £ is taken and applied to the £6. That figure, which comes to 18s., is deducted from the £6, leaving £5 2s. To discover what the actual gross dividend is the £5 2s. is "grossed up," which gives a figure of £9 5s. 5d. From that tax at 9s. is deducted and there is left £5 2s. Apparently nobody has complained about that.

H In the case of another company *Godfrey Phillips, Ltd.* (1) with articles which, in my opinion, so far as the point of construction is concerned, are identical with these, VAISEY, J., said that the method which I have described was not the right way of construing similar words in the articles of that company. The



result of his system on this figure of six per cent. is set out also very conveniently and clearly in the letter of May 2, 1949. I will describe first what is the result of that method, because it has a certain attraction in logic. The present rate of tax to which I have referred leads to a gross figure which, less tax at 6s. in the £, leaves £6, and then, as tax at 3s. in the £ on the gross figure also has to be paid, that comes off the £6, and the six per cent. "B" cumulative preference stockholder gets a sum of £4 14s. 4d., which is £6 less tax at 3s. in the £ on the gross figure. That is quite a neat, logical scheme which people might provide for in this class of case, but, in my opinion, it is impossible to get it out of these words. It involves grossing up the sum of £6, which is described as "a gross sum of £6," on the basis that income tax was 6s. in the £. That seems to me an impossible construction to put on this phrase, and, although I appreciate what I might describe as the logic and the neatness of the result, I find it impossible to obtain that result out of these words. Indeed, counsel for the preferred ordinary, ordinary, and "A" ordinary stockholders, who had given very careful consideration to this matter and attacked what I call the old procedure (the method supported by counsel for the six per cent. "B" cumulative preference stockholders), admitted that, having regard to the words used in this article, he felt great difficulty in making them fit the scheme of VAISEY, J.

So I will pass from that to the third suggestion which was put before us by counsel for the preferred ordinary, ordinary, and "A" ordinary stockholders. This results in the six per cent. "B" cumulative preference stockholders getting less than they do under the scheme supported by their counsel. Again, the scheme of the preferred ordinary, ordinary, and "A" ordinary, stockholders was conveniently set out in the table in the letter of May 2, 1949. Coming to the words after "less" in the article under the formula of the six per cent. "B" cumulative preference stockholders all the words that follow are treated as leading to a single item. Counsel for the preferred ordinary, ordinary, and "A" ordinary stockholders treats the words that follow as leading to two items. He says it is, first of all, "less the amount of any income tax for the time being payable." That phrase, he says, refers back to the amount of income tax to be deducted from the yet unascertained gross figure. So that the £6 is to be less 9/20ths of X, taking income tax at 9s. in the £. There is a further deduction, in that it is less the extent by which that amount is in excess of 6s. in the £ computed on a gross sum of £6 per cent. So the result is £6 minus 9/20ths of X minus 6/20ths of £6. These things can be elaborated, but that is not, to my mind, the natural reading or construction of the words which follow "less." I think they do, as the scheme for the six per cent. "B" cumulative preference stockholders contends, point to a single figure. I think there is difficulty in the way of the formula of counsel for the preferred ordinary, ordinary, and "A" ordinary stockholders by reason of the word "any." Even apart from that, I think the natural construction is to treat the words as directed to a single sum.

There are other difficulties in the way of the scheme of the preferred ordinary, ordinary, and "A" ordinary stockholders. For the six per cent. "B" cumulative preference stockholders it was submitted, I think with force, that on the true construction of these words it was clearly intended that, so long as income tax was 6s. or below, the six per cent. "B" cumulative preference stockholder should get £6. No doubt, although that intention may be clear, words might have been used in this rather complicated subject-matter which defeated it, but I accept the view that that is the intention to be derived from the paragraph as a whole. Under the scheme of the preferred ordinary, ordinary, and "A" ordinary stockholders, with income tax at 5s. in the £ or at 5s. 6d. in the £ the six per cent. "B" cumulative preference stockholder will get a sum less than £6. Of course, if the words compelled one to that result one would have to apply them as they are, but, having regard to the fact that, in

my view, the construction forces the words in any event into an unnatural meaning, the fact that they also lead to a result which the parties cannot have contemplated makes it, to my mind, impossible to adopt it as a proper construction. For these reasons I think the appeal should be allowed, and the declaration in the appropriate form asked for by the six per cent. "B" cumulative preference stockholders should be made.

- A JENKINS, L.J. : I agree. The article seeks to produce the result which is commonly called a payment of dividend tax free up to 6s. in the £. That is the general intention, but it is an intention which can be carried out in more than one way. It seems to me, that either of the formulae consisting, on the one hand, of the company's old practice, now supported by the six per cent. "B" cumulative preference stockholders, and, on the other hand, of the practice held by VAISEY, J., to be right in the *Godfrey Phillips* case (1) might be said to carry out what was intended. The method propounded by the six per cent. "B" cumulative preference stockholders has the merit of simplicity. The stockholders' dividend of six per cent. is reduced by the amount of tax appropriate to a gross dividend of that amount in excess of 6s. in the £, and the net figure is thus arrived at, being, with tax at 9s. in the £, £5 2s. 0d. That figure is then grossed up, and the amount of the gross sum to be paid is thus arrived at. That seems to me to carry out the literal meaning of the article, because it does give a remaining amount consisting of six per cent. on the capital in question, less the amount of any income tax for the time being payable in excess of 6s. in the £, computed on a gross sum of £6 per cent. on such capital. The method adopted by D VAISEY, J., on the other hand, while, as I have said, it is a perfectly reasonable method, seems to me to be one which it is impossible to extract as a matter of construction from the language used. The construction he places on the article involves computing the excess of tax over 6s. in the £, not on a gross sum of £6, but on a net sum of £6 which has to be grossed up for the purpose of arriving at the amount of the tax. For my part, I cannot extract that E process from the language used, and I, therefore, agree that the method of VAISEY, J., should be rejected in favour of the method advocated by the six per cent. "B" cumulative preference stockholders. The method which I am rejecting is, as I have said, quite reasonable, and it provides an attractive scheme which the company might very properly have adopted had they chosen to do so and had they framed the article accordingly. It is attractive because F it consistently ensures that the gross payment to be made by the company will be such a sum as, with tax at 6s. in the £, will produce the desired net amount. However, in my view, the company has not so provided. As regards the third possibility propounded by the preferred ordinary, ordinary, and "A" ordinary stockholders, in my judgment, it should not be adopted, first, because it does not seem to me that it can fairly be got out of the language used, and, G secondly, because, as distinct from either of the other two methods, it does not seem to me to produce a result which can reasonably be supposed to have been in the contemplation of the company. For these reasons I agree with the conclusion stated by SOMERVELL, L.J.

- SIR RAYMOND EVERSHED, M.R.: I also agree, and I do not feel that I can usefully add anything to the reasons given by my brethren, with H which I find myself in full accord. The result will be that the appeal of the six per cent. "B" cumulative preference stockholders will be allowed.

*Appeal allowed. Declaration in terms of judgment.*

Solicitors: *E. F. Turner & Sons* (for the six per cent. "B" cumulative preference stockholders); *J. J. Saunders & Co.* (for the preferred ordinary, ordinary and "A" ordinary stockholders); *Linklaters and Paines* (for the company).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## R. v. FURLONG AND OTHERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Sellers and Devlin, J.J.), February 20, 24, 1950.]

*Criminal Law—Trial—Irregularity—Communication from jury to judge—Jury's question while considering verdict—Answer by judge—Question and answer not announced in court until after verdict and discharge of jury—Irregularity not going to root of case.*

While enclosed to consider their verdict the jury sent a written question to the judge asking whether they could convict one of the appellants of stealing some, but not all, of the property. The answer written by the judge was "Yes, certainly, if that was what you found." Question and answer were not read in open court until after the jury had been discharged, but they were read in the presence of the appellants before sentence was passed. The Court of Criminal Appeal took the view that no argument could possibly have taken place on the question and answer.

HELD: the irregularity did not go to the root of the case, and the appeal would be dismissed.

*R. v. Neal* ([1949] 2 All E.R. 438) and *R. v. Green* ([1950] 1 All E.R. 38), distinguished.

[AS TO COMMUNICATIONS WITH A JURY OUT OF COURT, see HALSBURY, Hailsham Edn., Vol. 19, p. 312, para. 650; and FOR CASES, see DIGEST, Vol. 30, pp. 236, 237, Nos. 312-327.]

Cases referred to:

- (1) *R. v. Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; 113 J.P. 468.
- (2) *R. v. Green*, [1950] 1 All E.R. 38; 114 J.P. 60.
- (3) *R. v. Bodmin Justices, Ex parte McEwen*, [1947] 1 All E.R. 109; [1947] K.B. 321; [1947] L.J.R. 338; 111 J.P. 47; 2nd Digest Supp.

APPEAL against conviction before HUMPHREYS, J., at the Essex Autumn Assizes.

The appellants were charged with conspiracy to steal and stealing. After their retirement to consider their verdict the jury sent a written question to the learned judge and received an answer written on the same piece of paper, but the question and answer were not read out in open court until after the jury had been discharged. For the appellants it was argued that this was an irregularity which rendered the trial unlawful. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

*Casswell, K.C., Gillis and Sells* for the appellants.  
*Bass* for the Crown.

*Cur. adv. vult.*

Feb. 24. LORD GODDARD, C.J., delivered the following judgment of the court. The appellants were convicted before HUMPHREYS, J., at Essex Autumn Assizes on certain counts in an indictment which charged them with conspiracy to steal and with stealing. This appeal has nothing to do with the merits of the case. No attempt has been made to say that there was any misdirection on the part of HUMPHREYS, J., or that there was any misreception of evidence, or that anything could be said to point to a miscarriage of justice, except in the following respect. The jury, in the course of their deliberations, desired to ask the learned judge a question. At that time HUMPHREYS, J., had gone to his lodgings which are very close to the court, and he directed his clerk to go to the court and ask the jury to put their question in writing. The jury put the question in writing, and it was handed to the bailiff, and we are quite satisfied that the judge's clerk did not enter the jury room. Even if he had, we do not think that that would have been in itself an irregularity, because the court has power always to allow somebody to make a communication to the



jury, if it is a communication proper to be made and is made by the direction of the court. The oath sworn by a jury bailiff is that "he shall suffer no person to speak to them nor speak to them himself unless it be to ask whether they are agreed upon a verdict, without leave of the court." That has been the jury bailiff's oath for at least a hundred years, though it was altered because at one time the bailiff used to be sworn to keep the jury without light, food, or water.

A In 1860 the jury were allowed to get refreshment at their own expense, and no doubt the jury bailiff's oath now leaves out those words.

We are quite satisfied that so far there was no irregularity at all. The jury asked this question which they put in writing. HUMPHREYS, J., went to the court immediately he had written his answer to the question, and that answer was taken to the jury. HUMPHREYS, J., has reported to us that he meant to announce in court what the question was, but the jury came back into court before he had the opportunity of doing so, and he accepted their verdict. It would have been much better, I think we may say, if before the jury had given their verdict HUMPHREYS, J., had said what were the question and the answer, because we desire to say that we are in no way departing from the rules which have been laid down in this court and that the right practice to follow is this:

C If a jury, when it is considering its verdict, wishes to ask a question or to have more information or to make any request about the case, it should do so in open court, and the judge should answer only in open court in the presence of the prisoner. A jury may put their request into writing or be asked by the judge so to do, but in such a case the communication should always be read and answered in open court. It is entirely in the judge's discretion whether he asks

D or permits counsel or the prisoner, if undefended, to address him on the jury's communication. The question that was asked by the jury in this case was whether they could convict the appellant, Pickard, of stealing some, but not all, of the property. That is a question which sometimes is asked by juries, and, no one doubts that the only answer is: "Yes, of course you can." It would have been better if that question and his answer (which was, "Yes, certainly")

E had been read out by HUMPHREYS, J., before the jury actually returned their verdict. In fact, it was read out by him in court, though after the jury returned their verdict.

There was, therefore, no secrecy. The sort of question that has arisen in this case has to be considered in relation to the rule which has always been laid down in criminal law and, indeed, in civil law, that all proceedings in court must be

F open and in public. The question asked in this case was an elementary one on which no argument possibly could have taken place, and, as HUMPHREYS, J., has said, he would not have allowed argument. It is true that the appellants were entitled to know what the question was, and they did know, because HUMPHREYS, J., announced it in court in these words after he had allowed the jury to be discharged :

G "I will sentence these men tomorrow morning. The jury asked me to give them some assistance—their question merely was this—I have not got it because I wrote upon it and sent it back to them—but it was merely a request to know whether, on count 15, on which they were satisfied that Pickard had stolen some property, they could say that he had not stolen

H all the property in the indictment but only four out of the sixty articles, to which my answer was: 'Yes, certainly, if that was what you found.' That was all the question was about."

It is impossible to say that every irregularity in a trial is a ground for quashing a conviction. It may, not infrequently it does, happen that something is done in the course of a trial which is not strictly in accordance with recognised procedure. If that is so, the court must consider whether or not it is an irregularity which goes to the root of the case, as, for instance, in *R. v. Neal* (1) which was

cited to us by counsel for the appellants, where a jury, having been enclosed to consider their verdict, were allowed by the recorder during their enclosure to leave the court and have their lunch in the town. That was such a grave departure from the recognised practice and procedure of criminal law that the court felt that the verdict could not stand. In *R. v. Green* (2) a question had been sent by the jury to the recorder at quarter sessions, and he had sent back an answer without announcing it in open court at all. When the case came before this court the recorder could not remember what the question was, and nobody except the recorder and the members of the jury ever knew before the trial concluded what the question was which the jury had asked. Accordingly, this court quashed the conviction, and in giving judgment I said ([1950] 1 All E.R. 38):

"This court and the Divisional Court has said on more than one occasion that any communication between a jury and the presiding judge must be read out in court, so that both parties, the prosecution and the defence, may know what the jury are asking and what is the judge's answer. Very likely, in the present case, the communication was quite immaterial, and, if the recorder had been able to tell this court what was the question asked by the jury, we might have been able to consider it, although nothing that I say now should be taken in any way to authorise a departure from the well recognised rule that these matters must be dealt with openly in court."

After referring to *R. v. Bodmin Justices, Ex parte McEwen* (3) in which magistrates had called a witness into their room and asked him a question, and no one else knew what the question was because it was never stated in open court, and the Divisional Court said that the conviction must be brought up on *certiorari* and quashed, I continued (*ibid.*, 39):

"In the present case the court feels the same difficulty. The communication made to the recorder was not read out in court and the appellant, therefore, did not, and does not, know what it was."

In the present case the appellants do know what the communication was. It was stated in court before the trial was concluded, and its nature was such that no possible argument could have been taken on it in court if it had been read out before the jury gave their verdict and not after. In this case, therefore, we cannot say that justice was not seen to be done, and, in our opinion, there is no ground for quashing the conviction.

*Appeals dismissed.*

Solicitors: *A. E. Hamlin Brown, Veale & Twyford* (for the appellants); *Director of Public Prosecutions* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

## HOUGHTON-LE TOUZEL v. MECCA, LTD.

[KING'S BENCH DIVISION (Birkett, J.), February 20, 1950.]

*Theatres and Entertainments—Sunday entertainment—Offence—Penalty—Liability of limited company—Evidence against company—Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s. 1, s. 2.*

A common informer brought an action against a company, Mecca, Ltd., under the Sunday Observance Act, 1780, s. 1, claiming a penalty for a breach of the section. Evidence was given on his behalf that, at the dance hall where the breach was alleged to have been committed, (a) the words, "Mecca, Ltd." were painted in large lettering in two places in front of the building, (b) there were also on the building several trade signs with the words, "Mecca, Ltd., 76 Southwark Street" (which was the address

of the company's head office), and (c) on the side of the building was a sign "Mecca Dances." Evidence was also given that in the latest balance sheet of the company the dance hall was mentioned as being one of its properties.

HELD: (i) a limited company was within the ambit of s. 1 of the Act of 1780 and could be sued by a common informer for a penalty under the section.

*Orpen v. Haymarket Capitol, Ltd.* (1931) (145 L.T. 614), *followed*. *A.-G. v. Walkergate Press, Ltd.* (1930) 142 L.T. 408, *not followed*. Observations of LORD ESHER, M.R., in *Reid v. Wilson & Ward* ([1895] 1 Q.B. 320), *not applied*.

(ii) there was evidence to go to the jury that the company was the "keeper" of the premises, within the meaning of s. 1 and s. 2 of the Act of 1780.

*Green v. Berliner* ([1936] 1 All E.R. 199), *distinguished*.

[AS TO SUNDAY ENTERTAINMENTS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 94-96; and FOR CASES, see DIGEST, Vol. 15, pp. 759, 760, Nos. 8173-8178, and Supplement.

FOR THE SUNDAY OBSERVANCE ACT, 1780, s. 1, see HALSBURY'S STATUTES, 2nd Edn., Vol. 5, p. 560.]

Cases referred to:

(1) *Orpen v. Haymarket Capitol, Ltd.*, (1931), 145 L.T. 614; 95 J.P. 199; Digest Supp.

(2) *A.-G. v. Walkergate Press, Ltd.*, *A.-G. v. Bloomfield*, *A.-G. v. Carlton*, (1930), 142 L.T. 408; 94 J.P. 90; Digest Supp.

(3) *Green v. Kursaal (Southend-on-Sea) Estates, Ltd.*, [1937] 1 All E.R. 732; Digest Supp.

(4) *Reid v. Wilson and Ward*, *Reid v. Wilson and King*, [1895] 1 Q.B. 315; 64 L.J.M.C. 60; 71 L.T. 739; 59 J.P. 516; 15 Digest 759, 8177.

(5) *Green v. Berliner*, [1936] 1 All E.R. 199; [1936] 2 K.B. 477; 105 L.J.K.B. 662; 155 L.T. 486; Digest Supp.

PRELIMINARY ISSUES OF LAW in an action by a common informer against a limited company for recovery of a penalty under the Sunday Observance Act, 1780, s. 1.

The plaintiff alleged that a dance hall at Brighton was used on Apr. 17, 1949, for public dancing, to which persons were admitted by tickets for which they paid at the entrance, and that the defendant company was the keeper, or the joint keeper, of the dance hall, within the meaning of s. 1 and s. 2 of the Act of 1780. At the close of the plaintiff's case, counsel for the defendant company submitted that there was no case to go to the jury, on the grounds (a) that a limited company could not be sued under s. 1 of the Act of 1780, and (b) that the evidence given by the plaintiff did not show that the company was the "keeper" of the dance hall within the meaning of s. 1 and s. 2 of the Act.

The plaintiff appeared in person.

*Salmon, K.C.*, and *J. MacMillan* for the defendant company.

**BIRKETT, J.:** Counsel for the defendant company, Mecca, Ltd., submits that the company, being a limited company, cannot be sued successfully in this action, which is brought under the Sunday Observance Act, 1780, because a limited company cannot be sued under the Act. By s. 1 of the Act:

"... any house, room or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day, called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for



money, shall be deemed a disorderly house or place; and the keeper of such house, room or place shall forfeit the sum of £200 for every day that such house, room or place shall be opened or used as aforesaid on the Lord's Day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses . . . "

Counsel for the defendant company contends that, in view of the punishment prescribed for keeping a disorderly house, a limited company cannot come within the ambit of the section. A

In *Orpen v. Haymarket Capitol, Ltd.* (1), a common informer claimed penalties under the Sunday Observance Act, 1780, from a limited company which was the proprietor of a cinematograph. In a considered judgment ROWLATT, J., held that a limited company was liable to the penalties under the Act and the informer was entitled to succeed. Using language very similar to what I have used in this case ROWLATT, J., said (145 L.T. 616): B

"The claim is made against a limited company who own and manage a cinema and open it on Sundays, and against four gentlemen who are directors of that company. It was ultimately agreed by Sir Patrick Hastings, who appeared for the company, after he had legitimately thrown every difficulty which he could in the way of the plaintiff proving her case, that evidence had been produced that this hall was opened on Sunday for the exhibition of cinematograph films by the defendant company. The only substantial point which he took was that the Act of Parliament does not impose any penalties upon the company because the word 'person' in the Act of Parliament does not in this connection include a company. Now everybody agrees that *prima facie* the word 'person' in an Act of Parliament includes that artificial kind of person which is called a limited company, but there may be points in the particular statute or in the subject-matter which show that in a particular case the word 'person' does not include a limited company." C

ROWLATT, J., then went on to say that, in his view, a limited company could be liable under the Sunday Observance Act, 1780, and held the defendant company liable in the case before him. He said (*ibid.*, 617): D

"... it seems to me that a company is liable under this Act and that the plaintiff is entitled to succeed against the company. I should add that, as a matter of fact, in three cases the penalties under this section have been recovered against a company. These cases which were brought against the Brighton Aquarium when it was a limited company have been reported, and were cited by Sir Thomas Inskip in argument, and the point was never taken although the defendants in those cases were represented by able counsel. The point not having been taken, the cases are not authority before me, but they certainly tend to confirm my view that there is nothing in the objection which is taken." E

In *A.-G. v. Walkergate Press, Ltd.* (2), which was decided a year before *Orpen v. Haymarket Capitol, Ltd.* (1), HORRIDGE, J., had come to the opposite conclusion on the same point. In the *Walkergate Press* case (2), informations were preferred against a limited company and its directors, charging them with having published a scheme for the sale of chances in a lottery not authorised by the Lotteries Act, 1823, and HORRIDGE, J., held that the company could not be sued. That case, apparently, was not cited to ROWLATT, J., in *Orpen's* case (1), but both *Orpen's* case (1) and the *Walkergate Press* case (2) were cited to GODDARD, J., in *Green v. Kursaal (Southend-on-Sea) Estates, Ltd.* (3), which was an action brought by a common informer against a company which was the printer and publisher of a newspaper issued on Aug. 8, 1936, in which the following advertisement appeared: "Kursaal Gardens. Amusement park and attractions open daily (including Sundays). Dancing." The common informer claimed penalties F

from the company, under s. 3 of the Act of 1780, for advertising entertainments on Sundays, but GODDARD, J., held that the company was not an advertiser within the meaning of s. 3 of the Act. In the course of his judgment, however, GODDARD, J., said ([1937] 1 All E.R. 734):

A "... [counsel for the company] takes three points in substance. First of all, he says, a limited company cannot commit those offences, because the Act not only provides for penalties but also provides that persons who commit the offences shall be liable to the other penalties which may be imposed upon the keepers of disorderly houses. I do not think it is necessary to give a concluded decision upon this point, because, in my view, I find the claim fails upon other grounds. But, if I had to give a decision on whether or not a limited company could commit this offence, I should follow the decision of ROWLATT, J., in *Orpen v. Haymarket Capitol, Ltd.* (1) rather than that of HORRIDGE, J., in *A.-G. v. Walkergate Press, Ltd.* (2). It is true that the decision of HORRIDGE, J., does not appear to have been cited to ROWLATT, J., but the case ROWLATT, J., decided was a case under the Sunday Observance Act, whereas the case HORRIDGE, J., decided was a case under the Lotteries Act. HORRIDGE, J., in his decision, laid great stress on the fact that, under the Lotteries Act, a person promoting a lottery was liable to be treated as a rogue and vagabond, and I think that was the main ground on which he held that a limited company could not be a person within the meaning of the Lotteries Act. ROWLATT, J., had this very Act under consideration, and he thought, and, if I may say so, I respectfully agree with the learned judge, so far as it is necessary for me to express any opinion upon it at all, that a limited company could be liable for penalties under this Act, and that an informer is entitled to succeed in a claim against a company ..."

In *Reid v. Wilson* (4), which is a decision of the Court of Appeal and, therefore, binding on me, LORD ESHER, M.R., said ([1895] 1 Q.B. 320):

E "The jury have found facts from which it was contended that the house was to be deemed to be a 'disorderly house,' and we have to see whether, applying the Act strictly to the evidence, Wilson was the 'keeper' of this house which is to be deemed disorderly. He had been the secretary of a company which had the power of letting the house. If he had let the house when he was secretary and when the company were his masters, though he had actually made the bargain for the letting, he would not have been the person who let the house. It would have been the company who let the house, and the company could not have been sued for penalties under the Act."

F Counsel for the defendant company in the case now before the court relies on that statement of LORD ESHER, M.R., as an authority for his contention that a limited company cannot be sued for penalties under the Act. The question whether a company could be sued was not, however, the main point for decision in *Reid v. Wilson* (4), and one does not know whether, if a full argument had been addressed to LORD ESHER, M.R., on the point, his decision on that question would have been the same, and, therefore, *Reid v. Wilson* (4) cannot be regarded as an authority which is binding on me on this point.

G I am greatly impressed by the careful considered judgment of ROWLATT, J., in *Orpen v. Haymarket Capitol, Ltd.* (1), with which I find myself in agreement, and I am very much influenced by the fact that GODDARD, J., in deciding *Green's* case (3) on another ground, went out of his way to say that, if he had been required to decide the question whether a limited company could be liable under the Act of 1780, he would have decided it as ROWLATT, J., did in *Orpen's* case (1). I, therefore, hold that a limited company is within the ambit of s. 1 of the Act of 1780, and that, in a proper case, a common informer may sue a limited company in the circumstances laid down in the Act.

The second point taken by counsel for the defendant company is that there is no evidence to go to the jury and, therefore, I should stop the case and enter judgment for the company. The evidence, which was given by the plaintiff's wife—to which counsel for the defendant company took objection at the time it was given—was (a) that "Mecca, Ltd." was painted in two places in large lettering in front of the building in which the offence is alleged to have taken place, (b) that there were also on the building at least half a dozen trade signs (glass signs, about as large as a plate), on which were the words "Mecca, Ltd., 76, Southwark Street" (*i.e.*, the head office of the company), and (c) that, high up, on the side of the building, apparently designed to catch the eye of people on the sea front, was "Mecca Dances." Counsel for the defendant company submits that, although "Mecca, Ltd." was, so to speak, emblazoned all round the building, the plaintiff failed to prove that the defendant company, Mecca, Ltd., put out those signs, and he says that there is no evidence that the company is the "keeper" of the premises within the meaning of s. 1 and s. 2 of the Act of 1780. He relies for this submission on *Green v. Berliner* (5), a decision of DU PARCQ, J., in which a limited company, Salisbury Press, Ltd., was sued, under s. 3 of the Act of 1780, for advertising a boxing match which was to take place on a Sunday, the allegation being that the company had printed a hand-bill advertising the match. The only evidence against the company was the hand-bill, which was presented to one of the witnesses for the plaintiff, and on which appeared the words "Salisbury Press, London." DU PARCQ, J., held that that was not in itself sufficient evidence that Salisbury Press, Ltd. had printed the hand-bill, and he dismissed the action against the company on the ground that there was no evidence against it. Counsel for the defendant company in the case now before the court contends that, *mutatis mutandis*, the emblazoned signs outside the building must be regarded in the same light as the hand-bill in the case before DU PARCQ, J. The plaintiff, however, distinguishes that case, on the ground that the notices outside the building are not the only evidence in this case, as he has also produced evidence in regard to the defendant company's balance sheet of Dec. 31, 1947 (which was the company's current balance sheet as on Apr. 18, 1949, the balance sheet for 1948 not having then been filed). Counsel for the defendant company submits that this evidence should also be disregarded. On the back of the balance sheet is: "A list of the company's branches," followed by a full list under the heading, "Cafes and restaurants not licensed," and, under that, another full list under the heading, "Licensed premises." Under a third heading, "Dance halls," is another full list, which includes "Sherry's, West Street, Brighton," (the place where the offence is alleged to have been committed). In view of the evidence (a) that at Sherry's dance hall at Brighton there were the signs, "Mecca, Ltd.", to which I have referred, and (b) that in the defendant company's balance sheet there was a specific reference to "Sherry's, West Street, Brighton", as being a dance hall and one of the company's branches, I cannot say that there is no evidence to go to the jury that the company was the "keeper" of the premises within the meaning of s. 1 and s. 2 of the Act, and, therefore, I overrule the submission of counsel for the defendant company on that point.

*Preliminary objections overruled.*

Solicitors: *H. H. Wells & Sons* (for the defendant company).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]



**Re BRADSHAW (deceased). BRADSHAW v. BRADSHAW.**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.J.J.), February 13, 14, 1950.]

*Administration—Lunatic—Distribution of estate—Lunatic entitled, on father's death in 1906, to undivided share in freehold estates—Freeholds unsold and held by trustees on statutory trusts—Nature of lunatic's interest—"Beneficial interest in real estate"—Administration of Estates Act, 1925 (c. 23), s. 51 (2).*

By his will, dated Jan. 22, 1853, W.B., who died in 1855, devised certain freehold estates on trust for his son, T.B., for life, and, on the death of T.B. (in the events which happened), on trust for the children of T.B. equally. In 1906 T.B. died, leaving five children, one of whom, C.B., was born in 1877, and now became entitled to a one-fifth undivided share in the property. In 1912 C.B. became of unsound mind, and in 1935 a receiver was appointed of her property and had not been discharged when, on Sept. 2, 1948, she died, a spinster and intestate. The freehold property was still unsold, and, under the Law of Property Act, 1925, s. 39 and sched. I, pt. IV, para. 1, was vested in the trustees of W.B.'s will on the statutory trusts for sale set out in s. 35 of that Act. The question arose whether the application of pt. IV of the Administration of Estates Act, 1925 (dealing with the distribution of an intestate's residuary estate) was precluded by s. 51 (2) of that Act.

**HELD:** C.B.'s interest in the property existed and belonged to her on Jan. 1, 1926, and at the date of her death; it was such that on, or immediately before, the coming into operation of the Administration of Estates Act, 1925, it would have devolved as real property; and (JENKINS, L.J., dissenting) her interest was a "beneficial interest in real estate" within the meaning of s. 51 (2), and, therefore, it devolved on her heir-at-law in accordance with the general law in force before 1926 applicable to freehold land.

*Re Donkin* ([1947] 2 All E.R. 690), distinguished and criticised.

*Decision of DANCKWERTS, J.* ([1949] 2 All E.R. 905), reversed.

[AS TO DISTRIBUTION OF ESTATE OF LUNATIC, see HALSBURY, Hailsham Edn., Vol. 10, pp. 592, 593, para. 856.]

Cases referred to:

- (1) *Re Donkin*, [1947] 2 All E.R. 690; [1948] Ch. 74; [1948] L.J.R. 409; 2nd Digest Supp.
- (2) *Re Price*, [1928] Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.
- (3) *Re Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 177; 142 L.T. 111; Digest Supp.
- (4) *Re Warren*, [1932] 1 Ch. 42; 101 L.J.Ch. 85; 146 L.T. 224; Digest Supp.

APPEAL by the heir-at-law of an intestate from an order of DANCKWERTS, J., dated Nov. 3, 1949, and reported [1949] 2 All E.R. 905.

The originating summons was issued to determine the nature of the interest of the intestate, Constance Mary Bradshaw, in freehold properties to which she and her brothers became entitled in undivided shares on the death in 1906 of their father, and which were now held by trustees on statutory trusts under the Law of Property Act, 1925, s. 39 and sched. I, pt. IV, para. 1. The intestate was of unsound mind from before Jan. 1, 1926, until her death on Sept. 2, 1948.

DANCKWERTS, J., held that the intestate's interest was not a "beneficial interest in real estate" within the meaning of the Administration of Estates Act, s. 51 (2), and that the interest would devolve in accordance with pt. IV of that Act.

*Droop* for the first defendant, H. R. E. Bradshaw, heir-at-law of the intestate. *N. S. S. Warren* for the plaintiff, A. E. Bradshaw, an administrator.

*Wigan* for the second defendant, J. S. Bradshaw, a niece of the intestate.

**SIR RAYMOND EVERSLED, M.R.:** The question which we have to determine in this appeal is one of the many problems, now happily diminishing,

which have arisen out of the effect and construction of the real property legislation of 1925. It relates to the application to the facts of the case (which I will presently state) of the Administration of Estates Act, 1925, s. 51 (2). It is a difficult and somewhat complex problem and since, as I read the judgment of DANCKWERTS, J., from whom the appeal comes, he would for himself have inclined in another direction if he had not conceived himself bound by an earlier decision of ROXBURGH, J., it may be said to have given rise already to some divergence of judicial opinion. I am sorry to say that that divergence persists in this court, for the view which I am about to express I express with the diffidence due to my awareness of the different view taken by JENKINS, L.J. A

The facts, so far as relevant, can be briefly stated. A Miss Bradshaw died intestate on Sept. 2, 1948. At the date of her death she was, within the meaning of the words as used in s. 51, a lunatic having no testamentary capacity, and she had been such consistently since the Act came into force on Jan. 1, 1926. Her property, at the date of her death, included what would, had it not been for the Act, have been an undivided share in certain freehold property which came to her *via* her father from her grandfather. It is conceded on all hands that, as a result of the real property legislation of 1925, her beneficial interest in the property was a personalty interest at her death. The grandfather had died many years ago, and the father died in 1906. It was at his death, equally beyond question, an interest which all conveyancers and lawyers would have regarded as a species of real property, namely, an undivided fifth share in freehold land. But, as I have said, by reason of the converting process of the Law of Property Act, 1925, on Jan. 1, 1926, her beneficial interest in the property became a one-fifth undivided share in the proceeds of sale of the self-same property which became thereafter held by the trustees of the grandfather's will on the statutory trusts. B C D

The Administration of Estates Act, 1925, s. 51, provides:

"(2) The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case. For the purposes of this sub-section, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged." E F

The question is: Was the lady's undivided share in the proceeds of sale of her grandfather's freeholds at the date of her death a beneficial interest in real estate comprised in that sub-section which, by the terms of the sub-section, devolved in accordance with the general law in force before the commencement of the Act applicable to land? If yea, then the appellant here, her heir-at-law and the first defendant in the action, is entitled to the property. If nay, then it is divided in accordance with the general scheme of distribution of estates under the Administration of Estates Act, 1925, pt. IV, and the heir-at-law shares the property equally with the plaintiff and the second defendant. G H

It must be confessed, on reading the sub-section, that it is couched in terms of a somewhat complex character. First, I point out that the opening words, "The foregoing provisions of this Part of this Act," is a reference to the language of the earlier sections of pt. IV of the Administration of Estates Act, 1925, a Part of the Act exclusively concerned with the distribution of the

residuary estate of deceased persons. In other words, it is a Part providing for the distribution, among the persons entitled, of the property of which a deceased person was entitled to dispose as his own beneficial property; and, in approaching the problem, I venture to think that the framers of the legislation of 1925 have made the task of the court more difficult by the somewhat oblique method by which, if at all, they have introduced into the sub-section the definition provisions relative to the term "real estate." As this matter is not without significance, I will deal with it. In s. 55 (1) of the Act, in pt. V, is to be found a number of definition paragraphs, and para. xix is:

" 'Real estate' save as provided in pt. IV of this Act means real estate, including chattels real, which by virtue of pt. I of this Act devolves on the personal representative of a deceased person."

It is clear that that paragraph, though it may not strictly be called a definition so much as, perhaps, an exposition of the phrase, does not in terms wholly exclude its application to pt. IV. It is only saying, as I read it, that except as otherwise provided for in pt. IV, it shall apply thereto. The difficulties are not yet over, because if you look at pt. I of the Act, there is a definition of "real estate" in s. 3 which, however, is only in terms to apply in that Part of the Act. Section 3 provides:

"(1) In this Part of this Act 'real estate' includes—(i) Chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and (ii) Real estate held on trust (including settled land) or by way of mortgage or security, but not money to arise under a trust for sale of land, nor money secured or charged on land."

Counsel for the second defendant, a niece of the intestate, has contended that the effect of these definitions is that you must read the phrase "real estate" in s. 51 as having the meaning assigned to real estate, albeit expressed only as applying for the purposes of pt. I, in s. 3. Counsel for the heir-at-law has contended that those definitions really do not apply at all, and that (particularly when you pay regard to the subject-matter with which pt. IV is dealing) real estate means real estate in the strict sense, which under the common law descended to the heir-at-law. I do not think that it matters for the decision of this case which view is taken. I have referred to it because I think DANCKWERTS, J., as I read his judgment, was disposed to take the view that the language of s. 55 (1) (xix) and particularly the words "save as provided in pt. IV," excluded that definition paragraph from the section altogether. Even, however, if you read into "real estate," with the exception of the reference to chattels real, the full definition of s. 3, it does not seem to me that the solution of the problem facing the court is materially advanced. At least, there will be included, by the terms of the definition, real estate held on trust; and I do not read that as meaning held on trust by the lunatic exclusively, nor does it seem to me that it is held any less or more "on trust" if it happens to be held on trust for sale. Whatever definition is given to the phrase "real estate" in s. 51, the vital question in the case is whether the somewhat larger phrase "any beneficial interest in real estate" covers this particular subject-matter. As I have already stated, the learned judge seems to me to have indicated that his own view, unshackled by any authority, would have favoured the contention of counsel for the heir-at-law. If I read his judgment correctly, he thought that, *prima facie*, the words in the paragraph applied all the more since there is judicial authority for the view that an interest in the proceeds of sale of real estate may, in an appropriate context, properly be described as an interest, or a beneficial interest, in real estate. He did not think he was prevented from coming to such a conclusion by the terms of the above-mentioned



definition, but he thought himself bound by a decision of ROXBURGH, J., in the earlier case of *Re Donkin* (1).

I think I shall best formulate the points which have been taken, and the answers which suggest themselves to my mind to those points, if I now refer to that case. It was not parallel to the present case on its facts, for it was a case where a lunatic, who had been such since Jan. 1, 1926—in that respect it was like the present case—succeeded, in the interval between Jan. 1, 1926, and her own death, which took place two years later, to an interest which descended to her from her brother, of whom she was the sole next of kin. The brother's estate consisted in part of freehold houses. As a result of the operation of the legislation of 1925, that property had to be administered in accordance with the Administration of Estates Act, 1925. Those provisions (I refer to s. 33) require that the property should first be sold and then the proceeds applied in the payment of debts, costs, and testamentary expenses and thereafter handed over to the persons beneficially interested. So that, passing for the moment over s. 51 and any effect it may have, the interest to which the lunatic became entitled on her brother's death in 1928 was, *inter alia*, the balance of the proceeds of sale of her brother's freeholds, after the primary trust for conversion and payment of debts had been carried into effect. Therefore, the question which ROXBURGH, J., had to decide was whether s. 51 applied to a beneficial interest, derived though it was from freehold property, which came to her after the operation on that property of the Administration of Estates Act, 1925, s. 33, and which, so far as she was concerned, came into existence for the first time after these provisions had come into operation. It will be seen, therefore, that there is this vital distinction between *Re Donkin* (1) and the present case on their facts. In the present case, the lunatic's interest, whatever its quality, real or personal, existed on Jan. 1, 1926, and continued to exist thereafter. In *Re Donkin* (1), it came into existence for the first time after Jan. 1, 1926.

The point is one of great importance, because, on one view of the reading of the relevant sub-section, it might be said that devolution according to the old law would be preserved in the case of any beneficial interest in real estate to which a lunatic succeeded, however long after the converting operations of the Act of 1925 had come into operation, so long, of course, as the lunatic remained a lunatic till her death, and had continuously been so since 1925. To take an illustration, it would be possible that in 1975, a lunatic, having been a lunatic all her life and before 1926, then acquired by gift or succession an absolute interest in freehold property. In those circumstances, it might be said that on her death that freehold property, unlike any other freehold property, would go to her heir-at-law at her death (*i.e.*, to the person who, under the old law, would have answered that description).

So far as *Re Donkin* (1) was concerned, the decision of ROXBURGH, J., faced as he was with that possibility, turns on one phrase. He says ([1947] 2 All E.R. 692), after reading s. 51 (2):

"It seems to me that, to make sense of that provision, it is necessary to confine the beneficial interests indicated to such interests as would under the general law in force before the commencement of the Act have devolved in accordance with the law applicable to freehold land."

That phrase, which is the turning point in the judgment, is, I think, capable of two constructions. It might mean that the phrase "beneficial interest" is confined to such an interest as existed at the commencement of the Act, and would then have devolved as freehold land. Or it might mean a beneficial interest which, whenever it came into the lunatic's possession, would, if it had not been for the Act, have devolved to the heir-at-law. If the learned judge had meant the former, I should have agreed with him, and I think DANCKWERTS, J., would have agreed with him also. But, in my judgment,

ROXBURGH, J., undoubtedly used the phrase in the latter sense, and, so used, it seems to me (though it is sufficient to decide *Re Donkin* (1)), it would leave it open to question whether the property to which the lunatic succeeded, and which at that time was undoubtedly real estate, would devolve on the heir. I think that *Re Donkin* (1) was correctly decided, but I venture to base my reason for so deciding on grounds somewhat different from those which ROXBURGH, J., if I rightly understand him, expressed. The grounds on which I would decide *Re Donkin* (1) would not have obliged DANCKWERTS, J., to decide the present case as he did, and as, indeed, I think this case ought to be decided, namely, as DANCKWERTS, J., if left to himself, would have decided it.

In my judgment, the clue to the matter is this. I think that, for s. 51 (2) to apply, beneficial interests in real estate (whatever they may be) must possess certain characteristics. They must have existed and belonged to the lunatic on Jan. 1, 1926; and they must also exist and belong to the lunatic at the time of the lunatic's death. If that is right, then *Re Donkin* (1) is excluded from further consideration for the first characteristic in that case was absent. But I think also that the beneficial interests must, thirdly, be such that at the date of the coming into operation of the Act, or immediately before the coming into operation of the Act, they would have devolved as real property and gone to the heir. I will state in a moment my reasons for that view, but, subject to those limiting characteristics, I think the phrase "any beneficial interest in real estate" is one of wide import and does (because it is not in terms, or by necessary implication, excluded from so doing), according to the ordinary usage of language, cover an interest such as this lunatic had, namely, an interest in the proceeds of sale of real estate held on trust for sale. If that is right, the necessary conclusion follows.

I will give my reasons for saying that these beneficial interests, whatever they are, must have the characteristics I have ventured to ascribe to them. I have already read the sub-section. The language provides that the beneficial interest concerned must be one "to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will," etc. The beneficial interest, therefore, must, I think, be one in reference to which, at the date of the commencement of the Act, the lunatic was "unable to make a will." In other words, it must have existed and belonged to the lunatic at that date. I reach that conclusion because the section goes on "... who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity," and there is a further reference to any will "in respect thereof," which the lunatic had made before his or her insanity, which, *ex concessis*, must have begun before Dec. 31, 1925. There can, secondly, be no doubt that the beneficial interest must continue until the date of the lunatic's death because in terms the section says "to which" the lunatic "was entitled at his death." Finally, in the last part of this section, come the words

"... and any such beneficial interest ... shall ... devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

That seems to me to indicate, in the plainest terms, that this beneficial interest is one in respect of which the law of descent applicable would, apart from the repeal section, have been the old law as to real estate. Therefore, I feel compelled, as a matter of construction of this section, to say that the beneficial interest referred to must have those three characteristics that I have stated. So long as the interest has them, I see no reason for limiting the natural and, as I think, wide usage of the phrase "any beneficial interest in real estate." My view, above referred to, is reinforced, I think, for a reason indicated during

the argument by SOMERVELL, L.J., viz., the use before the word "entitled" of the past "was" rather than "is."

I come to the phrase "any beneficial interest in real estate." There has been considerable argument what that phrase properly describes, but it cannot be doubted, I think, that, at least in some contexts, a share in the proceeds of sale of realty would be covered by the phrase "any beneficial interest in real estate." For other purposes, no doubt, it is equally true that interests in the proceeds of real estate are personalty. Thus, CLAUSON, J., in *Re Price* (2), described them as an interest in personalty. But, as counsel for the heir-at-law pointed out, his mind was not directed in the least to the particular question with which we are concerned. What he was concerned to point out was, to use his own language ([1928] Ch. 589), that the trust for sale had converted, "so far as the beneficiaries are concerned," their interest from a landed or real interest into a personalty interest. Indeed, so far as authority is concerned, if authority be necessary, it seems to me that DANCKWERTS, J., rightly derived some support from, among others, the language of RUSSELL, L.J., in *Re Kempthorne* (3).

Another case cited to us was *Re Warren* (4), which followed *Re Kempthorne* (3). MAUGHAM, J., in that case was concerned with the question whether a particular gift was adeemed, a question which, no doubt, would depend primarily on the language of the will in suit. But, in the course of his judgment, the learned judge said ([1932] 1 Ch. 46):

"In considering that question it is important to note that the legislature has not deprived the testatrix of all interest in the land. The 'statutory trusts' (the meaning of which expression is set out in s. 35 of the Law of Property Act, 1925) are shortly to sell and hold the net proceeds on such trusts as may be requisite for giving effect to the rights of the persons interested in the land."

Then the learned judge observed, after referring to s. 26 (3) of the Law of Property Act, 1925 (*ibid.* 47):

"But in substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act."

The learned judge then referred to *Re Kempthorne* (3), and I would like to quote one short passage from the judgment of RUSSELL, L.J., in that case ([1930] 1 Ch. 292):

"And, therefore, it was contended that his property continued to be freehold property, and had not been changed into personal estate. I am unable to accept that view. There is no doubt that he is interested in the land; but his interest has ceased to be freehold property, and has become personal estate. To borrow an old phrase, frequently used in another connection, his interest, though an interest which savours of realty, is none the less personal estate."

That was a case of undivided shares. I have cited those observations to support the view that as a matter of ordinary English, the formula "any beneficial interest in real estate" can quite properly, and without abusing language or using it loosely or imprecisely, cover a share in the proceeds of sale of real property. It is true that in the passages I have quoted the word "land" is used rather than "real estate," but I cannot think myself that that vitally affects the matter.

Counsel for the niece of the intestate was asked what were the beneficial



interests in that estate which, and which alone, s. 51 (2) was designed to cover. It would be most unjust to him to suppose that the reply he gave was exhaustive, but he did give examples which no doubt were present in his mind after giving much thought to the problem. He said "Land in fee simple: interests in remainder: estates *pur autre vie*: and absolute equitable interests." Then he was asked "If the words 'any beneficial interest in' were omitted from the formula which of those interests would no longer be covered?", to which he, subject to one qualification, answered "None." He expressed a doubt whether absolute equitable interests would be covered in either event, but if they were covered in the one case, I did not understand counsel to say they would not be covered in the other. However that may be, I think it became apparent in the course of the argument that those words "any beneficial interest in" must either be given the sort of significance which I have given them, or should be treated as put in *ex abundanti cautela* to exclude the application of this sub-section, in effect, to real estate held by the lunatic as trustee. I find the suggestion that holdings as trustees could ever have been in contemplation at all in this section and in this Part of the Act extremely difficult to accept. The whole of this Part of the Act, as I have said, deals, and deals only, with the distribution of the beneficial interests of a deceased person. I cannot think that anybody could have contemplated or thought that special words were required to procure that this sub-section should not be applicable to cases—and it could relate only to them—where lunatics were sole trustees.

Therefore, in its context (though I appreciate the force of the view which may be taken on the other side), I, for my part, feel compelled to the view that "any beneficial interest in real estate" is a phrase which is naturally—and is, in fact—used in this context to cover such an interest as that with which we are here concerned. The word "beneficial" is, no doubt, a limitation of the word "interest." None the less, in my judgment, the addition of the whole phrase "beneficial interest in" to "real estate" expands and enlarges the subject-matter to which the sub-section would otherwise have been related and makes its language apply to a species of property which, being a beneficial interest in realty in 1925, still continued thereafter to retain that quality. I think the result is natural, for after all this section is, on the face of it, a saving section. It seems to me naturally to be designed to preserve the rights of those who would be dispossessed, so to speak, by the coming into operation of the Acts in circumstances in which such dispossession could not have been prevented by the testator owing to his or her lunacy. I think it natural in such circumstances that such well recognised real property interests under the old law as undivided shares in real property should not be treated differently from other real estate interests.

My conclusion, for the reasons I have already stated, does not involve the view that interests coming into existence for the first time *quoad* the lunatic after the Acts have come into force, and converted as a result of the legislation into personalty, would be diverted from the ordinary rules of distribution provided by the Act. Moreover (and this is the point with which I end this judgment) my conclusion does not involve that if, apart altogether from the Act, real property had, before the Act came into force, been subjected to a trust for sale, the interest of the lunatic in the proceeds of such sale would descend as realty under the old law. I say that for this short and simple reason, because that beneficial interest in real estate would not have been a beneficial interest in real estate which, at the material date, namely, the coming into operation of the Act, would have devolved as the real estate of the lunatic under the old law.

My conclusion is the result of the three characteristics which I find attributable to the beneficial interest covered by the section. I agree with

counsel for the niece that it means putting some gloss on, or explanatory language into, the section. So that I may not be thought to be evading that consequence, I will state what seems to me one way, at any rate, of reading the section, adding the words which I think must necessarily be added. I would read it thus: "The foregoing provisions of this Part of this Act do not apply to any beneficial interest to which a lunatic or defective living and of full age was entitled as real estate (but not including chattels real), at the commencement of this Act," etc. I think that reading is necessarily involved in the language. If that reading is justified, I think all the results follow. For the reasons I have stated, I would allow the appeal.

**SOMERVELL, L.J. :** I agree. The first question that I think has to be considered is whether or not s. 51 (2) is confined to cases where a beneficial interest existed in the lunatic at the commencement of the Act. I come to the conclusion that that is a necessary condition of the application of the sub-section. I think the actual words used in the sub-section are capable of either construction, but I think, whichever of the two constructions is put on them, it might be said that the language is not so completely clear or as apt as, perhaps, it might have been. I come to that conclusion for these reasons. I think the opening words plainly point to this construction. The fact that the person entitled must be a lunatic of full age at the commencement of the Act, naturally, though not, perhaps, necessarily, indicates that it is to that date that you look to see whether he has any beneficial interest in real estate in respect of which he was not able to make a will. Then the later words, "was entitled at his death," naturally have to be inserted, because there must be two conditions if the *prima facie* view I have expressed about the commencement of the Act is right. Obviously, the section must not operate, or purport to operate, unless the interest still subsists at his death. I, therefore, come to that conclusion for the reasons which I have shortly expressed, and for the reasons given by the Master of the Rolls.

Then we come to the question whether this undivided share in realty, the nature of which was changed by this body of legislation including the Law of Property Act, 1925, is within these words. On that I associate myself, with respect, if I may, with what has been said by the Master of the Rolls as to the construction of these words in this context, but, speaking for myself, once I have come to the conclusion that the beneficial interest in real estate must exist at the commencement of the Act, I think I would have arrived at the same result by a somewhat shorter route, because, on this view, it seems to me natural to construe the words in the light of their meaning immediately before the commencement of the Act. Nobody disputes that until the Law of Property Act, 1925, operated on interests such as those we are considering they were beneficial interests in real estate. I think that that construction is reinforced by the logic and purport of this sub-section. I can see no reason why the sub-section should make a saving in respect of interests in real estate which are left as such as the result of the Law of Property Act, but not make a saving in respect of interests in real estate, the nature of which was changed, for certain purposes at any rate, by that Act. If, therefore, one construes these words in that way, that illogicality does not arise. For these reasons, I agree that the appeal should be allowed.

**JENKINS, L.J. :** I regret that I find myself unable to agree with my Lords as to the right conclusion in this case. The Law of Property Act, 1925, by s. 39 and pt. IV of sched. I, subjected to a statutory trust for sale land held at the commencement of the Act in undivided shares. Statutory trusts were defined by s. 35 of the Act. Very briefly, they were a trust for sale with power to postpone the sale "and to stand possessed of the net proceeds of sale . . . and of the net rents and profits until sale" on the trusts requisite for

giving effect to the rights of the persons interested in the land. It is not open to doubt that the statutory trust for sale thus imposed was just as effective as an express trust for sale created by a disposition for the purpose of effecting an immediate conversion of the land in equity from realty to personalty. It follows that every former owner of an undivided share in land which, as the law stood before 1926, was real estate, received in lieu of that interest in realty, an interest in personalty consisting of a share in the proceeds to arise from the execution of the statutory trust for sale, and a share also in the rents and profits until sale. That substituted interest, I apprehend, was clearly personalty for all purposes, including devolution on intestacy, and incidentally also including the construction of gifts by will in the sense that a general testamentary gift of real estate in the absence of some special context would no longer include such undivided share.

It was open to the legislature, if minded so to do, to insert in the Law of Property Act, 1925, a saving to the effect that the conversion effected by the statutory trusts should not alter the character or quality of any interest in an undivided share to which a lunatic or defective might have been entitled before the commencement of the Act. No such saving was inserted, and the undivided share of a lunatic or defective suffered the same fate as the share of any person who was fully *compos mentis*. Had the legislation rested there, the result as regards devolution, would have been quite plain. By force of the conversion, a former undivided share, or rather a share in the proceeds of sale corresponding to the former undivided share whether of a lunatic or defective or of a person of sound mind, instead of passing to the heir, would have passed to the persons entitled to his personal estate under the statutes of distribution in force before the Law of Property Act, 1925, but, in fact, in addition to the Law of Property Act and the other Acts passed at the same time, there was passed the Administration of Estates Act, 1925, which altered the devolution of property on an intestacy.

Broadly speaking, the effect of that Act (the part of which chiefly material for the purposes of this case is pt. IV) was to abolish all the rules of descent specially applicable to realty and to assimilate the devolution of realty to that of personalty. The devolution of personalty, or, rather, of property generally, irrespective of whether it was realty or personalty, reproduced in a somewhat modified form the main provisions governing intestate succession to personalty as they stood before the Act. I say in a somewhat modified form because there were various modifications of more or less importance, but the change as regards personalty was not nearly so radical as the change involved in abolishing the old rules of descent to the heir. As I have said, there is no saving clause in the Law of Property Act, 1925, in relation to undivided shares held by lunatics or defectives, but it was thought necessary in the Administration of Estates Act, 1925, to insert a saving clause as regards the application of the new rules of succession to the real estate of such persons. Apparently, the framers of the Act considered that the alterations, so far as they affected personalty, were of a kind to which no one would be likely to raise any strong objection. Therefore, the personalty of a lunatic was left to descend after the Act in the same way as the personalty of a person of sound mind, but with respect to real estate a saving was thought to be necessary, and it was provided for, in the terms to which my Lord has already referred, by s. 51 (2):

“The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such



beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

The question in the case is whether, by virtue of that saving provision, the intestate's share in the proceeds of sale, and net rents and profits until sale of the property in an undivided share to which she was entitled immediately before the commencement of the legislation of 1925, devolved as real estate. As to that, I would first observe that, as appears from what I have already said, the conversion of this undivided share into personalty was effected not by pt. IV of the Administration of Estates Act, 1925, at all, but by the Law of Property Act, 1925. A section which purports to be a saving from the application of "the foregoing provisions" of pt. IV of the Administration of Estates Act, 1925, is, *prima facie*, not an appropriate vehicle for the saving of an undivided share of an intestate from the results of the conversion effected by a wholly different Act. One would expect the saving in the Administration of Estates Act, 1925 s. 51 (2), to be dealing simply with the innovations in the way of rules as to devolution of property on intestacy effected by that Act and nothing else. In my judgment, that is precisely what this sub-section does refer to.

The first question which arises is what is meant by "any beneficial interest in real estate." Does that expression include a share in the proceeds of sale to arise under the statutory trusts for sale? With respect to my Lord, I should say the answer to that question quite clearly must be in the negative. If an interest in the proceeds of sale to arise under the statutory trusts for sale is a beneficial interest in real estate within the meaning of the section, by parity of reasoning an interest in the proceeds of sale to arise under an express trust for sale would be an interest in real estate. If that were so, one would, on a natural reading of the section, *prima facie*, get the peculiar result that where a lunatic or a defective was entitled to proceeds to arise under an express trust for sale, those proceeds on the death of that person intestate would pass in accordance with the old law applicable to the devolution of freehold land—an extraordinary result indeed!

Counsel for the heir-at-law appreciated the difficulty about construing "any beneficial interest in real estate" in that way, and he disclaimed the view that a share in the proceeds to arise under an express trust for sale would be affected by the section in the way I have mentioned. He sought to extricate himself from the difficulty by saying that this sub-section only applied to beneficial interests in real estate to which a lunatic or defective was entitled immediately before the commencement of the Administration of Estates Act, 1925, and which, as the law stood immediately before such commencement, were real estate. I understand that to be in substance the view which has commended itself to my Lords. For my part, and with diffidence, I find it impossible to extract that construction from the language used. It seems to me that the sub-section quite clearly, so far as language can make anything clear, is directed to one point of time and one point of time only, and that is the death of the lunatic or the defective. The lunatic or the defective dies after the commencement of the Act without ever having recovered testamentary capacity and one has to consider how his property is to devolve. One finds that his estate includes a share in proceeds to arise under a statutory trust for sale of freeholds. In my judgment, such an interest on the death of the lunatic or defective after the commencement of the Act must necessarily be personal estate and cannot be anything else. I think that result necessarily follows unless one can re-cast the language in the way my Lord proposes so as to determine the quality of the property immediately before the commencement of the

Act instead of at the death of the lunatic or the defective. That is simply a matter of the construction of the language used in the sub-section, which is admittedly very involved, as the draftsman has thought it necessary to treat himself to at least one relative enclosed within another, and has managed to postpone, to about the eighth line of the section, the vital words "was entitled at his death." But when one reads it through to the end, speaking for myself, A I think it is really quite clear that the date of the death is the only date which can be looked at.

There is very little more that I wish to say. My Lord found it possible, as I understood his reasons, to hold that the word "beneficial" has some enlarging effect on the word "real estate." I find it impossible to agree with that. It seems to me that the word "beneficial" is only inserted to exclude interests B which might be held by the lunatic or defective as a trustee. I think exactly the same meaning would have been achieved if the section had run "any interest in real estate" and then had said "to which a lunatic" and so on "was entitled at his death beneficially and not as a trustee." My Lord has suggested that this is not enough to account for the use of the word "beneficial." He pointed out that the cases in which trust interests could come into question would be C very rare, and in any case no one could suppose that the section was intended to apply to them. That may be so, but I think in that kind of matter the draftsman of the Act did display a superabundance of caution, for a little later on in the section he found it necessary to exclude interests ceasing on the death of the lunatic or defective. For my part, I find it impossible to see how an interest ceasing on the death of the lunatic or defective could devolve D either in accordance with the old law or in accordance with the new law. Further, as to the meaning of the vexed phrase "any beneficial interest in real estate," for my part, reading the definition contained in s. 55 (1) (xix) of the Act

"'Real estate' save as provided in pt. IV of this Act means real estate, including chattels real, which by virtue of pt. I of this Act devolves on E the personal representative of a deceased person"

in conjunction with the definition of real estate which so devolves contained in s. 3 (1), I would be disposed to conclude that by definition, *i.e.*, by the definition extracted from the joint application of s. 55 (1) (xix) and s. 3 (1), money to arise under a trust for sale, or in other words an interest under a trust for sale, is excluded from the expression "any beneficial interest in real F estate" in s. 51 (2). I do not attach any great importance to that, however, for it seems to me that ROXBURGH, J., was perfectly right in *Re Donkin* (1) when he said, in effect, that from the context it is apparent that the beneficial interests in real estate referred to are those beneficial interests which would have devolved in accordance with the old law of an intestate succession to real estate, if that law had not been abrogated by the new legislation.

G I think my Lords in substance are in agreement with that, and the real point of difficulty is simply at what moment of time should the quality of the beneficial interest be determined. For the reasons I have endeavoured to express, I find myself unable to accept any other moment of time for that purpose than the date of the death of the deceased. If I could agree with my Lords that the moment before the commencement of the Act was the appropriate time, I H would agree with them that the consequences which they indicate would follow from that, but, having regard to the contrary view I take on that point, for my part, I would dismiss the appeal.

*Appeal allowed with costs.*

Solicitors: *Blyth, Dutton, Wright & Bennett* (for all parties).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

## ROSS v. ROSS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 15, 24, 1950.]

*Divorce—Maintenance—Wife entitled to maintenance under order made by justices—Application to Divorce Court for maintenance while justices' order still in force—Election by wife—Waiver of right to order by Divorce Court—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (2).* A

On May 4, 1949, the wife obtained a decree *nisi* of divorce from the husband. At the conclusion of the hearing of her petition counsel stated on her behalf that she would not ask for maintenance as she proposed to rely on a maintenance order, dated Aug. 30, 1945, which she had obtained from a court of summary jurisdiction on behalf of herself and her child, on the ground of the husband's desertion and wilful failure to maintain. The decree was made absolute on June 17, 1949, and on Aug. 15, 1949, the wife filed an application for maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), without having applied to the justices to discharge their order of Aug. 30, 1945. On Oct. 26, 1949, she took out a summons for arrears due under the order of the justices, and on Oct. 27 she applied to the justices to discharge their order, but her application was adjourned *sine die* pending the hearing of her application to the Divorce Court. It was contended by the husband that the application under the Act of 1925 could not be entertained as the wife had made an irrevocable election to rely on the order of the justices. B C

**HELD:** (i) on the facts of the case, there was no evidence of an irrevocable election by the wife in favour of the order of the justices, but D

*Semble:* the doctrine of election could not apply where the wife had only one remedy open to her (*viz.*, an order for maintenance against the husband), but a choice of courts in which she might pursue that remedy.

(ii) assuming that, by the statement of her counsel at the conclusion of the hearing of her divorce petition, and by her subsequent conduct, she had purported to make an irrevocable election not to apply for maintenance under the Act of 1925, the wife could not renounce or waive her right to maintenance under the Act of 1925 and the Matrimonial Causes Rules, 1947, r. 44 (1), by any unilateral statement or conduct on her part, as such a purported election would offend against the principles laid down in *Hyman v. Hyman* ([1929] A.C. 601) and would not be binding on her. E F

(iii) the court would not make an order for maintenance while the order of the justices was still in force, and the wife would have to decide whether she would rely on the order of the justices, or whether she would apply to them to discharge their order and would then apply to the Divorce Court for an order under the Act of 1925.

*Kilford v. Kilford* ([1947] 2 All E.R. 381), *followed*. G

[AS TO PERMANENT MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-787, paras. 1244, 1245, and Supplement; and FOR CASES, see DIGEST, Vol. 27, pp. 500-502, Nos. 5355-5378, and Supplements.]

Cases referred to:

- (1) *Kilford v. Kilford*, [1947] 2 All E.R. 381; [1947] P. 100; [1948] L.J.R. 447; 111 J.P. 495; 2nd Digest Supp. H
- (2) *Scarf v. Jardine*, (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 21 Digest 224, 577.
- (3) *Re Davison, Ex p. Chandler*, (1884), 13 Q.B.D. 50; *sub nom., Re Davison, Ex p. Blenkiron's Executors*, 50 L.T. 635; 30 Digest 163, 328.
- (4) *Curtis v. Williamson*, (1874), L.R. 10 Q.B. 57; 44 L.J.Q.B. 27; 31 L.T. 678; 1 Digest 579, 2193.



- (5) *McHenry v. Lewis*, (1882), 22 Ch.D. 397; 52 L.J.Ch. 325; 47 L.T. 549; 11 Digest 477, 1313.  
(6) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; Digest Supp.  
(7) *Gaisberg v. Storr*, [1949] 2 All E.R. 411; [1950] 1 K.B. 107.  
(8) *Ward v. Baugh*, (1799), 4 Ves. 623; 20 Digest 439, 1657.  
(9) *Fytche v. Fytche*, (1868), L.R. 7 Eq. 494; 19 L.T. 343; 20 Digest 441, 1666.

APPLICATION FOR MAINTENANCE adjourned into court.

The wife, who had obtained a decree *nisi* of divorce on May 4, 1949, filed an application for maintenance, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2), on Aug. 15, 1949, while an order for maintenance, dated Aug. 30, 1945, which she had obtained from a court of summary jurisdiction at Southport, was still in force. On Oct. 27, 1949, she applied to the justices to discharge their order, but the application was dismissed *sine die* pending the hearing of the application before the High Court. On Dec. 5, 1949, the application under the Act of 1925 came before the district registrar of the Southport District Registry who referred the matter to the judge for his decision, under the Matrimonial Causes Rules, 1947, r. 53. The facts appear in the judgment.

*Fay* for the wife.

*Comyn* for the husband.

*Cour. adv. vult.*

Feb. 24. WILLMER, J., read the following judgment. This is a wife's application for maintenance which has been referred to me by the district registrar of the Southport District Registry because of an unusual point of law raised by the husband in opposition to the application. The case originally came before me at Manchester Spring Assizes last year, and on May 4, 1949, I pronounced a decree *nisi* in favour of the wife. This was made absolute on June 17. The petition included no prayer for maintenance, and it is common ground that at the conclusion of the hearing before me counsel for the wife stated in open court that there would be no question of maintenance as the wife proposed to rely on an order, dated Aug. 30, 1945, which she had obtained from the court of summary jurisdiction at Southport on the ground of desertion and wilful failure to maintain, whereby the husband was ordered to pay £2 per week maintenance for the wife and 10s. per week for the one child of the marriage. The period of two months from final decree within which an application should be made under the Matrimonial Causes Rules, 1947, r. 44 (1), expired on Aug. 17, 1949. Two days before that, *i.e.*, on Aug. 15, the wife, without having taken any steps towards the discharge of the order of the court of summary jurisdiction, filed the present application for maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2). On Oct. 26, the wife took out a summons for arrears due under the order of the court of summary jurisdiction, and I am informed that some, at least, of the arrears alleged to be due were subsequently paid by the husband. On the following day, Oct. 27, the wife for the first time applied for the discharge of the order of the court of summary jurisdiction, but her application was adjourned *sine die*, pending the hearing of the present application. Consequently, at the date of the hearing before the learned district registrar, the order of the court of summary jurisdiction was still in force, and it is still in force to-day.

In these circumstances it is contended on behalf of the husband that the wife has elected to take her remedy elsewhere and can no longer be allowed to put forward a claim for maintenance in this court. It is well established that a wife cannot obtain an order for maintenance in this court while at the same time retaining in force an order previously obtained from a court of summary jurisdiction: see *Kilford v. Kilford* (1). In that case a wife had previously obtained an order from a court of summary jurisdiction, with which for the time

being she was quite satisfied, but to safeguard her future position she sought, while the order of the justices was still in force, to obtain in addition a nominal order for maintenance in this court. BARNARD, J., however, refused to entertain the application so long as the order of the justices was in force, and left the wife to choose either to rely on the order of the justices or to have that order discharged before proceeding with her application in this court. In the present case the wife is quite content that I should take a similar course, and I am invited to make an order for maintenance in her favour on the understanding that the application to discharge the order of the justices will be proceeded with forthwith. For the husband, however, it is objected that in this case the time for such a choice has now passed, and it is said that the wife has already made an irrevocable election to rely on the order of the justices. It is contended that, having regard to the statement made by her counsel at the trial, coupled with her subsequent conduct in retaining the order of the justices in force after the filing of the present application—and, indeed, after the last date on which the application could have been made without leave—the wife has made an election, within the principle stated by the House of Lords in *Scarf v. Jardine* (2), and, having made that election, is precluded for all time, and in all circumstances, from obtaining an order for maintenance in this court.

The doctrine of election, as I understand it, applies in a case where a plaintiff has alternative remedies, and it is held that, where he has once elected to pursue one, he has waived his right to the other and is for ever precluded from asserting it. This is nowhere made clearer than by the words of CAVE, J., in *Re Davison* (3), where he said (13 Q.B.D. 54):

“ This doctrine applies only where the person having the cause of action is put to elect between two inconsistent remedies, as in the case of the right to sue either the agent or the principal when disclosed: *Curtis v. Williamson* (4); or the old and new partners in a firm where the old partners are liable only by estoppel, as in *Scarf v. Jardine* (2); or in the case of the right to sue for a tort or to waive the tort and sue for the proceeds in the hands of the wrongdoer. In these cases the plaintiff may elect which remedy he will have, but when he has elected one remedy he has thereby waived his right to the other.”

In the present case, as it seems to me, the wife was never in the position of having alternative or inconsistent remedies. She never had more than one remedy open to her, *viz.*, an order for maintenance against the husband, but she had a choice of courts in which she might pursue that remedy. The position, as I see it, is somewhat analogous to the case where proceedings in respect of substantially the same cause of action are pending at the same time in two different courts. Of this class of case, *McHenry v. Lewis* (5) is a well-known example. In such cases it has never, so far as I know, been suggested that a plaintiff, by instituting proceedings in one court, has irrevocably elected to pursue his remedy only in that court, so as to be precluded for all time from proceeding elsewhere. On the contrary, it is clear that, on a motion to stay proceedings on the ground of *lis alibi pendens*, the court has a discretion to stay or not to stay the proceedings, and may at that stage put the plaintiff to his election in regard to the court in which he will proceed. I very much doubt, therefore, whether the doctrine of election, as enumerated in the cases referred to, could ever be applied to a case such as the present, where the wife's only choice so far has been in regard to the court in which she will pursue the remedy which she undoubtedly has. In any case I am not satisfied, on the facts of the present case, that the wife has ever, so far, done anything which could be dignified by the name of an election in the sense of a final and irrevocable choice. The words used by her counsel at the trial of the suit appear to me to amount to no more than a statement of present intention—an explanation to the court

in regard to the reason for the absence of any prayer for maintenance in the petition. If the wife were to be held irrevocably bound by any such statement by counsel, it would seem to be logical to say that she would equally be bound by a similar intimation in the course of solicitors' correspondence at any stage of the proceedings. Carrying the argument one stage further, why should she not be said to have made an irrevocable election by including no claim for maintenance in her petition? Plainly, such a contention would be absurd, yet, logically, I do not see why a statement by counsel at the trial, in the circumstances in which this statement was made, should be treated as having any more binding effect. The fact is that by the Matrimonial Causes Rules, 1947, r. 44 (1), a wife is not required to assert her claim for maintenance until decree absolute and two months thereafter. Moreover, even after that time she may still assert such a claim by leave of the court. Up to the time when this application was, in fact, filed, *viz.*, Aug. 15, 1949, I cannot see that the wife had done any unequivocal act, within the principles laid down in *Scarf v. Jardine* (2), such as to show an irrevocable election to rely only on the order of the justices and to waive her rights in the High Court. Reliance is placed on the fact that after that time, and notwithstanding the filing of the present application, she continued to retain in force the order of the justices. It seems to me, however, that the most that can be said against her in that respect is that her conduct after Aug. 15 was equivocal. Nothing that happened after that date could be regarded as evidence of an irrevocable election in favour of the order of the justices.

Assuming, however, that I am wrong in all that I have said so far, it appears to me that there is another fatal objection to the husband's contention. Even if the wife, by the statement of her counsel and by her subsequent conduct, did purport to make an irrevocable election not to apply for maintenance in the High Court, such a purported election would, in my judgment, offend against the principles laid down by the House of Lords in *Hyman v. Hyman* (6), and would not be binding on her. In that case it was held that the terms of a separation agreement entered into before the institution of divorce proceedings could not be relied on to oust the jurisdiction of the court to award the wife maintenance, but the members of the House made it clear that, in their view, any agreement entered into between the parties at any stage, whereby it was sought to limit or control the jurisdiction of the court to award maintenance to a wife, would be void and unenforceable. The reason for this is that the statutory right to maintenance is accorded to a wife as much in the public interest as for her own benefit, and it is, therefore, a right which it is not competent for her to renounce or barter away by agreement. The same principle was recently followed by the Court of Appeal in *Gaisberg v. Storr* (7), where it was held that a husband's undertaking, given during divorce proceedings, to make weekly payments, in consideration of the wife undertaking not to apply for alimony pending suit or for permanent maintenance, did not in any way preclude the wife from claiming alimony pending suit or permanent maintenance. Applying the same principle to the present case, if it is not competent for a wife by agreement to contract out of her statutory right to claim maintenance in this court, I do not see how it is possible for her, by any unilateral statement or conduct on her part, to renounce or waive such right, at any rate up to the time of decree absolute and two months thereafter. It was further argued by counsel on behalf of the wife, following the principles applied in *Ward v. Baugh* (8) and *Fytche v. Fytche* (9) that, even assuming the wife herself to be barred by an irrevocable election on her part to rely only on the order of the justices, such an election on her part could not in any circumstances bind the child of the marriage, so as to bar a claim for maintenance in this court on behalf of the child. In view of the conclusion which I have already stated, it is unnecessary for me to express any opinion on this further point, but I merely refer to the argument presented to me so as to keep the point open in the event of an appeal.



This being my conclusion on the question of law argued before me, it remains for me to consider what order I ought to make in the circumstances. I was invited by counsel on both sides to regard the whole matter, including all questions of *quantum*, as being referred to me, and, in the event of my deciding (as I have decided) that the claim is not barred, to proceed forthwith to the making of a maintenance order. It should be stated that the question of *quantum* has already been considered by the learned district registrar, who has reached a tentative conclusion in regard to what would be an appropriate sum by way of maintenance for the wife and child respectively, assuming that the claim is admissible. After consideration I have come to the conclusion that, notwithstanding the invitation of counsel, it would be wrong for me to make an order for maintenance at the present stage. To do so now, while the order of the justices is still in force, would be contrary to the ruling in *Kilford v. Kilford* (1), by which I hold myself bound, and with which, in any case, I agree. It is stated in *RAYDEN ON DIVORCE*, 5th ed., p. 473—correctly, in my judgment—that the court will not hear the application and make an order subject to the discharge of the justices' order. The wife can have only one order in force at one time. If I make an order now, as I am invited to do, the wife will have two orders in force at the same time, and she will be in a position to enforce whichever appears to her the more favourable, and to apply for the discharge of the other. In my judgment, she is not entitled to be put in any such privileged position. I propose to follow *BARNARD, J.*, in *Kilford v. Kilford* (1), and to say that the wife must now make up her mind whether she will rely on the order of the justices, or whether she prefers to have that order discharged so as to make way for an order of this court. I propose, therefore, to adjourn this application for twenty-eight days. If at the expiration of that time the order of the justices remains undischarged, this application will stand dismissed. But if within that time the wife shall have obtained the discharge of the justices' order, she will be at liberty to renew this application before the district registrar, to whom I refer the matter to make such order as he may think fit. Since this result amounts to a substantial success for the wife, I think that she should have her costs of the proceedings both before the district registrar and before me. Such costs as may be included in any renewal of the application before the district registrar, I reserve to him. But, without wishing in any way to fetter his discretion in the matter of costs, I think it is proper to point out that, if the wife feels that the order of the justices is inadequate in present conditions the justices now have jurisdiction under the Married Women (Maintenance) Act, 1949, s. 1, to award substantially larger amounts than the amounts payable under the Married Women (Maintenance) Acts, 1895 and 1920, so that she is in no way bound to have recourse to this court in order to obtain a more favourable order.

Solicitors: *Blundell, Baker & Co.*, agents for *Brighouse, Jones & Co.*, Southport (for the wife); *Haslewood, Hare & Co.* (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

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*Re* MACADAM (No. 2). *Ex parte* GUILLAUME AND ANOTHER  
v. THE TRUSTEE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.J.J.),  
February 27, 1950.]

*Bankruptcy—Appeal—Appeal to Court of Appeal—Appeal out of time—Jurisdiction of Court of Appeal to grant leave—Need to show special circumstances—R.S.C., Ord. 58, r. 15—Bankruptcy Rules, 1915 (S.R. & O., 1914, No. 1824), r. 130, r. 134.*

The trustees of a settlement appealed to the Divisional Court of the Chancery Division against a decision of a court judge that the settlement (which was made within two years of the bankruptcy of the settlor) was not for valuable consideration and could therefore be impeached by the settlor's trustee in bankruptcy under the Bankruptcy Act, 1914, s. 42 (1). On Jan. 23, 1950, the Divisional Court dismissed the appeal, but gave the settlement trustees leave to appeal to the Court of Appeal. During a casual conversation after the hearing, the solicitors for the settlement trustees raised the question of the time allowed for the appeal, and counsel in error suggested that the period was six weeks. On Feb. 22, 1950, the solicitors attempted to lodge a notice of appeal, but the clerk refused to permit the lodgment on the ground that having regard to the Bankruptcy Rules, 1915, r. 130, no appeal to the Court of Appeal from any order of the court could be brought after the expiration of twenty-one days. The settlement trustees now applied for leave to appeal out of time.

**HELD:** despite the elimination in 1909 from Ord. 58, r. 15, of the words "special leave of the Court of Appeal," it was still necessary, in cases subject to the Bankruptcy Rules, 1915, having regard to r. 130 thereof, to show special circumstances before leave to appeal out of time could be granted; and, although a mere mistake by a legal adviser did not constitute "special circumstances," on the facts of this case the circumstances as a whole were adequate to justify the granting of the leave sought.

*Re Coles & Ravenshear* ([1907] 1 K.B. 1), *followed*.

[AS TO TIME FOR APPEAL, see HALSBURY, Hailsham Edn., Vol. 2, pp. 401, 402, para. 546; and FOR CASES, see DIGEST, Vol. 4, pp. 529-531, Nos. 4840-4866.]

Cases referred to:

- (1) *Re Coles & Ravenshear*, [1907] 1 K.B. 1; 76 L.J.K.B. 27; 95 L.T. 750; 2 Digest 561, 1937.
- (2) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916; [1939] Ch. 841; 108 L.J.Ch. 380; 161 L.T. 208; Digest Supp.
- (3) *Re Macadam*, *ante* p. 303.

**MOTION** by the trustees of a settlement for leave to appeal out of time.

The events leading up to the application are stated in the headnote. The decision of the Divisional Court from which it was now desired to appeal is reported *ante* p. 303.

*M. J. Albery* for the trustees of the settlement.

*J. K. Wood* for the trustee in bankruptcy.

**SIR RAYMOND EVERSLED, M.R.:** This is an application for an extension of the time wherein an appeal to this court can be lodged against an order of the Divisional Court made on an appeal from His Honour JUDGE ARCHER, K.C., at Brighton and Lewes County Court on Nov. 10, 1949. The appeal was heard by the Divisional Court on Jan. 23, 1950, and was then dismissed, but the order was not drawn up until Jan. 31. It is not in doubt that the time for the purpose of an appeal ran from the former date, Jan. 23. It is also not in doubt

that, subject to any powers we may have (which I will mention in a moment) the period for entering an appeal was twenty-one days from that date. The trustees of the settlement attempted to enter the notice of appeal on Feb. 22, but that was some ten days or so out of time, and this application is so to extend the time as to enable that notice of appeal to be made effective.

The matter of appeal is governed by the rules in bankruptcy which have been in operation since 1915. They provide, by r. 134:

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"Subject to the foregoing rules, appeals to the Court of Appeal shall be regulated by Ord. 58 of the Rules of the Supreme Court, 1883,"

and any amending rules. As I shall have occasion to observe presently, in 1915 Ord. 58 had been amended in a material respect, and the effect of that amendment was to give to this court much greater latitude in matters of this kind and a much wider discretion than it had earlier possessed. Rule 130 of the Bankruptcy Rules, 1915, provides:

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"Subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the court shall be brought after the expiration of twenty-one days."

Counsel for the applicants has argued that the effect of the two rules read together and of the change in the Rules of the Supreme Court is that the power of the Court of Appeal to extend the time for appeal is not now limited to a case in which special circumstances have been shown. I am unable to accept that argument. It seems to me that those two rules, read together, plainly mean that the time for appeal is limited as stated subject to the powers to extend time which the Court of Appeal have under the ordinary rules, which powers shall only be exercised "under special circumstances."

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I deal next with the history so far as it affects Ord. 58 of the Rules of the Supreme Court. Before 1909 Ord. 58, r. 15, provided that the powers of the Court of Appeal to extend time should be limited according to this formula, namely, that the time for appeal should be as fixed in the rules subject to extension "by special leave of the Court of Appeal." In 1909 (by R.S.C. May, 1909), the words I have just read, "special leave of the Court of Appeal," were eliminated so that there was no longer need to prove anything special, and the matter became simply one for the free and unfettered discretion of the court in view of the circumstances in each case as it came before it. But before that change had been made, it had been decided in *Re Coles & Ravenshear* (1) that a mistake on the part of the legal advisers of the would-be appellant should not be counted as "special circumstances" such as would justify leave being given by the Court of Appeal under the old rule, *i.e.*, it was held by this court that, in order to obtain the "special leave of the Court of Appeal," special circumstances must be shown and a mistake by a party's legal advisers did not constitute such circumstances. Counsel for the applicants has drawn attention to the fact that in the more recent case of *Gatti v. Shoosmith* (2) this court pointed out that the effect of the alteration of the rule which removed the necessity of proving special circumstances was that in a case to which the ordinary rule applied it was no longer to be treated as conclusive against the applicant that the reason for the delay had been merely due to mistake; that that, in itself, would not be fatal to the application, but the court was entitled to consider every case on its merits; and, if it thought that, notwithstanding the mistake, it was right and proper to give leave, there was power to do so. In my judgment, however, that change which the alteration of Ord. 58 effected as regards ordinary appeals is inapplicable to bankruptcy appeals, for the reason which I have already stated—that the powers to grant extension of time are, in the case of bankruptcy appeals, limited by the phrase "under special circumstances." If, therefore, the only matter which is relied on by the applicants is a mistake on the part of the legal advisers, this court would be bound to hold, as I conceive, following

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*Ravenshear's* case (1), that such a mistake does not constitute a special circumstance.

A What are the facts here? It is said in an affidavit by the solicitors to the applicants that the reason why they sought to enter the appeal on Feb. 22 instead of within the period of twenty-one days was a casual conversation with the learned counsel who appeared in the court below as a result of which they were misled into thinking that they had got six weeks from the time when the order was made and they forbore to read r. 130 of the Bankruptcy Rules, 1915. That, of itself, as I have indicated, would appear to me to be insufficient to deprive the successful party of the right to say: "No, I have won my case and the order made should not now be disturbed merely because the other side have made a mistake." Indeed, it was a casual conversation which was the cause of the trouble in *Re Coles & Ravenshear* (1). But that is not quite all in the present case. In the first place, the applicants here are the trustees of a settlement. As I follow it, from my recollection of reading the report in the ALL ENGLAND LAW REPORTS of the proceedings before the Divisional Court (*Re Macadam* (3)), the cost of certain premises was provided in part by the trustees out of trust moneys and in part by the bankrupt, and the question was whether that transaction could be successfully impeached in the bankruptcy. There may be persons other than the bankrupt interested under the settlement. The point which was considered by the Divisional Court was obviously one of some importance in principle, and the learned judges went so far, when asked to grant leave to appeal, as to say that they thought it a case proper to go to the Court of Appeal. The property remains vested in the trustees, so that it may be fairly said with greater emphasis than could be said in other cases that the property remains where it was, and nobody is the worse off for this mistake. I also bear in mind, as I think it is legitimate to do, that in *Gatti v. Shoosmith* (2) this court indicated that the court regarded fetters on its discretion with some disfavour. That can, I think, be fairly taken into account, though, of course, it would be quite improper on the view which I take for this court to do other than loyally follow *Re Coles & Ravenshear* (1) or to suggest that it was not correct. But, when all the circumstances are added together—the fact of there being here trustees concerned and persons interested under a settlement, the fact that the property remains safely in the trust, the fact that special leave to appeal was given by the Divisional Court (which was, at any rate, some intimation to the trustee in bankruptcy that the question of an appeal was going to be considered), the fact that counsel who has been good enough to attend and assist us on behalf of the trustee in bankruptcy is obviously not disposed to press very strongly for the rejection of the application—I think that there is just sufficient—but, in my judgment, only just—to say that there are special circumstances which would justify the court in this case in granting the application sought. It will be, of course, on the terms that the applicants pay the costs of the trustee which have been occasioned by this application. It is unnecessary to say whether those costs ought or ought not in any circumstances to be charged against the trust estate. That is a matter beyond our jurisdiction, but for the reasons I have indicated, and without in any way desiring to cast doubt on the validity of the view expressed in WILLIAMS ON BANKRUPTCY, 16th ed., p. 617, that a mere mistake by counsel or solicitor or both would not qualify as special circumstances, nevertheless, as I have said, in this case I think it would be right to give leave to appeal.

DENNING, L.J.: I agree.

JENKINS, L.J.: I also agree.

*Application allowed accordingly.*

Solicitors: *Guillaume & Sons* (for the trustees of the settlement); *Gibson & Weldon*, agents for *Farrington & Winterton*, Brighton (for the trustee in bankruptcy).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## FOWLER v. BRATT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.J.J.), February 27, 28, 1950.]

*Agent—Commission—Estate agent—Instructions to find “ purchaser ”—Purchaser bound by law to purchase.*

The defendant instructed the plaintiff, an estate agent, to “ find a purchaser ” for his (the defendant’s) house at a price of £3,000. A

**HELD:** to earn his commission the plaintiff had to produce a purchaser who was bound in law to buy the property at the price agreed.

*Dicta of LORD RUSSELL OF KILLOWEN and LORD ROMER in Luxor (Eastbourne), Ltd. v. Cooper* ([1941] 1 All E.R. 44, 64), *applied*.

*Jones v. Lowe* ([1945] 1 All E.R. 194); *E. H. Bennett & Partners v. Millett* ([1948] 2 All E.R. 929); and *Murdoch Lownie v. Newman* ([1949] 2 All E.R. 783), *approved*. B

[AS TO AGENTS’ RIGHTS TO REMUNERATION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-263, paras. 432-436; and FOR CASES, see 2nd Digest Supp.]

Cases referred to :

- (1) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108 ; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp. C
- (2) *Jones v. Lowe*, [1945] 1 All E.R. 194; [1945] K.B. 73; 114 L.J.K.B. 164; 172 L.T. 18; 2nd Digest Supp.
- (3) *Bennett (E.H.) & Partners v. Millett*, [1948] 2 All E.R. 929; [1949] 1 K.B. 362; [1949] L.J.R. 1050; 2nd Digest Supp.
- (4) *Murdoch Lownie, Ltd. v. Newman*, [1949] 2 All E.R. 783. D
- (5) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; 103 L.J.K.B. 634; 152 L.T. 88; Digest Supp.
- (6) *Long v. Millar*, (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 1 Digest 627, 2516.
- (7) *Stokes v. Whicher*, [1920] 1 Ch. 411; 89 L.J.Ch. 198; 123 L.T. 23; 12 Digest 143, 967.
- (8) *E. P. Nelson & Co. v. Rolfe*, [1949] 2 All E.R. 584; [1950] 1 K.B. 139. E

APPEAL by the defendant from an order of His Honour JUDGE L. C. THOMAS, made at Cardiff County Court, on Nov. 11, 1949, whereby he allowed the plaintiff’s claim for commission. The facts appear in the judgment.

The plaintiff, an estate agent, alleged that he had, in accordance with the defendant’s instructions, found a purchaser for the defendant’s property. The defendant failed to complete, and, on the plaintiff claiming commission, resisted the claim on the ground that there was no note or memorandum, within the meaning of s. 40 of the Law of Property Act, 1925, sufficient to bind the purchaser, and, alternatively, that there was no concluded contract between the defendant and the purchaser, because the date for possession had not been agreed. F

*David Pennant* for the defendant.

*Meurig Evans* for the plaintiff. G

**SIR RAYMOND EVERSLED, M.R.:** This action was brought by a Mr. William Howard Fowler, trading as William Fowler & Son, estate agents, in Cardiff, for commission alleged to have been earned in respect of a “ sale ” by him on the defendant’s behalf of certain premises 355, Lansdowne Road, Cardiff, owned by the defendant, at the end of 1948. H

The first question is: What were the terms of the contract between the defendant and the plaintiff, and on that the learned county court judge has expressed no view. That, however, may be understandable because, having considered the evidence, I do not think that there can be any doubt about what the terms were. In his evidence-in-chief the plaintiff said that he received

instructions to sell, and then he adds: "Had to find purchaser willing and able to pay." In cross-examination he said: "I was asked by defendant to find 'a buyer'," and those words are placed by the judge in inverted commas. He goes on: "Neither of us mentioned a person able and willing to purchase." The defendant stated: "Instructed him [the plaintiff] to find purchaser." So the learned judge may well have said to himself: "There is no doubt that the terms of the agency were that the plaintiff was to find a purchaser." At any rate,

A I think it is clear that that is what the evidence shows the bargain to have been.

The next question is: On that footing, what did the plaintiff have to do to earn his commission? In my judgment, the answer to that question is that he had to find, *i.e.*, produce for his principal, a purchaser who was bound in law to buy. That statement I base on the language of LORD RUSSELL OF KILLOWEN and LORD ROMER in *Luxor (Eastbourne), Ltd. v. Cooper* (1). The facts in the *Luxor* case (1) were quite different from those in the present case, and the observations to which I am about to allude and on which I rely were, no doubt, strictly *obiter*. The whole question, however, of the relationship which properly exists between a house owner and an agent employed by him for the purpose of selling was considered most carefully by their Lordships in that case, and I think it would be the duty of this court on any view of it to follow the opinions which I am about to read. I only add that they have been followed in the sense which I attach to them by HILBERY, J., in two recent cases, one *Jones v. Lowe* (2) and the other *E. H. Bennett & Partners v. Millett* (3), to which may be added a decision of SLADE, J., in *Murdoch Lownie, Ltd. v. Newman* (4).

C The first passage in the *Luxor* case (1) to which I would refer is in LORD D RUSSELL's speech ([1941] 1 All E.R. 44) where he says this:

"The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case, it can be said with truth that a 'purchaser' has been introduced by the agent. In other words, the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent."

E That conclusion followed a discussion of *Trollope (George) & Sons v. Martyn Bros.* (5), which LORD RUSSELL criticised, and in that context I think there can be no doubt that LORD RUSSELL is expressing the view that where one has a bargain by which the agent has to introduce a purchaser, the agent, to earn his commission, must produce the result of a binding contract (I am quoting LORD F RUSSELL's language) having been made between vendor and purchaser. LORD ROMER, after discussing the *Trollope* case (5) says this ([1941] 1 All E.R. 64):

"The question, then, to be determined upon the hypothesis which I mentioned just now is this. Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term . . . ?"

G I take those two passages as guiding me to the conclusion I have indicated, namely, that in the present case, where the bargain was that the plaintiff should find a purchaser, he must, to earn his commission, at least produce a person bound in law to buy. Whether it is also necessary that his principal, the vendor, should be bound in law it is unnecessary for the present case to decide. The plaintiff says, and, as I hold, says with truth: "I have found someone. I have found a Mr. T. A. Harris, and he is a person bound at law to buy."

H [HIS LORDSHIP held on construction that the terms of the correspondence, constituted a sufficient memorandum of the contract between the defendant and the purchaser and that the date of possession was not of the essence of the contract, which was, therefore, binding and enforceable against the purchaser, and, accordingly, that the plaintiff was entitled to commission. He continued:]



For these reasons I conclude that we should not disturb the decision of the judge below and I would dismiss the appeal.

DENNING, L.J., and JENKINS, L.J., concurred.

*Appeal dismissed with costs.*

Solicitors: *Rhys Roberts & Co.*, agents for *Myer Cohen & Co.*, Cardiff (for the defendant); *Wrentmore & Son*, agents for *Phoenix & Walters*, Cardiff (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

*Distinguished. Re PAYTON (decd.).*  
[1951] 2 All E.R. 425.

*Re DUKE OF NORFOLK'S WILL TRUSTS. PU*  
*v. INLAND REVENUE COMMISSION*  
*Dictum of JENKINS, L.J., at p. 675 applied. Re LONGBOURNE'S MARRIAGE SETTLEMENT. [1952] 2 All E.R. 933.*

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.J.J.),  
February 10, 13, March 6, 1950.]

*Estate Duty—Continuing annuity—Bequest of annuity for joint lives and life of survivor—Property passing on death of first of beneficiaries to die—Finance Act, 1894 (c. 30), s. 1, s. 2 (1) (b).*

The Finance Act, 1894, s. 1 provides: "In the case of every person dying after the commencement of this Part of this Act, there shall . . . be levied and paid, on the principal value . . . of all property . . . which passes on the death of such person a duty, called 'estate duty' . . ." By s. 2: "(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . ."

A testator, who died on Feb. 11, 1917, bequeathed to the trustees of his will certain property to pay out of the income therefrom an annuity to commence from his death and to continue payable during the joint lives of his brother A. and his brother's son B. and the survivor of them, and to be paid to A. during his lifetime and after his death to B. On May 18, 1947, A. died leaving B. him surviving, and the Inland Revenue claimed that estate duty thereupon became payable either (a) under s. 1 of the Act of 1894 in respect of the share producing the said annuity of the property charged therewith, being a share thereof bearing the same ratio to the whole as the said annuity bore to the whole income of the same property, or (b) under s. 2 (1) (b) in respect of the property charged with the payment of the said annuity to the extent by which a benefit accrued or arose by the cesser of the interest of the said deceased therein, such benefit to be valued in the manner prescribed by s. 7 (7) of the Act.

**HELD:** (i) sections 1 and 2 were mutually exclusive; on the death of A. the property passing was the benefit of the annuity, which was taxable under s. 1; and there could not also be deemed to pass under s. 2 (1) (b) a "slice" of the property calculated according to s. 7 (7) (b).

*Cowley (Earl) v. Inland Revenue Comrs.* ([1899] A.C. 198), considered, and dictum of LORD MACNAGHTEN therein (*ibid.*, 212), applied.

*Re Cassel* ([1927] 2 Ch. 275), approved and followed.

*Decision of WYNN-PARRY, J.* ([1949] 2 All E.R. 701), affirmed.

(ii) the property taxable under s. 1 was not (as in the case, for instance, of the death of one of a number of life tenants interested in the same

property) a proportionate part of the capital, but the annuity itself, and duty should be charged in respect of its actuarial value.

[AS TO PROPERTY PASSING ON THE DEATH, see HALSBURY, Hailsham Edn., Vol. 13, pp. 232-237, paras. 222-226; and FOR CASES, see DIGEST, Vol. 21, pp. 7-10, Nos. 21-42.]

Cases referred to:

- A (1) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.
- (2) *Re Cassel*, [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; Digest Supp.
- (3) *Christie v. Lord Advocate*, [1936] 1 All E.R. 443; [1936] A.C. 569; 105 L.J.P.C. 65; 154 L.T. 441; Digest Supp.
- (4) *Re Northcliffe*, [1929] 1 Ch. 327; 98 L.J.Ch. 65; 140 L.T. 300; Digest Supp.
- B (5) *Inland Revenue Comrs. v. Crossman, Inland Revenue Comrs. v. Mann*, [1936] 1 All E.R. 762; [1937] A.C. 26; *sub nom. Re Crossman, Re Paulin*, 105 L.J.K.B. 450; 154 L.T. 570; Digest Supp.
- (6) *Bignold v. Giles*, (1859), 4 Drew. 343; 28 L.J.Ch. 358; 32 L.T.O.S. 308; 39 Digest 135, 296.
- (7) *De Trafford v. A.-G.*, [1935] A.C. 280; 104 L.J.K.B. 396; 153 L.T. 17; Digest Supp.
- C (8) *A.-G. v. Watson*, [1917] 2 K.B. 427; 86 L.J.K.B. 1034; 117 L.T. 187; 21 Digest 10, 37.

APPEAL by the Crown from an order of WYNN-PARRY, J., dated Oct. 19, 1949, reported [1949] 2 All E.R. 701, made on an originating summons by which it was sought to determine the basis on which estate duty became payable on the death of Viscount Fitzalan.

- D By his will, the testator, Henry, fifteenth Duke of Norfolk, provided a fund on trust out of the income therefrom to "pay any annuity or annuities which may be bequeathed by any codicil hereto." By a first codicil to his will the testator bequeathed to his trustees an annuity of £3,000 to commence from the day of his death and to continue payable during the joint lives of his brother, E Viscount Fitzalan, and his said brother's son, Henry Edmund Talbot, and during the life of the survivor of them, and he directed that his trustees should stand possessed of the said annuity on trust to pay it to Viscount Fitzalan during his life on protective trusts. In the same codicil the testator further declared that after the death of Viscount Fitzalan, on certain (in the events, irrelevant) conditions, the trustees should pay the annuity to Viscount Fitzalan's said son F during his life on similar protective trusts. By a second codicil the amount of the annuity was reduced to £2,000. On Feb. 11, 1917, the testator died. On May 18, 1947, Viscount Fitzalan died, the protective trust not having operated to determine the payment to him of the annuity of £2,000. Viscount Fitzalan was survived by his son. The summons raised the question whether on the death G of Viscount Fitzalan estate duty became payable (i) under the Finance Act, 1894, s. 1, and only on the value (calculated under s. 7 (5) of the said Act) of a continuing annuity of £2,000 for the life of the son, or (ii) under s. 2 (1) (b) of the said Act on the capital value (ascertained according to s. 7 (7)) of the proportion of the testator's estate required to produce an annuity of £2,000. By leave of the Court of Appeal and with the consent of the plaintiff, the Public H Trustee, the Crown before the Court of Appeal advanced contention (a) stated in the headnote, in addition to contention (b) which alone had been argued before WYNN-PARRY, J.

*Sir Andrew Clark, K.C.*, and *J. H. Stamp* for the Crown.

*Upjohn, K.C.*, and *H. A. Rose* for the Public Trustee, the sole trustee of the will of the testator.

*Cur. adv. vult.*

Mar. 6. The following judgments were read.

**SIR RAYMOND EVERSLED, M.R.** (read by **SOMERVELL, L.J.**): In this appeal the Inland Revenue Commissioners have taken two distinct points, the first having been added by our leave and by consent of the plaintiff respondent to the notice of appeal, it not having been taken before **WYNN-PARRY, J.** These two contentions are clearly stated by the terms of the notice of appeal as amended and are as follows:

“That in the events which have happened estate duty became payable upon the death of the Right Honourable Edmund Bernard Viscount Fitzalan of Derwent either (a) under the Finance Act, 1894, s. 1, in respect of the share producing the said annuity of the property charged therewith being a share thereof bearing the same ratio to the whole as the said annuity bears to the whole income of the same property, or (b) under the Finance Act, 1894, s. 2 (1) (b), in respect of the property charged with the payment of the said annuity to the extent by which a benefit accrued or arose by the cesser of the interest of the said deceased therein such benefit to be valued in the manner prescribed by s. 7 (7) of the said Act.”

If the Crown is entitled to succeed under either head of appeal, the result will be to effect a change in the practice hitherto adopted by the Estate Duty Office in levying estate duty in respect of a single annuity bequeathed to several persons in succession on the deaths of the annuitants (other than of the last). That circumstance is not in itself a valid reason for rejecting the Crown's contention, though (having regard to the numerous occasions on which revenue statutes are reviewed by Parliament) it inclines me to regard the contention with caution. The second ground of appeal involves the existence (at least) of an option in the Crown as regards the basis on which estate duty may be charged in respect of one and the same subject of benefaction, and this also appears to me to require that the argument be cautiously received. It was only the second ground which was considered—and rejected—by **WYNN-PARRY, J.**, and, since we are all agreed that the view of the learned judge was correct, I propose to deal with it first.

The relevant facts are stated in the report of the decision of **WYNN-PARRY, J.** ([1949] 2 All E.R. 701), and need not be repeated. According to this head of the Crown's argument, there arose on the death of the testator's brother, Viscount Fitzalan, who had enjoyed the first life interest in the annuity of £2,000 per annum bequeathed by the will and codicils, two distinct subject-matters of taxation, namely (i) the annuity itself, *i.e.*, the right to receive the sum of £2,000 per annum for the remainder of the life of Viscount Fitzalan's son; and (ii) the benefit which accrued to the Norfolk estates by the cesser of Viscount Fitzalan's right to enjoy the annuity. It is clear that the first subject falls to be taxed exclusively by reference to s. 1 of the Act of 1894, but that the second can only be taxed (if at all) by virtue of s. 2 (1) (b) of the Act. **WYNN-PARRY, J.**, was of opinion that the simultaneous existence of a right to tax under s. 1 and s. 2 was inconsistent with the well-known statement of **LORD MACNAGHTEN** in *Earl Cowley v. Inland Revenue Comrs.* (1), and could not, therefore, be sustained. I agree with him. It is true that the actual language used by **LORD MACNAGHTEN**, and, particularly, his phrase ([1899] A.C. 212) “... s. 2 does not apply to an interest in property which passes on the death of the deceased,” was used in reference to a case in which only one possible subject-matter of taxation was under consideration and that it is of the essence of the Crown's argument in the present case that there are two distinct proprietary interests. Counsel for the Crown observed further that the celebrated pronouncement of **LORD MACNAGHTEN**, which has constituted one of the most significant decisions on the interpretation of the Finance Act, 1894, did not, in fact, represent the determination of an issue argued in the *Cowley* case (1). Nevertheless, I think with **WYNN-PARRY, J.**, that **LORD MACNAGHTEN**'s opinion ought not to be regarded as subject to such refinement, and that the law (at



any rate in the courts of first instance and in this court) must be taken to be that as regards any such single benefaction as that with which we are concerned the application of s. 2 of the Act is necessarily excluded by the application to the annuity itself of s. 1.

In conceding that the Crown had only an option under this part of his argument, counsel for the Crown stated that he was compelled so to do by the terms of s. 7 (10) of the Act which provides :

“ Property passing on any death shall not be aggregated more than once, nor shall estate duty in respect thereof be more than once levied on the same death.”

I am inclined to think that counsel is thereby shown to be on the horns of a dilemma, for, if he is right in saying that there are here, in truth, two distinct properties, two distinct subject-matters of taxation, then, *prima facie*, I should have thought s. 7 (10) would be inapplicable. On the other hand, if there is but one property, one subject-matter of taxation (as the invocation of s. 7 (10) seems to import), the argument necessarily fails *in limine*.

WYNN-PARRY, J., felt himself further bound by the decision of RUSSELL, J., in the second case of *Re Cassel* (2). Again I think the learned judge was right, but since there has been in this court considerable argument on the true effect of that decision and of the views taken of it in subsequent cases, including, particularly, *Christie v. Lord Advocate* (3), and since the consideration of this matter is pertinent also to the first head of the Crown's argument before us, I will give my reasons for construing the decision of RUSSELL, J., in the way which WYNN-PARRY, J., adopted. The subject-matter in *Re Cassel* (2) which gave rise to the claim for duty was a direction in the testator's will that during a period of years ending in 1995 the trustees should provide the annual sums required for payment of rent, rates and certain other outgoings in respect of premises known as Brook House, which was itself bequeathed in trust for the benefit of several persons in succession. The first of these persons had died. RUSSELL, J., expressed his own view that, apart from authority, he would have supposed in the case of a gift to A. for life followed by an absolute gift of the same subject-matter to B. that no property “ passed ” within the meaning of s. 1 of the Finance Act, 1894, and that tax would have been levied as on the cesser of an interest by virtue of s. 2 (1) (b), but he regarded himself bound by the *Cowley* case (1) to hold that there was in truth a passing within s. 1. He further stated that, had he been at liberty to follow his own inclinations in the case before him, he would, in accordance with s. 7 (7) (b) of the Act, and by taking the average amount expended annually by the trustees in respect of rent and other outgoings at £5,000, have fixed the “ slice ” deemed to have passed at £78,250. Since, however, *ex hypothesi*, this method of assessment was not open to him and there was a direct “ passing ” of property, namely, the right to receive or enjoy the benefit of the variable annual sums, he was faced with the difficulty of determining, pursuant to s. 7 (5) of the Act, the principal value “ in the open market ” of something which, from its nature, could have no market and was in other respects obviously most difficult of estimation.

The above is, in my judgment, a brief but essentially accurate statement of RUSSELL, J.'s decision so far as relevant to the present case, and it involves necessarily the determination that, for estate duty purposes, an annual sum bequeathed to or for the benefit of several persons in succession is the property which passes on the deaths of such persons (save the last) and that the duty is exigible in respect of its capital value. Thus the learned judge said ([1927] 2 Ch. 280):

“ What then is the property which passes on Mrs. Cassel's death ? In my opinion the true answer is the benefit of the annual sum payable under the special clause . . . What passes is the right to enjoy the benefit of that

annual sum. That is the property which passed on the death of Mrs. Cassel."

In my judgment, accordingly, WYNN-PARRY, J., rightly held that the present case, at least so far as he was concerned, was governed by *Re Cassel* (2). In this court we were invited to take a different view and to hold either (i) that *Re Cassel* (2) was a decision depending solely on its own peculiar facts and inapplicable in principle to a case of an ordinary continuing annuity, or (ii) that it was wrongly decided.

To the first ground of criticism, colour is undoubtedly lent by certain observations, first of MAUGHAM, J., in *Re Northcliffe* (4), and secondly of LORD RUSSELL himself as a member of the House of Lords in *Christie v. Lord Advocate* (3). Both the two last mentioned cases were instances of dispositions of aliquot shares of the general income of an estate to be enjoyed in succession, as distinct from an annuity or yearly sum which, even though variable (as in *Re Cassel* (2)), is in no way dependent on, or related to, the general income of the estate, and they constitute authority for the proposition that on the death of the first taker of the aliquot share of income there is a "passing" within s. 1 of the Act of a like share of the corpus, but they are, in my judgment and for reasons which I will later give, no authority for the view that on the death of the first taker of a continuing annuity there is a passing of any part of the corpus of the property out of which the annuity is raised or on which it may be charged. In distinguishing from his own case of *Re Northcliffe* (4) that of *Re Cassel* (2), MAUGHAM, J., used of the latter these words ([1929] 1 Ch. 333):

"It was therefore almost impossible to say that the principal value of the property out of which that sum had to be paid passed on the death of the first tenant for life. Accordingly, quite naturally as I think, he [RUSSELL, J.] came to the conclusion that the case was of a very special character, and there being no section of the Act of 1894 which really exactly applied, it had to be met by holding that what passed was the benefit of the annual sum which was payable under the special clause."

It is true that the relevant provision in *Re Cassel* (2) was of a "very special," that is, unusual, character, but with the greatest respect to MAUGHAM, J., in other respects he appears to me to have misapprehended RUSSELL, J.'s decision and the basis on which it rested. As I have already stated, RUSSELL, J.'s own opinion would have favoured, in the case before him as in the case of successive interests in an aliquot share of general income, a notional passing under s. 2 of the Act. Had he been free so to decide, he would have found no difficulty in arriving at the appropriate capital sum. He, in fact, did the calculation and arrived at the figure of £78,250, but he held himself (rightly) bound to treat both types of case as falling under s. 1 of the Act. There was thus no question but that s. 1 did in fact and "exactly" apply to the annual sums in question, and the property to which it applied was "the benefit of the annual sum payable under the special clause."

But RUSSELL, J., appears himself (as LORD RUSSELL OF KILLOWEN) to have felt some misgiving in *Christie's* case (3), for, in the course of his opinion in that case, he said of his earlier judgment ([1936] 1 All E.R. 447):

"That was indeed a very special case, in which, it having been decided that the *Cowley* case (1) compelled me to treat it as falling within s. 1 of the Act, it became apparent that no capital sum could be earmarked as producing either actually or notionally an annual sum which necessarily varied in amount within elastic limits. I indicated, as best I could, the lines upon which a valuation might be fairly reached."

It must be confessed that the language I have quoted seems to indicate that LORD RUSSELL may then have thought that only the "very special" circumstances of the *Cassel* case (2) prevented its determination on lines similar to those applicable to cases of aliquot shares of income, i.e., by regarding the

property which passed as the appropriate capital amount which "produced" the annual sums. LORD RUSSELL, however, was only concerned to show that *Re Cassel* (2) was no authority for a method of taxing an aliquot share of general income. The ordinary case of a continuing annuity was not present to his mind. Nor is it suggested in the present case that the method of assessment appropriate to a continuing annual sum, whether fixed or variable, determines the method of assessment for an aliquot share of income. The two things are, for estate duty purposes, essentially different, but, in my judgment, the principle of *Re Cassel* (2) is the principle appropriate to a continuing annuity such as that in the present case, which is in essential characteristics the same as the annual sum in *Re Cassel* (2). The real difficulty in *Re Cassel* (2) (and the only difficulty) lay, not in deciding by reference to which section, s. 1 or s. 2, duty was exigible, but, having regard to the peculiar and "special" nature of the annual sums provided, in discovering the "principal value" of those sums by applying the method of estimation enjoined by the relevant s. 7 (5) of the Act. Thus, finally, in *Crossman's* case (5), LORD RUSSELL himself again observed ([1936] 1 All E.R. 788):

"I have recently explained in *Christie v. Lord Advocate* (3) how very special that case [*Re Cassel* (2)] was in its facts; and that all that I did was to indicate, as best I could, the lines upon which a valuation might fairly be reached of a benefit which (being purely personal) could not be offered for sale at all."

I should add that counsel for the Crown further criticised RUSSELL, J.'s decision in *Re Cassel* (2) on the ground that, on the hypothesis that s. 2 applied, his taking for the purposes of his calculation the average figure of £5,000 was in excess of the directions to be found in s. 7 (7) (b). I cannot take that criticism seriously. The provisions of that paragraph have only been rendered workable by giving a most liberal interpretation to its enigmatic language. I cannot think such an objection would be found in the commissioner's mouths when, on the death of the last individual to enjoy the benefit of the special clause, s. 2 (1) (b) and s. 7 (7) (b) of the Act would in any case have to be applied.

I have dealt at length with this aspect of the matter because of its prominence in the course of the argument and because of confusion which has arisen out of what, with all respect, I venture to think was the misapprehension on the part of MAUGHAM, J., of RUSSELL, J.'s, decision. For reasons which I have given, I think *Re Cassel* (2) is (as WYNN-PARRY, J., thought it was) an authority in principle governing the case of successive interests in a continuing annuity, and I am inclined also to think, after *Christie's* case (3) and *Crossman's* case (5) in the House of Lords, that it is an authority binding this court also. If so, that is the answer to the second argument of counsel for the Crown in regard to *Re Cassel* (2) noted above, *i.e.*, that it was wrongly decided. I now arrive at the first ground of the Crown's appeal, namely, that in the case of a continuing annuity, as in the case of aliquot shares of general income, the property passing within s. 1 of the Act is some share or portion of the corpus of the estate.

Accepting without reservation that in the case of aliquot shares of the general income of an estate there is, having regard to the language of s. 1 of the Act, and, particularly, the use of the words "settled or not settled," a "passing" of a corresponding part or share of the corpus of the estate, it does not, in my judgment, follow either as a principle of construction of the statute (established by authority) or in logic that there is a similar passing of corpus in the case of a continuing annuity. Indeed, in my opinion, the principle underlying the former class of case is wholly inapplicable and cannot be sensibly related to the latter. In the case of one who has enjoyed for his life the income of (say) one-fourth of the income of an estate, it seems to me in accordance with common sense and a natural use of language to say that he enjoyed for his life, that he



was life tenant of, a fourth part of the (corpus of the) estate, and, accordingly, that on his death a fourth part of the estate passed to the next successor. But no such language can, in my judgment, appropriately be used in the case of an annuitant. He is in no way concerned with changes in the yield of the estate. His right to his annuity will continue whatever income the estate may produce or (unless he has a right to look to income only) though the estate produce no income at all. The share which (according to the suggested analogy) is to be attributed to the annuity will vary from half year to half year. If the general income is exactly equal to the annuity, the corpus passing on his death will be the entirety, and the result will be presumably the same when there is no income at all. The suggested analogy, in my view, involves a confusion of right with remedy, and disregards the essential characteristics of an annuity: see, for example, *Bignold v. Giles* (6), and see also the language once more of LORD RUSSELL OF KILLOWEN in *De Trafford v. A.-G.* (7) ([1935] A.C. 290):

"The present baronet's right to an annual sum of £8,000 gave him no right to the receipt of any particular items of the annual income, or to the income of any particular portion of the estates."

The basis of the contention of counsel for the Crown lay in the fact that (in the present case) the annuitant has a charge on, and, therefore, some kind of interest in, the corpus and every part of it, and can call on the trustees, in the course of their administrative duties, to give effect to such rights. But since the artificial process called the "slice" enjoined by s. 7 (7) (b) has no application, the logical result of counsel's emphasis on these rights of the annuitant seems to me to involve the result that, whatever the arithmetical relation at any point of time between the corpus of the estate and the first taker of a continuing annuity, the whole corpus passes on his death. It is true that in one sense he who is entitled to an aliquot share of general income is also "interested" in the whole estate and can call on the trustees of the whole for due administration of the whole estate, but that right and that interest are irrelevant to the calculation of what property passes on his death. The share of the whole which passes is determined by the necessary and direct relationship between a given proportion of the whole income (whatever it may be) and the like proportion of the corpus out of which the income arises—a relationship which is wholly absent in the case of an annuity. It is true that the distinction may seem a fine one between the two cases, and (more so) between the case of successive takers of a continuing annuity, on the one hand, and the case of takers of successive, but distinct, annuities of the same amount, on the other. But the distinction rests on the essential characteristics of an annuity and (in the case of successive takers of distinct annuities) on the circumstance that there is no passing of any property within s. 1, but an artificial passing within s. 2, which brings into play the statutory method of calculation provided by s. 7 (7) (b). Nor, as it seems to me, would counsel's contention, if accepted, entirely avoid apparent anomalies. If trustees, pursuant to a testator's directions, buy an annuity for a fixed period or for the period ending with the death of the longest liver of a number of persons, counsel concedes that on the death of the first recipient duty could only be levied under s. 1 on the then value of the annuity as such. The distinction rests, says he, on the existence of the charge and the administrative remedies which, in such a case as the present, the annuitant has. With this matter I have already dealt. I am not entirely clear what would, on counsel's argument, be the position where a single and continuing annuity is given to persons in succession, but such annuity is given no charge on any part of the estate. I conceive that the annuity would, in such a case, rank as a legacy, and any annuitant would have the right to have the estate so administered that due provision was made for the annuity before any distribution of residue. In my view, the existence of such an administrative remedy cannot involve the "passing" of some specified portion of the estate.

Counsel further conceded that in the case of a continuing annuity for a specified period of years, the death of the first recipient did not give rise to any benefit to the general estate comparable with that derived, on the happening of the like event, in the case of a continuing annuity for the joint lives of A. and B. and the life of the survivor. But the distinction, if otherwise sound, is irrelevant to this head of the Crown's appeal.

A In opening his case, counsel for the Crown observed that the existing practice of the Estate Duty Office might, and often did, work hardly on the second annuitant, that is, if he only survived the first by a short time. In other cases other methods of taxation have no less been said to work hardships. These are not matters with which we are concerned. In any case, the alleged hardship of the present case is one for which a testator can (and frequently does) make  
B a provision. In truth, the object of the Crown in the present case is (if rightly entitled thereto) to obtain a larger amount of duty. At any rate, if the practice hitherto adopted works unfairly between taxpayers and inadequately for the Crown, Parliament has never thought fit to take any of the frequent opportunities offered to it to remedy those ills. In my judgment, the appeal ought to be dismissed.

C **SOMERVELL, L.J.** : I have had the advantage of reading the judgment which I have just delivered for the Master of the Rolls and that about to be delivered by JENKINS, L.J. I have nothing I wish to add on the point argued before WYNN-PARRY, J. On the point set out in paragraph (a) of the notice of appeal and argued before us I think that there is more force in the argument than do my brethren on the following grounds. The authorities, in particular  
D *Earl Cowley v. Inland Revenue Comrs.* (1), and *Christie v. Lord Advocate* (3), make it clear that where life tenant succeeds to life tenant or life renter to life renter what passes within the meaning of s. 1 is the property producing the life interest. This is so whether the life interest is in the whole or an aliquot part. This indicates the principle on which the Act is based, namely, that property passes to a man in the sense of the words as they appear in the section when he is able to enjoy what that property produces, although he cannot  
E expend the capital. So far as the application of the section is concerned, the same amount of property passes when life tenant succeeds to life tenant as when absolute owner succeeds to absolute owner. MAUGHAM, J., emphasises this very clearly in *Re Northcliffe* (4). What actually passes when life tenant succeeds to life tenant is the life interest. That life interest could be readily valued in  
F the open market, and if the successor is an old man the value would be very much less than the fund in which he gets a life interest. What actually passes, therefore, is not the test. If it were, it is clear that what actually passed in this case was what was left of the one continuing annuity. I was at one time inclined to think that the principle I have set out was applicable in the sense contended for by counsel for the Crown as between successive annuitants. I have, however,  
G come to the conclusion, first, that so to hold would be inconsistent with the decision in *Re Cassel* (2), and that that case, for the reasons given by the Master of the Rolls, is probably now binding on this court. I have also, with some hesitation, come to the conclusion that the argument fails apart from authority. The artificial conception of the "slice" which has been found in the words of s. 7 (7) (b), must, if it is to apply here, be based on implication. There is, of  
H course, no difficulty, when one is dealing with an aliquot share of income, in arriving at the value of the share of the fund producing the income. In the possible case, however, of a single continuing annuity which is being paid in part out of capital, insuperable difficulties seem to me to arise in applying the method for which counsel contends. One cannot imply a principle which would be in some cases unworkable. I therefore think that in this case what passed within s. 1 was the annuity to be valued on the basis set out by JENKINS, L.J., at the conclusion of the judgment which he is about to read.

**JENKINS, L.J. :** By the joint effect of his will and certain codicils thereto, Henry Duke of Norfolk, who died on Feb. 11, 1917, (i) devised and appointed to his wife as sole executor and trustee thereof certain freehold hereditaments for a term of one thousand years on trust (*inter alia*) to pay out of the rents and profits thereof any annuity or annuities bequeathed by him, and (ii) bequeathed to her as such sole executor and trustee an annuity of £2,000 to commence from his death and to continue to be payable during the joint lives of his brother Edmund Bernard Viscount Fitzalan of Derwent (hereinafter called the late viscount) and the late viscount's son Henry Edmund Talbot (hereinafter called the present viscount) and the life of the survivor of them, and to be paid to the late viscount during his life and after his death to the present viscount, subject in both cases to certain protective trusts which are not material for the present purpose. The late viscount died on May 18, 1947, and the present proceedings concern the liability to estate duty on his death in respect of this annuity.

It is not in dispute that, on the true construction of the relevant provisions of the will and codicils, the interest in question is, in truth, one continuing annuity (charged on the estates comprised in the one thousand years term) for the longer of the lives of the two annuitants, and cannot be regarded as comprising two successive annuities, the first ceasing, and the second commencing, on the death of the late viscount. It has been the established practice of the Estate Duty Office, in cases in which one continuing annuity for two or more lives is given to two or more persons in succession and charged on property, to claim estate duty on the death of any annuitant other than the last on the footing that the annuity passes on his death within the meaning of the Finance Act, 1894, s. 1, and attracts duty on its principal value calculated actuarially for the residue of the period for which it is payable (*i.e.*, the lives or life of the remaining annuitants or annuitant), and to claim duty as on a cesser within the meaning of s. 2 (1) (b) of an interest in the shape of the annuity, attracting duty under s. 7 (7) (b) on the proportion of the capital of the property charged corresponding to the proportion of its income theretofore absorbed by the annuity, only on the death of the last annuitant. This practice, whether it gives full effect to the legitimate claims of the Revenue or not, obviously produces less duty than would be realised if a charge as on a cesser of the annuity under s. 2 (1) (b) were made on the death of each annuitant, inasmuch as the "slice" of capital required to produce the annuity, which is chargeable with duty on this basis, must needs be greater, and where the age of the surviving annuitants or annuitant is advanced, very much greater, than the actuarial value of the annuity to which, under the existing practice, the claim on the basis of s. 1 is confined.

Accordingly, the Estate Duty Office, with a view to testing the validity of the practice I have described, and, if possible, establishing a more lucrative interpretation of the law, claimed duty in the present case on the death of the late viscount as on a cesser under s. 2 (1) (b) of an interest in the property charged, in the shape of his life interest in the annuity, bringing about a notional passing of the property charged with the annuity to the extent of the benefit accruing or arising by such cesser, and attracting duty at the appropriate rate on the "slice" of capital declared by s. 7 (7) (b) to constitute the value of such benefit for this purpose. The Public Trustee, who is now sole trustee of the will and codicils of the late duke, resisted this claim, contending that duty only became payable under s. 1 on the value of a continuing annuity of £2,000 for the life of the present viscount, and applied to the court by originating summons for a decision of the question at issue. The case was heard by WYNN-PARRY, J., who, in a considered judgment delivered on Oct. 19, 1947, rejected the claim under s. 2 (1) (b), and made an order declaring that on the death of the late viscount estate duty became payable on the basis contended for by the Public Trustee.



A The Inland Revenue Commissioners now appeal from that order, and, in arguing their appeal, they have, with the leave of the court and the consent of the Public Trustee as respondent, added to the claim under s. 2 (1) (b) a claim not advanced before WYNN-PARRY, J., to the effect that, even if recourse cannot be had to s. 2 (1) (b), nevertheless the admitted passing of the annuity under s. 1 attracted duty not merely on the actuarial value of the annuity for the life of the present viscount, but on a capital "slice" of the property charged with the annuity, ascertained as under s. 7 (7) (b), the property which "passed" by virtue of the "passing" of the annuity being nothing more nor less than this capital "slice."

B I will deal first with the claim as argued before WYNN-PARRY, J. He (in effect) held himself bound by the decision of the House of Lords in *Earl Cowley v. Inland Revenue Comrs.* (1), as applied by RUSSELL, J., in *Re Cassel* (2), to hold (i) that there was an actual passing of the annuity on the death of the late viscount under s. 1; (ii) that s. 1 and s. 2 are mutually exclusive, and that the application of s. 1, accordingly, precluded recourse to s. 2 (1) (b); and (iii) that, accordingly, duty was only exigible under s. 1 as on a passing of the annuity, and could not be claimed under s. 2 (1) (b) as on the cesser of an interest. In my judgment, the learned judge was clearly right in the conclusion to which he came, and the principles by which he was guided in arriving at it are no less binding on this court than they were on him. It is clearly not open to this court to depart from the construction placed on s. 1 and s. 2 over fifty years ago by the House of Lords in *Earl Cowley v. Inland Revenue Comrs.* (1), and followed by their Lordships in the comparatively recent case of *De Trafford v. A.-G.* (7).  
D I need only refer to one passage from the well-known speech of LORD MACNAGHTEN in the former case where he says ([1899] A.C. 212):

E "I am, therefore, compelled to differ from the Court of Appeal at the very outset. I think the present case falls within s. 1. I think it belongs to a class of cases which the authors of the Act had directly in view when they framed that section. Now, if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed, 'With regard to property passing on death, be it enacted as follows.' Section 2 might with equal propriety be headed, 'And with regard to property not passing on death, be it enacted as follows.' I cannot, therefore, agree with RIGBY, L.J., when he says that s. 2 is a provision 'explanatory' of s. 1. In my opinion the two sections are quite distinct, and s. 2 throws no light on s. 1. But, then, no doubt s. 2 speaks of 'property in which the deceased . . . had an interest ceasing on the death of the deceased.' And that, it may be said, was just the position of the second Earl with regard to the Mornington settled estates. So it was. But s. 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section. For property in the lifetime of the deceased subject to a charge or interest which ceased on the death must of course pass free from that charge or interest. And, so passing, it must of course be valued accordingly. That is s. 1. You do not want s. 2 for that. You cannot resort to s. 2. For that would be giving the duty twice over. The Crown cannot have it both ways. Double duty is forbidden by the Act."

H Applying these principles to the case of a continuing annuity in the form of an annual sum of varying amount given by a testator to defray the outgoings and upkeep of a leasehold house settled by his will on successive life tenants, RUSSELL, J., in *Re Cassel* (2), as I think rightly, and, indeed, inevitably, held that on the death of the first life tenant there was an actual passing under s. 1 of property consisting of the right to enjoy the benefit of the annual sum in question, and that s. 2 (1) (b) had no application.

It is not disputed on the part of the Crown that in the present case there was an actual passing of the annuity under s. 1, and that on the principles stated in *Earl Cowley v. Inland Revenue Comrs.* (1) this has the effect of excluding the application of s. 2 (1) (b) so far as the annuity itself is concerned. It is, however, argued that it is, nevertheless, open to the Crown to claim in the alternative that, so far as the property charged with the annuity is concerned, the late viscount's life interest in the annuity was an interest in that property which ceased on his death within the meaning of s. 2 (1) (b), and, accordingly, brought about a notional passing of the property on his death to the extent to which a benefit accrued or arose by the cesser of such interest and thus attracted duty on a "slice" of the capital of the property ascertained as provided in s. 7 (7) (b). A

In my judgment, this alternative contention is wholly inadmissible. As pointed out by WYNN-PARRY, J., it was, in effect, considered and rejected by RUSSELL, J., in *Re Cassel* (2); and it appears to me to have been rightly and necessarily so rejected for the simple reason that it involves doing the very thing which according to *Earl Cowley v. Inland Revenue Comrs.* (1) is not to be done, that is to say, treating an actual passing of property under s. 1 as if it was a cesser of an interest in property under s. 2 (1) (b), which in the words of LORD MACNAGHTEN (*ibid.*, 213) does not refer "to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass." B C  
Once the actual passing of the annuity under s. 1 is established, the cesser of the late viscount's life interest in the annuity must be regarded merely as the event which brought about such passing, and not as the cesser of an interest within the meaning of s. 2 (1) (b). Moreover, it seems to me that, even if the cesser of the late viscount's life interest in the annuity could properly be regarded as a cesser of an interest in the property charged with the annuity within the meaning of s. 2 (1) (b), it would not be a cesser by reason of which any benefit accrued or arose within the meaning of s. 2 (1) (b), read in conjunction with the formula for the valuation of such a benefit provided by s. 7 (7) (b). D  
Section 2 (1) (b), in my judgment, contemplates a cesser of some interest in property or the income thereof which has the effect of discharging the property from the interest so ceasing for the benefit of the persons entitled to it subject to such interest. In other words, the benefit contemplated by the section is a benefit which accrues or arises to the property by reason of the cesser of the interest. This accords with the views expressed by LUSH, J., in *A.-G. v. Watson* (8) ([1917] 2 K.B. 431), and is, I think, borne out by the method of valuation prescribed by s. 7 (7) (b), the value of the "slice" ascertained in accordance with that provision being an appropriate index of the benefit accruing or arising to property, or to persons entitled to property, when an interest such as an annuity for one life to which it was formerly subject ceases by the death of the annuitant, but, so far as I can see, wholly inappropriate to a case in which property is charged with a continuing annuity, which does not cease on the death of the person for the time being entitled, but remains on foot for the benefit of the next taker. In such a case, no benefit whatever has accrued or arisen to the property, which remains subject to precisely the same annual payment as before. It was contended for the Crown that a benefit did accrue or arise in the present case in the shape of the passing of the annuity to the present viscount. But that, in my view, is not a benefit which can be taken into account for the purposes of the Crown's alternative claim under s. 2 (1) (b). E F  
It is a benefit produced by the actual passing of the annuity under s. 1, and admittedly that is the only section which can be called in aid so far as the annuity itself is concerned. The alternative claim under s. 2 (1) (b) necessarily involves separating the late viscount's life interest in the annuity from the present viscount's life interest in it, treating the former as a distinct and separate interest in the property charged ceasing on the death of the late viscount within the meaning of s. 2 (1) (b), and finally demonstrating that by reason of the cesser G H

of such interest, as distinct from the actual passing of the annuity under s. 1, a benefit accrued or arose. Even if the first two steps in this process were legitimate, as, in my judgment, they clearly are not, the third would, as it seems to me, present an insurmountable obstacle. The issue is, perhaps, obscured by the fact that the passing of the annuity under s. 1 was here brought about by the cesser of the late viscount's life interest in it. If an annuity of like duration had been given to the late viscount absolutely, so that the right to receive it during the residue of the present viscount's life had passed on his death as part of his free estate, there could have been no question of any claim for duty otherwise than under s. 1. The fact that the annuity was settled on the late and present viscounts successively for life lends colour to the claim under s. 2 (1) (b), but, in truth, it is just as much, and just as exclusively, a s. 1 case as it would have been in the hypothetical circumstances I have mentioned.

It was argued, though somewhat faintly, on the part of the Crown that the reduction in the actuarial value of the annuity by the dropping of one of the two lives on which it depended (as to which reduction there was in fact no evidence) constituted a benefit within the meaning of s. 2 (1) (b) which fell to be valued according to the wholly irrelevant formula provided by s. 7 (7) (b). I find myself quite unable to accept this contention. I am, accordingly, of opinion that the claim under s. 2 (1) (b) fails, first, because it is inadmissible according to the principles laid down in *Earl Cowley v. Inland Revenue Comrs.* (1), and, secondly, because the continuing character of the annuity in any case seems to me to make s. 2 (1) (b) and s. 7 (7) (b) wholly inappropriate according to what appears to me to be the true construction of those provisions.

I now turn to the new contention raised on the part of the Crown in this court to the effect that, even if duty can only be claimed under s. 1 as on an actual passing of the annuity on the death of the late viscount, the property which passed was not simply the right to receive the annuity during the residue of the life of the present viscount, but the proportion of the corpus of the property charged corresponding to the proportion of the income thereof required to produce the annuity. The argument in support of this contention proceeds in this way. It is pointed out (and rightly) that where the income of property is divided into shares which are settled on persons in succession, the death of any person entitled to a life interest in any one of such shares occasions a passing under s. 1 of the corresponding share of capital: see *Re Northcliffe* (4); *Christie v. Lord Advocate* (3). It is next alleged that the interest of an annuitant in respect of an annuity charged on property is equivalent to a life interest in the share of capital required to produce the annuity ascertained by reference to the proportion borne by the amount of the annuity to the whole income of the property charged. The conclusion is then adduced that, on the authorities to which I have just referred, it follows that the property which passes under s. 1 when a continuing annuity charged on property passes on a death within the meaning of that section is not simply the annuity for the residue of its prescribed duration (which is clearly all that passes in fact), but the proportion ascertained as above of the corpus of the property charged with the annuity.

This contention seems to me contrary to all principle. An annuity charged on property is not, nor is it in any way equivalent to, an interest in a proportion of the capital of the property charged sufficient to produce its yearly amount. It is nothing more nor less than a right to receive the stipulated yearly sum out of the income of the whole of the property charged (and in many cases out of the capital in the event of a deficiency of income). It confers no interest in any particular part of the property charged, but simply a security extending over the whole. The annuitant is entitled to receive no less and no more than the stipulated sum. He neither gains by a rise nor loses by a fall in the amount of income produced by the property, except in so far as there may be a deficiency of income in a case in which recourse to capital is excluded. On the other hand, a life interest



in a share of the income of property is equivalent to, and, indeed, constitutes, a life interest in the share of the capital corresponding to the share of income. The life tenant enjoys the share of income whatever it may amount to, and his interest, viewed as a life interest in capital, consists of a constant proportion of the whole property, whether the income is great or small and whether the capital value of the property rises or falls. The property which changes hands on his death (or, in other words, passes under s. 1) thus clearly consists of the designated share of capital which then passes from his beneficial enjoyment to that of another. An annuity cannot be so related to any fixed proportion of capital: see *De Trafford v. A.-G.* (7) ([1935] A.C. 290). The proportion of the total income required to produce the annuity, and with it the corresponding share of capital, varies from year to year according to the total income produced by the property charged. The Crown's contention thus involves substituting for the annuity a "slice" of capital ascertained by means of a calculation on the lines prescribed by s. 7 (7) (b) for ascertaining the benefit accruing or arising by the cesser of an interest, with a result depending on the rate of income produced by the whole fund over whatever period might be selected for the purposes of the calculation. The "slice" so ascertained would bear no relation whatever to the legal rights of the annuitant, and its ascertainment would amount to the construction for estate duty purposes of a wholly fictitious and notional proprietary interest for which there is no warrant whatever in the relevant legislation.

It was suggested that authority for this method of charging duty on the passing of a continuing annuity under s. 1 was to be found in the comments on *Re Cassel* (2) made by MAUGHAM, J., in *Re Northcliffe* (4), and by LORD RUSSELL himself in *Christie v. Lord Advocate* (3). In my judgment, these comments properly understood provide no such authority. The peculiar difficulty in the *Cassel* case (2) to which reference is made consisted not in deciding what property passed—RUSSELL, J., made it abundantly plain that what passed, and what had to be valued, was simply the right to receive the benefit of the annual payment—but in valuing the property which passed, *i.e.*, the right to receive the benefit of the annual payment, owing to its fluctuating amount and other peculiar characteristics. This is, I think, made clear by the further observations of LORD RUSSELL on the *Cassel* case (2) in *Inland Revenue Comrs. v. Crossman* (5) ([1936] 1 All E.R. 788). Annuities charged on property which cease on death and fall within s. 2 (1) (b) being charged to duty on the "slice" basis prescribed by s. 7 (7) (b), the Act might consistently have prescribed a similar basis of charge with respect to continuing annuities which pass on death under s. 1, but no such provision has, in fact, been made, and it is for the legislature and not this court to supply it should that be considered desirable. In the absence of any such special provision the property which attracts duty on a passing under s. 1 is simply the property which passes, and the property which passed in the present case was the annuity and nothing else. The annuity must, accordingly, be valued for duty purposes simply as consisting of the right to receive £2,000 per annum from the death of the late viscount for the residue of the life of the present viscount. For these reasons I would dismiss the appeal.

*Appeal dismissed. No order as to costs was asked for.*

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Nicholl, Manisty, Few & Co.* (for the Public Trustee).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## CACKETT (otherwise TRICE) v. CACKETT.

[PROBATE DIVORCE AND ADMIRALTY DIVISION (Hodson J.), February 21, 1950.]

*Nullity—Wilful refusal to consummate marriage—Coitus interruptus—Cruelty.*

In 1935 the parties went through a ceremony of marriage. Against the wishes of the wife and in spite of frequent protests by her, the husband practised *coitus interruptus*. A doctor who examined the wife warned the husband that the practice was having a serious effect on the wife's health, but he persisted in the practice, maintaining that he could not allow his wife to have a family because her parents were first cousins. The wife petitioned for a decree of nullity on the ground of her husband's wilful refusal to consummate the marriage, and, in the alternative, for a divorce on the ground of cruelty.

HELD: (i) the marriage had been consummated, and, therefore, the wife was not entitled to a decree of nullity.

*White (otherwise Berry) v. White* ([1948] 2 All E.R. 151), followed.

*Grimes (otherwise Edwards) v. Grimes* ([1948] 2 All E.R. 147), not followed.

(ii) the husband's conduct, which was persisted in, notwithstanding the wife's repeated protests and which to his knowledge was having an increasingly adverse effect on her health, constituted cruelty, and the wife was entitled to a decree of dissolution on that ground.

*Observation of LORD JOWITT, L.C., in Baxter v. Baxter* ([1947] 2 All E.R. 892), referred to.

[AS TO WILFUL REFUSAL TO CONSUMMATE MARRIAGE, see HALSBURY, Hailsham Edn., 1949 Supp., Title Divorce; and FOR CASES, see DIGEST, Second Supp.]

Cases referred to:

- (1) *White (otherwise Berry) v. White*, [1948] 2 All E.R. 151; [1948] P. 330; [1948] L.J.R. 1476; 2nd Digest Supp.
- (2) *Grimes (otherwise Edwards) v. Grimes*, [1948] 2 All E.R. 147; [1948] P. 323; [1948] L.J.R. 1471; 2nd Digest Supp.
- (3) *Baxter v. Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 2nd Digest Supp.
- (4) *Cowen v. Cowen*, [1945] 2 All E.R. 197; [1946] P. 36; 114 L.J.P. 57; 173 L.T. 176; 2nd Digest Supp.
- (5) *D—e v. A—g (falsely calling herself D—e)*, (1845), 1 Rob. Eccl. 279; 27 Digest 267, 2350.
- (6) *G— v. G—*, (1871), L.R. 2 P. & D. 287; 40 L.J.P. & M. 83; 25 L.T. 510; 27 Digest 265, 2330.

PETITION by the wife for a decree of nullity on the ground that the husband, throughout the marriage and against the wishes of the wife, had practised *coitus interruptus*, and had thereby wilfully refused to consummate the marriage, and, in the alternative, for a decree of dissolution on the ground of cruelty. The suit was undefended. The facts appear in the judgment.

*Tolstoy* for the wife.

HODSON, J.: This is a suit brought by a wife for nullity on the ground that the husband has wilfully refused to consummate the marriage. In the alternative she seeks a divorce on the ground that the husband has been guilty of cruelty. The suit is undefended.

Against the wishes of the wife the husband, throughout the married life, which existed from 1935 until 1947, followed the practice described as *coitus interruptus*. A Dr. Evans, who had known the wife before the marriage when she was in exceptionally good health, stated that after the marriage the wife's health had been such as to render it necessary for her to consult him. He found

that she was in a condition which he found it difficult to explain and in 1943 he spoke to the husband. He said:

"I told him (in effect) that his wife had said to me that throughout their married life he would insist on practising *coitus interruptus*. I warned him that if he continued this incomplete intercourse his actions would result in a complete breakdown of her health. The [husband] did not even attempt to deny that he practised *coitus interruptus*, but said that he did so because he could not allow his wife to have any family as her parents were first cousins. I did my best to bring home to the [husband] the effect his attitude was having upon the [wife's] health, but I failed to convince him that his point of view was a selfish one and harmful to the [wife]. During our conversation I asked the [husband] if he would be willing to have normal intercourse with the use of contraceptives. His reply was to the effect that he did not trust them to be fully effective and said he would not alter his methods."

He then describes how he saw the wife in January, 1948, shortly before the separation, and he says:

"The [wife] was clearly under a nervous strain. I had a long talk with her and advised her for the sake of her health to leave her husband, at any rate for the time being. Some time later the [husband] had a conversation with me during which he informed me that he had asked the [wife] to return to him and that she had refused to do so unless he promised to have normal intercourse and he had refused to make such a promise."

That is borne out by the evidence of the wife.

On those facts one has to consider how far the possibility of conception is relevant. That matter was considered in *White (otherwise Berry) v. White* (1), in which WILLMER, J. ([1948] 2 All E.R. 153), said:

"I should state that in this case there is evidence from Dr. McLean that, when *coitus interruptus* is practised, the possibility of conception none the less remains, and for this reason. According to him, many men do in fact have a small emission of semen before the main emission that follows on the completion of the act. There is always the possibility, therefore, that from this minor preliminary emission conception may result. Dr. McLean said that, speaking as a medical adviser, he would not recommend the practice of *coitus interruptus* as a means of birth control. That may or may not be of some materiality."

I mention that aspect of the case because I think that on the evidence I could not find other than that penetration was effected, and that there was the possibility of conception.

The question which I have to decide arose in two cases which were tried within a few days of one another, the first being *Grimes (otherwise Edwards) v. Grimes* (2), before FINNEMORE, J., and the other being the case to which I have just referred. FINNEMORE, J., came to the conclusion that conduct of this kind can amount to wilful refusal to consummate the marriage, and WILLMER, J., came to the opposite conclusion. That puts me in a position of some embarrassment. FINNEMORE, J., however, decided in favour of the wife petitioner in an undefended case without hearing any argument on the other side, whereas the decision of WILLMER, J., was arrived at after argument on both sides. WILLMER, J., came to the conclusion that, although the point was left open in *Baxter v Baxter* (3), the right conclusion, following on the reasoning of their Lordships' House, was that in circumstances of this kind it was impossible to hold that there was no consummation of the marriage, and I prefer to follow that decision.

Counsel for the wife has made a point which, so far as one can see, was not made in either *White v. White* (1) or *Grimes v. Grimes* (2). He says that the effect



of the decision of the House of Lords in *Baxter v. Baxter* (3) was not to overrule the decision of the Court of Appeal in *Cowen v. Cowen* (4) on this particular point, and, therefore, that the latter case was an authority in his favour. In support of this contention he relies on a passage from the opinion of LORD JOWITT, L.C., in the *Baxter* case (3) where he said ([1947] 2 All E.R. 888):

"... I wish to make an observation upon one practice referred to in this summary of facts, viz., that of withdrawal before emission, or *coitus interruptus*. This practice, as distinct from artificial methods of contraception, does not arise in the case before the House and I prefer to express no opinion about it. I desire also to reserve the question what bearing the employment of force or fraud may have on the issue of consummation."

The question is how is the decision in *Cowen v. Cowen* (4), to which LORD JOWITT refers, affected? In that case DU PARCQ, L.J., delivering the judgment of the court, who had earlier referred to the use of contraceptives, the subject of the appeal in the *Baxter* case (3), said ([1945] 2 All E.R. 199):

"... in order that intercourse should be complete, it is well established that there must be what DR. LUSHINGTON referred to as *vera copula*. He said in *D—e v. A—g* (5) (1 Rob. Eccl. 298) 'Sexual intercourse in the proper meaning of the term is ordinary and complete intercourse; it does not mean partial and imperfect intercourse . . .' We are of opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated."

In *Baxter v. Baxter* (3), the whole basis on which this conclusion was reached, in my opinion, removed because the LORD CHANCELLOR examined *D—e v. A—g* (5) in some detail and I think he made it quite clear that what DR. LUSHINGTON was speaking about in the quoted passage was malformation, because that was the subject-matter of the case which he had to decide, and at that time, under the law which he was administering, either malformation or frigidity or something else involving incapacity to consummate the marriage was a ground for a decree of nullity at the instance of one or other of the spouses, whereas in 1947, when the *Baxter* case (3) was decided, an additional ground for a decree of nullity had been introduced by the Matrimonial Causes Act, 1937, s. 7 (1) (a), which gave a spouse a right to a decree of nullity on the basis that, quite apart from capacity, the opposite spouse had refused to consummate the marriage.

The question under consideration in *Baxter's* (3), and also *Cowen's* case (4), was whether, on the facts of those particular cases, the spouses in question could be said to have wilfully refused to consummate the marriage, and I think the LORD CHANCELLOR's speech in the former case makes it plain that the House considered that the Court of Appeal in *Cowen v. Cowen* (4) had completely misapprehended the effect and the meaning of DR. LUSHINGTON's words. It is pointed out ([1947] 2 All E.R. 891):

"... that the key to DR. LUSHINGTON's judgment is that he thought the true distinction lay in the answer to the question whether the malformation was incurable, not as related to conception, but 'as to mere coitus'."

The whole foundation of the conclusion arrived at by the Court of Appeal in *Cowen's* case (4) having been destroyed, in my judgment, the conclusion also is destroyed, and the matter is in the fullest sense of the word left open, and is not any longer covered by the decision in *Cowen's* case (4), although the House of Lords have not dealt with the particular point. In my judgment, therefore,

it is my duty to decide this question in the light of such authority as there is, including the judgment in the *Baxter* case (3), in so far as it throws light on this problem. I, therefore, come back to the decision with which I previously stated I found myself in agreement, *viz.*, the reasoning of WILLMER, J., in *White (otherwise Berry) v. White* (1) and to his analysis of the decision of DR. LUSHINGTON in *D—e v. A—g* (5).

I have been invited by counsel for the wife to come to the opposite conclusion because he says that it is the duty of the court to find wilful refusal where consummation—quoting from the speech of the Lord Chancellor in the *Baxter* case (5) ([1947] 2 All E.R. 892)—“as that word is understood in common parlance and in the light of social conditions known to exist,” has not taken place, and he says that where one finds conditions such as these, it is not possible to hold that normal sexual intercourse has taken place, and if it has not taken place owing to the refusal of the husband, he says he is entitled to succeed. I think the court would be driven into an impossible position if it tried further to define of what normal sexual intercourse between normally formed people consisted, because the court would be bound to inquire exactly at what stage emission took place, or what degree of satisfaction was reached by the woman, in a case where the woman was alleging that the man had failed to complete the act. I have already indicated the difficulties in the present case of examining or trying to draw the line between a complete act and an incomplete act. Here seed was emitted from the man in close proximity to the woman so that conception might have been effected, and I must decline to embark on an inquiry of a kind which I think it would be almost impossible to complete. It is argued by counsel that that is no reason why the court should not embark on that inquiry because it has to embark on difficult inquiries in every case where capacity is in question. That is true, but in cases where capacity is in question the court expects to get assistance from expert witnesses who can give evidence as to physical facts which will guide the court on a subject where there is often no possibility of corroboration being available. It seems to me that it is impossible to determine exactly where normal intercourse begins and ends. There could be no legal standard laid down which would define a matter of that kind.

I have been referred to SHELFORD ON MARRIAGE AND DIVORCE, the date of that work being 1841. The learned author says, p. 202:

“Impotence then consists in incapacity for copulation, or in the impossibility of accomplishing the act of procreation. The manifest causes of impotence in both sexes are divided into physical and moral. The causes of impotence in man arises from two sources, from malformation of the genitals or from want of action in them; but in females impotence can only depend on malformation, either natural or acquired.”

It is said that it appears to have been thought that an essential part of the act of intercourse was the emission of seed into the body of a woman, and in that connection I was further reminded that at common law, before the stat. Geo. 4, c. 31, the emission of seed was an essential part of the evidence in criminal cases where carnal knowledge was involved. Without knowing of any reported cases where the emission of seed in criminal cases is concerned, it is impossible to determine how far the evidence of what happened to the seed would be considered relevant, but so far as cases of impotence are concerned I have the advantage of the authority of DR. LUSHINGTON in *D—e v. A—g* (5) from which I think it is clear that the possibility of conception, as opposed to the possibility of penetration, was not considered material. He said (1 Rob. Eccl. 296):

“Mere incapability, however, of conception is not a sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient, that it would be a waste of time to discuss an admitted point. The only question is,

whether the lady is or is not capable of sexual intercourse, or, if at present incapable, whether that incapacity can be removed."

Some attempt was made on behalf of the wife to support the argument by reference to the judgment of LORD PENZANCE, J.O., in *G. v. G.* (6), where he said (L.R. 2 P. & D. 291):

"It is conceded that if the organs of the woman were so formed structurally as to render intercourse impossible, the marriage would be void. It is apparent enough that without sexual intercourse the ends of marriage, the procreation of children, and the pleasures and enjoyments of matrimony cannot be attained."

I do not think that that passage goes so far as to support the view which I am asked to take, that sexual intercourse cannot be said to have taken place unless, not only has the woman been penetrated, but also emission has taken place within her body. The pleasures and enjoyments of matrimony therein referred to are obviously quite independent of the act of sexual intercourse referred to in the earlier part of the sentence, and the reference to the procreation of children as one of the ends of matrimony does not appear to me to carry the case any further, particularly in such a case as this, where the possibility of pregnancy is by no means absent. For these reasons I think that the claim for nullity fails.

The claim for divorce succeeds on the ground of cruelty, because I find that the conduct of the husband to this woman can properly be described by the English word "cruel" in its ordinary meaning, having regard to her repeated protests at this particular form of maltreatment which affected her health and caused reasonable apprehension of further injury to health if she had continued to live with him. Indeed, after they had parted, she gave him a further opportunity of restoring the position by leading a normal married life and behaving towards her sexually in what might reasonably be described as a normal manner, and I think that from that point of view the case is covered by the last part of the speech of the Lord Chancellor in the *Baxter* case (3) when he said ([1947] 2 All E.R. 892):

"I take the view that in this legislation Parliament used the word 'consummate' as that word is understood in common parlance and in the light of social conditions known to exist, and that the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief."

He obviously had in mind then, relief based either on desertion or on cruelty.

The evidence of the wife has been corroborated by the evidence of the doctor, and I find her case proved. I reject the prayer for nullity, but there will be a decree of divorce on the ground of cruelty with costs.

*Decree nisi with costs.*

Solicitor: *Miss P. B. Topham*, Law Society Services Divorce Dept. (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]



## PEARSON v. LAMBETH BOROUGH COUNCIL.

[COURT OF APPEAL (Cohen and Asquith, L.J.J., and Roxburgh, J.), February 15, 16, 17, March 1, 1950.]

*Negligence—Licensee—Licensor's "actual knowledge" of danger—Knowledge of potential danger—Public convenience—Injury caused by children tampering with grille—Liability of local authority.*

The plaintiff entered a public convenience provided by a borough council by passing through an outer gate at street level and down a flight of stairs to a roofed enclosure. On leaving he mounted the stairs, and as he reached the topmost steps his head came into contact with part of an overhead grille or grid which had been drawn forward while the plaintiff was in the convenience by the action of children swinging thereon, and he thereby suffered injury. The council, through their servant, the attendant, knew that children were in the habit of swinging on the grille, and it would have been possible to prevent anyone drawing the grille forward by padlocking it, but that was not done. In an action by the plaintiff against the council for damages for personal injuries,

**HELD:** (i) a licensor was not liable to a licensee for injury caused by dangers of which the licensor did not actually know, but of which he ought to have known, for, if it were otherwise, there would be no difference between the liability of an invitor and that of a licensor.

*Dicta* of LORD ATKINSON and LORD WRENBURY in *Fairman v. Perpetual Investment Building Society* ([1923] A.C. 86, 96) and LORD HAILSHAM, L.C., in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* ([1929] A.C. 365), considered.

(ii) to have "actual knowledge" of the danger a licensor need not know of the actual presence on the premises at the time of the accident of the physical object which causes the injury, but it is sufficient if he knows that there is present a physical object capable of being put into a dangerous condition by the action of third persons who are quite likely to act in such a way having regard to their past behaviour or inherent qualities.

*Coates v. Rawtenstall Borough Council* ([1937] 3 All E.R. 602), applied.

(iii) on the facts the defendants knew of the danger from which the plaintiff sustained his injury, notwithstanding that they could not foresee the precise manner in which the dangerous condition might cause personal injury to users of the convenience, because by their servants they knew that children were in the habit of tampering with the grille. Accordingly they were liable to the plaintiff as a licensee, and *a fortiori* if he were an invitee.

[As to OCCUPIER'S DUTIES TO INVITEES AND LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-612, paras. 851-863; and FOR CASES, see DIGEST, Vol. 36, pp. 35-49, Nos. 208-306, and Digest Supp.]

Cases referred to:

- (1) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affmd.* (1867) L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (2) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 92 L.J.K.B. 50; 128 L.T. 386; 87 J.P. 21; 31 Digest 99, 2381.
- (3) *Addie (R.) & Sons (Collieries) Ltd. v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (4) *Boylan v. Dublin Corpn.*, [1949] I.R. 60.
- (5) *Coates v. Rawtenstall Borough Council*, [1937] 3 All E.R. 602; 157 L.T. 415; 101 J.P. 483; Digest Supp.
- (6) *Baker v. Bethnal Green Corpn.*, [1945] 1 All E.R. 135; 109 J.P. 72; 2nd Digest Supp.

- (7) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454; [1938] 1 K.B. 212; 107 L.J.K.B. 84; 157 L.T. 380; 101 J.P. 469; Digest Supp.
- (8) *Stowell v. Railway Executive*, [1949] 2 All E.R. 193; [1949] 2 K.B. 519; [1949] L.J.R. 1482.
- (9) *Weigall v. Westminster Hospital*, [1936] 1 All E.R. 232; Digest Supp.
- (10) *Nickell v. City of Windsor*, [1927] 1 D.L.R. 379; 59 O.L.R. 618; Digest Supp.
- (11) *Glasgow Corp'n. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest 70, 453.

APPEAL by the plaintiff from a decision of His Honour JUDGE SHAW, given at Lambeth County Court on Nov. 11, 1949, whereby he found that the plaintiff was not entitled to damages for injuries received by him while making use of a public convenience maintained by the defendants. The facts appear in the judgment of the court read by ASQUITH, L.J.

*Stephen Terrell* for the plaintiff.

*Dennis Thompson and Hannay* for the defendants.

*Cur. adv. vult.*

Mar. 1. ASQUITH, L.J., read the following judgment of the court. This is the plaintiff's appeal against a decision of the county court judge for Lambeth refusing to award him damages for personal injuries caused, as he alleges, by the defendants' breach of duty as owners and occupiers of a public convenience. The case raises two issues: (i) Were the defendants in relation to the plaintiff when he visited the convenience in question, inviters, and liable as such for hidden dangers not only of which they knew but of which they ought to have known? or (ii) if they were not inviters, but merely licensors, may they not nevertheless be liable to the plaintiff on the facts of this case? The judge has held—(a) that the relationship between the parties was that of licensor and licensee; (b) that a licensor is only liable for "traps" or hidden dangers of which he actually knows; (c) that the defendants had no actual knowledge of the danger which caused the plaintiff's injuries, and hence the plaintiff cannot recover.

On Oct. 2, 1948, at 10.50 a.m., the plaintiff entered this convenience by passing through an outer gate at street level, and down a flight of stairs to the usual roofed enclosure containing urinals and w.c's. He used the urinal. He then mounted the stairs again, but, as he reached the topmost steps, his head came into violent collision with part of an overhead grille or grid which had been drawn forward by some person unknown while he was below. Normally in the day time this grille, which runs easily on rollers, is drawn back and when it is in that position no one could come into collision with it. At night time, at the hour when the convenience is closed, it is drawn forward, and, when drawn fully forward, it prevents anyone from entering the convenience. In this case the grille had been drawn, not fully, but partially, forward. It would have been perfectly possible to have prevented anyone from drawing the grille forward (except the authorised attendant at the proper time) by padlocking it and giving him alone a key. This was, in fact, done at several other conveniences, but not at this one. The negligence alleged in the statement of claim is this omission which is alleged to have invested the grille with the quality of a "trap." It is conceded that the plaintiff was guilty of no contributory negligence.

The county court judge has found as a fact that the grille was thus pulled forward by mischievous children who had been in the habit of tampering with it and had been seen swinging on it that very morning shortly before the accident. There was, in our view, ample evidence to support this finding, given in the main by witnesses for the defence. Thus Wright, the lavatory attendant, said:

"I had found children swinging on the convenience gate on that morning [before the accident] and on previous mornings. I had not seen

the children pull the grid. I had not known them pull the grid over. I had seen them swinging on the grid . . . It does not require any force to pull a grid . . . No doubt, the grid had been pulled over by children . . . If a child had swung on it it could have come forward to a certain extent . . . I had just previously driven away some children: they were swinging on the grid. This was about half an hour before the accident."

One Green, a painter, who was painting the outside of the ladies' convenience on the day and about the time of the accident, said:

"Just previous to this accident I had chased away boys from the top of the [men's] convenience. I did not see those boys interfering with the grid . . . I had seen children swinging on this grid. That did not pull the grid forward."

One O'Connell, superintendent of works of the Lambeth Borough Council, after saying that grids did not move forward of their own accord, went on:

"I never heard of a grid being pulled forward by children swinging on it . . . We have had complaints about children playing round these conveniences and swinging on grids and railings . . . for three or four years before this accident. It was worrying to me . . . If it had been pointed out to me that the children might have moved the grille by swinging on it, steps would have been taken to stop the grid from being so moved . . . I don't think children could have brought forward this grille by swinging on it."

The judge clearly rejects this last bit of evidence, but it is impossible to say that the evidence of these three-witnesses, all called for the defence, was not sufficient to support his finding that

"to the knowledge of (the defendants') servants, children were in the habit of swinging on this grille—a grille which moved easily and could be (and, as I find, was) pulled forward in that way."

Accepting, then, the finding that children had pulled the grille forward between the plaintiff's descent of the stairs and his re-ascent, we will proceed (inverting the order in which we stated the two issues) to consider first whether the defendants are liable to the plaintiff on the basis that the latter was a licensee. It is generally accepted that a licensor is only liable to a licensee for injury caused by hidden dangers of which the licensor "actually knows." What precisely is meant by "actually knowing of a danger" is by no means as easy a question as it sounds. The meaning of the word "know" and of the word "danger" are both in this connection surprisingly elusive. We are satisfied, at all events (notwithstanding certain expressions of opinion by very eminent judges which would appear to be *obiter dicta*), that a licensor is not liable for dangers of which he does not actually know, but of which he ought to know in the sense in which the words "ought to know" are used in *Indermaur v. Dames* (1). If it were otherwise, there would be no difference between the liability of an invitor and of a licensor. The *dicta* indicating a contrary view are contained in the speeches of two law lords—LORD ATKINSON and LORD WRENBURY in *Fairman v. Perpetual Investment Building Society* (2) and in the speech of LORD HAILSHAM in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* (3). In the first of those cases both LORD ATKINSON and LORD WRENBURY appear to be saying that a licensor is liable in respect of a trap of which he "ought to know," but, since it was held by the majority of the House that there was no trap (a trap is a hidden danger and this was a patent danger), it was immaterial to the decision whether the defendant company was an invitor or licensor. In neither event could it be liable. These passages must, therefore, be considered *obiter dicta*. In a recent decision of the Irish Supreme Court, *Boylan v. Dublin Corpn.* (4), BLACK, J., put the matter compactly in the following words ([1949] I.R. 77):



“The plaintiff’s status—whether that of licensee or that of an invitee—was not in issue, and I am at a loss to understand how a pronouncement on a matter that is not in issue can be part of the *ratio decidendi*, or anything but an *obiter dictum*.”

The same observation, in our view, applies to a passage to the same effect in the opinion of LORD HAILSHAM, L.C., in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* (3) where he said ([1929] A.C. 365):

“In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent [that is to say, less stringent than the duty towards an invitee] the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.”

In that case again the observation was unnecessary to the decision, since the plaintiff was neither an invitee nor a licensee, but a trespasser, and failed for that reason. The Court of Appeal in *Coates v. Rawtenstall Borough Council* (5) and the majority of text-book writers have treated these words as used *per incuriam*, but on any view they are used *obiter*.

An ingenious argument was, however, put forward by counsel for the plaintiff which, if sound, would incidentally justify the language of LORD ATKINSON, LORD WRENBURY, and LORD HAILSHAM. It was suggested that the formula “danger of which he ought to know” was used in different senses in relation to inviters and licensors respectively and that its use in relation to licensors could be defended when this distinction was grasped. Inviters may be liable though wholly ignorant of the facts constituting the danger provided they ought to have known those facts. A licensor will not be liable unless he knows the facts which objectively constitute the danger, but (so the argument runs) if any reasonable person would know that those facts did constitute a danger, he cannot be heard to say he did not know they did. On this view and in this sense of the words, a licensor who knows the facts which actually constitute the danger ought in addition to know that those facts do constitute a danger, in cases, at least, where it is obvious that they do so. In putting forward this contention counsel for the plaintiff prayed in aid *Baker v. Bethnal Green Corporation* (6) (the air raid shelter case). In that case the point is raised, described as attractive, but left open in the following passage from the judgment of LORD GREENE, M.R. ([1945] 1 All E.R. 140):

“Counsel for the respondent put forward what I must confess at first sight appears to me to be a very attractive explanation of that difficulty. What he said was that, if a licensor knows of the existence of what in fact is a trap or a hidden danger, that is sufficient, because he cannot be heard to say that although he knew the physical facts which constituted the danger from a purely objective point of view, the fact that it was a danger did not occur to his mind. In other words, that when the phrase “or ought to have known” was used, it was directed to that view of the position, and refers, not to the physical objective facts, but to the circumstance that those facts constitute a danger. That appears to me to be a very attractive view, but much though I should like to do so, I do not find it necessary to consider whether it is correct or not.”

Having regard to the view we take of this limb of the plaintiff’s argument, we too can afford to leave this point undecided. For we think that in the sense properly attributable to the words, the defendants “actually knew of the danger” and that the plaintiff does not need to rely on the word “ought.” Before seeking to define this sense, it may be well to glance at the authorities. A great many were cited to us, but on this branch of the case we need only

refer to the two which are most nearly in point. The first is *Ellis v. Fulham Borough Council* (7). In that case a local authority provided a recreation park with a paddling pool for children and sand. A notice was exhibited prohibiting users from taking bottles, tins, and the like into the pool, owing to the risk of cut feet. The pool was raked every morning to clear it of any broken glass, etc., which might be there, but the rake used was quite ineffective for this purpose, as it only stroked the surface of the submerged sand. The plaintiff, a small boy, while paddling in the pool had his foot cut by broken glass embedded in the sand. The plaintiff, who was held to be a licensee, was held entitled to recover. The local authority did not know glass was buried in the sand, but they knew of the possibility of its being there, *ergo* they were held to have that "actual knowledge of the danger" which fixes a licensor with liability. GREER, L.J., said ([1937] 3 All E.R. 459):

"It does not seem to me to matter that the council officials did not know that the actual piece of glass was there: the question is, did not the council know that there was a danger to children that it ought to provide against?"

Actual knowledge of a potential danger would, therefore, seem to suffice.

The other case is *Coates v. Rawtenstall Borough Council* (5). There again the local authority were occupiers of a recreation ground, which in this case contained a chute down which children could slide. The infant plaintiff was injured by a chain placed across the lower end of the chute by another boy in mischief. The chain was normally so placed on Sundays when the chute was out of use. On weekdays, when the chute was in use, the chains were padlocked to a pole by the attendant, partly, as he said, because, if loose, the children might tamper with them, *e.g.*, by doing what they had seen him do on Sundays, namely, place the chain across the chute. In this case the chains were insecurely attached to the pole. It was held (i) that the plaintiff was a licensee, and (ii) that the danger of the chains, if loose, being used by mischievous boys in the manner in which they were in the event used constituted a danger actually known to the attendant (and, therefore, to the local authority), not merely a danger of which he and it ought to have known. GREER, L.J., said (157 L.T. 416; [1937] 3 All E.R. 605):

"... the danger created by a mischievous boy using this chain was a danger known to the ground attendant, the servant of the defendants; it was not merely a danger of which he ought to have known, but a danger of which he did in fact know."

SLESSER, L.J., said (157 L.T. 417 *ibid.*, 608):

"The evidence, therefore, showed: first, knowledge on the part of the defendants, by their agent, that these chains were likely to be put to the dangerous use to which this chain was put, by boys in mischief; secondly, that this chain was not properly secured by the ground attendant; and, thirdly, that this particular chain was put round the chute by a boy in mischief."

The learned lord justice is clearly holding that to know this much is to have "actual knowledge of the danger." Both lords justices held there was a breach of the defendants' duty as licensors towards the infant licensee. SCOTT, L.J., agreed.

These two authorities are binding on this court. They seem to decide (i) that to have "actual knowledge of the danger" the defendant or his servants need not know of the actual presence on the premises at the time of the accident of the physical object which in the result causes the injury. It is enough if such an object has been there in the past and a similar object may be there again if no sufficient precautions have been taken to prevent its presence: *Ellis v. Fulham Borough Council* (7); (ii) (and more relevant to the present case) that it is sufficient if the defendant knows—(a) that there is present a physical object capable of being put in a dangerous condition; (b) by the action of third persons;

(c) who are quite likely to act in such a way as to put it in a dangerous condition, having regard to their past behaviour or inherent qualities: *Coates v. Rawtenstall Borough Council* (5). We feel it impossible to distinguish the present case materially from *Coates v. Rawtenstall Borough Council* (5). The three conditions (a), (b) and (c) are satisfied in the present case. In both cases a simple precaution was omitted which would have thwarted or rendered innocuous the possible action of the third persons. The only difference which can be suggested is that the accident in *Coates v. Rawtenstall Borough Council* (5) took the precise form which the defendants could have anticipated. The attendant had fastened the chain across the chute on Sundays in the presence of the children. He had put the idea into their heads, and the danger "of which the defendants" (by him their servant) "knew" was that of the children doing likewise, whereas in the present case no one on behalf of the defendants had seen the children pull the grille forward so as to threaten the safety of anyone emerging from the convenience.

We do not think this difference is crucial. What the defendants by their servant knew in this case (taking such evidence of the servants of the defendants as the county court judge accepted, and ignoring that part of it which he rejected) was—(i) that the children had persistently (for three or four years there had been complaints of this) tampered with the grille, in particular, by swinging on it, and that this had "worried" the witness, O'Connell, a lot; (ii) that the lavatory attendant had seen them swinging on the convenience gate that morning within half an hour of the accident and had seen them swinging on the grid, also that morning; (iii) that it does not require any force to pull a grid; (iv) that the swinging of the children could have moved the grid forward a bit. Given this knowledge on the part of the defendants' servants it would seem that on the principle on which *Coates v. Rawtenstall Borough Council* (5) proceeded the defendants "actually knew of the danger." The only distinction between the cases is that in *Ellis v. Fulham Borough Council* (7) and in *Coates v. Rawtenstall Borough Council* (5) the dangerous condition materialised in a casualty in the precise way contemplated by the defendants, e.g., in the first case the defendants had issued a warning notice specifying the sort of casualty likely to occur, namely, "cut feet" to a paddler, and cut feet to a paddler resulted. In the other case it had materialised also in the way contemplated, namely, in injuries to one child due to a chain being stretched across the chute by another. In the present case, while the dangerous condition (namely, an easily sliding grille habitually tampered with by children, movable by them and capable in certain positions of inflicting serious injury) was liable to injure someone—a child or someone else—in some way, yet the defendants could not and did not foresee the precise manner in which this dangerous condition would translate itself into an actual casualty. In our view, this distinction is not a material difference. In all three cases the defendant "actually knew of the danger," and the plaintiff is entitled to succeed even though a mere licensee.

This conclusion, if well founded, would absolve us from considering the other issue, namely, whether the plaintiff was, indeed, a mere licensee or an invitee. If we are wrong, and the plaintiff was an invitee, he would in this character *a fortiori* be entitled to recover, but as the issue has been argued before us at some length, we think we should set out briefly the grounds of our conclusion that the plaintiff was a licensee only. The general principles on which persons coming on the premises of an occupier with his consent are classified as invitees and licensees respectively are easy to formulate but not always easy to apply. They are somewhat over-simplified in the formula in SALMOND ON TORT (9th ed., p. 514) justly commended by MACKINNON, L.J., in *Ellis v. Fulham Borough Council* (7) ([1937] 3 All E.R. 464):

"The invitor says 'I ask you to enter upon my business.' The licensor says: 'I permit you to enter on your own business.'"



Succinct and vivid as is this formula, it might suggest that the visitor is an invitee only if the business on which he comes is exclusively that of the occupier. This is, of course, not what is meant. It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest, *e.g.*, a shopper has an interest to buy and a shopkeeper an interest to sell. It is sometimes said that the interest must be pecuniary, or, at least, "material." This certainly does not mean that a visitor who is not required to pay and does not pay is necessarily excluded from the class of invitees, *e.g.*, many shops encourage customers to enter and inspect their wares without any obligation to buy. No doubt, this practice pays in a purely pecuniary sense in the long run and is tolerated for that reason: *cf. Stowell v. Railway Executive* (8). It is not clear that a "common interest" for this purpose may not exist where no pecuniary gain whatever, immediate or remote, is aimed at. In *Weigall v. Westminster Hospital* (9) the mother of a patient (it is true a paying patient) at the hospital, in the course of visiting him, slipped on a mat placed on a polished floor and suffered injuries. She was held to be entitled to recover *qua* invitee. It is not clear that the result might not have been the same if her son had not been a paying patient. In a Canadian case—*Nickell v. City of Windsor* (10)—the same status was attributed to a person who, having entered a public library (presumably without paying), was injured in leaving it by slipping on an ice-covered step.

The observations *obiter* of LORD GREENE, M.R., in *Baker v. Bethnal Green Corpn.* (6) carry the matter a step further. He said ([1945] 1 All E.R. 139):

"The first question that arises is whether or not the relationship of the appellants to the respondent's husband was that of invitor and invitee. It seems to me that there are serious arguments in favour of the view that that was the true relationship. The appellants were fulfilling a public duty. Upon the due performance of that duty their reputation as servants of the public depended. In order to fulfil that duty they furnished themselves with premises thought to be suitable, and they threw them open to such members of the public as might desire to use them. In those circumstances it seems to me that there are serious grounds for saying that the case bears no resemblance to the case where, for social reasons or reasons of that kind, one person allows, or I will use the word 'invites' (but I use it here in a non-technical sense) somebody to come upon his premises; and it may well be that such a case as the present is to be distinguished from *Ellis v. Fulham Borough Council* (7), which was a case of a public park provided by a local authority. GREER, L.J., appears to have taken the view that even in that case the relationship was that of invitor and invitee, although he did not so hold as a matter of judgment. The other two members of the court, SLESSER and MACKINNON, L.JJ., took the view that the relationship was that of licensor and licensee. Here I do not find it necessary to express any concluded opinion upon the question, and I will assume that the true legal relationship was that of licensor and licensee."

It is true that these are *obiter dicta*, but they relate to a case in which no pecuniary interest—immediate or long-term—on the part of the occupier existed. If the matter were free from other authority and if the observations just cited were part of the *ratio decidendi* of the case, we should find ourselves impelled to the conclusion that the defendants, who were, from motives of civic duty and in pursuance of their public functions, providing an essential sanitary service, were invitores. In both cases the public authority had the power, but was under no legal compulsion, to provide the facilities in question. Our difficulty in arriving at such a conclusion arises from cases such as *Ellis v. Fulham Borough Council* (7), *Coates v. Rawtenstall Borough Council* (5) and *Glasgow Corpn. v. Taylor* (11), in all of which it was held that persons entering a public park or recreation ground were mere licensees. If, however, we are wrong in this view,

the result we have arrived at on the basis of the inferior duty owed to a licensee is confirmed and reinforced. For these reasons we think the appeal should be allowed.

*Appeal allowed with costs, with costs below on Scale "C."*

Solicitors: *Victor Mishcon & Co.* (for the plaintiff); *O. L. Roberts*, town clerk, Lambeth (for the defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

## Re WIGHTWICK'S WILL TRUSTS. OFFICIAL TRUSTEES B OF CHARITABLE FUNDS v. FIELDING-OULD AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), February 24, March 2, 1950.]

*Will—Perpetuity—Gift rendering capital inalienable—Gift of income to non-charitable association "until vivisection shall be made a punishable offence"—Gift over to the Royal Society for the Prevention of Cruelty to Animals—Validity of gifts and gift over—Contingency.*

By her will a testatrix bequeathed £2,000 to trustees on trust to invest the same and pay the dividends arising to "the treasurer for the time being of a society or association called ... the 'International Association for the Total Suppression of Vivisection' ... such dividends to be at the disposal of the committee for the time being for the purposes of the said association until the time shall arrive that the practice of vivisection be made penal by law within the United Kingdom of Great Britain and Ireland and shall also be made a punishable offence upon the continent of Europe and elsewhere And it is my will and I hereby direct that from and after the time when the objects of the said ... association ... shall have become accomplished by the absolute and total abolition by law of the practice of vivisection not only in the United Kingdom of Great Britain and Ireland but also on the continent of Europe and elsewhere then the trustees for the time being of this my will shall pay the dividends ... as they shall accrue unto the treasurer for the time being of the society called ... 'the Royal Society for the Prevention of Cruelty to Animals' ... to be at the disposal of the committee for the time being of the said society." The testatrix gave the residue of her estate to A.T. absolutely. The trustees paid the income first to the International Association for the Total Suppression of Vivisection, and later to the successors in title of that association, the National Anti-Vivisection Society. In *National Anti-Vivisection Society v. Inland Revenue Comrs.* ([1947] 2 All E.R. 217), the House of Lords held that the said society was not established for charitable purposes only.

HELD: (i) on the true construction of the will the gift to the society was made on trust to apply the income towards the furtherance of its objects for a period which, because the court could never be satisfied that the condition on which the payment was to determine had been satisfied, was indefinite, and, therefore, the gift involved rendering the capital inalienable, and was void as a perpetuity or as tending to a perpetuity.

*Re Chardon* ([1928] Ch. 464), distinguished.

(ii) it was not possible to postulate a *dies certus* when the primary gift would determine, and, therefore, the gift over to the Royal Society for the Prevention of Cruelty to Animals was contingent and failed.

*Dictum of LORD SELBORNE, L.C., in Chamberlayne v. Brockett* (1872) (8 Ch. App. 211), applied.

[AS TO GIFTS FOR INDEFINITE PERIODS TO NON-CHARITABLE ASSOCIATIONS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 130, 131, para. 172, Vol. 25,

pp. 80-83, para. 171; and FOR CASES, see DIGEST, Vol. 37, pp. 106, 107, Nos. 404-408.]

Cases referred to:

(1) *National Anti-Vivisection Society v. Inland Revenue Comrs.*, [1947] 2 All E.R. 217; [1948] A.C. 31; [1947] L.J.R. 1112; 177 L.T. 226; 28 Tax Cas. 311; 2nd Digest Supp.

(2) *Re Chardon*, [1928] Ch. 464; 97 L.J.Ch. 289; 139 L.T. 261; Digest Supp. A

(3) *Maddison v. Chapman*, (1858), 4 K. & J. 709; *on appeal*, (1859) 3 De G. & J. 536; 44 Digest 585, 4078.

(4) *Re Shuckburgh's Settlement*, [1901] 2 Ch. 794; 71 L.J.Ch. 32; 85 L.T. 406; 37 Digest 447, 510.

(5) *Re Randell*, (1888), 38 Ch.D. 213; 57 L.J.Ch. 899; 58 L.T. 626; 8 Digest 323, 1054. B

(6) *Re Blunt's Trusts*, [1904] 2 Ch. 767; 74 L.J.Ch. 33; 91 L.T. 687; 68 J.P. 571; 8 Digest 323, 1055.

(7) *Chamberlayne v. Brockett*, (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 8 Digest 326, 1095.

(8) *Re Foveaux*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 8 Dig. 259, 206.

ADJOURNED SUMMONS to determine, in the light of *National Anti-Vivisection Society v. Inland Revenue Comrs.* ([1947] 2 All E.R. 217), the validity of certain gifts made by will by Dorothea Wightwick, deceased. The relevant part of the will is set out in the judgment and in the headnote. C

*Newsom* for the plaintiffs, the Official Trustees of Charitable Funds.

*Pascoe Hayward, K.C.*, and *Mendel* for the National Anti-Vivisection Society. D

*Ian Campbell* for the Royal Society for the Prevention of Cruelty to Animals.

*Denys B. Buckley* for the Treasury Solicitor (who was joined because the person or persons entitled under the residuary bequest had not been traced).

*Cur. adv. vult.*

Mar. 2. **WYNN-PARRY, J.**, read the following judgment. This originating summons is necessitated by the decision of the House of Lords in *National Anti-Vivisection Society v. Inland Revenue Comrs.* (1). The relevant passage in the will of the testatrix reads as follows: E

"I give and bequeath the sum of £2,000 to be paid out of such part of my personal estate as can be lawfully applied for that purpose unto the Most Noble John Villiers Smart Townshend Marquis Townshend William Adlam of the Manor House Chew Magna in the county of Somerset Esquire and Arthur Frederick Astley of the Eton and Harrow Club London Esquire in trust to invest the same in such securities as they may deem proper and to pay the dividends arising out of such capital sum half yearly unto the treasurer for the time being of a society or association called or known by the name of the 'International Association for the Total Suppression of Vivisection' established in 1876 the offices of which association are now or were at the above date at No. 25 Cockspur Street London such dividends to be at the disposal of the committee for the time being for the purposes of the said association until the time shall arrive that the practice of vivisection be made penal by law within the United Kingdom of Great Britain and Ireland and shall also be made a punishable offence upon the continent of Europe and elsewhere And it is my will and I hereby direct that from and after the time when the objects of the said International Association for the Total Suppression of Vivisection shall have become accomplished by the absolute and total abolition by law of the practice of vivisection not only in the United Kingdom of Great Britain and Ireland but also on the continent of Europe and elsewhere then the trustees for the time being of this my will shall pay the dividends arising out of the capital sum before mentioned as they shall accrue unto the treasurer for the time F G H



being of the society called or known by the name of 'the Royal Society for the Prevention of Cruelty to Animals' established in 1824 to be at the disposal of the committee for the time being of the said society."

After other provisions not material to be referred to the testatrix gave the residue of her estate to one Anne Thacker absolutely. The plaintiffs, in whom are vested the investments representing the legacy in question, have paid the income arising therefrom first to the International Association for the Total Suppression of Vivisection and later to the defendants, the National Anti-Vivisection Society, an unincorporated body who are their successors. In view of the above decision of the House of Lords, it has become necessary to consider the validity both of the primary gift and the gift over. The Treasury Solicitor is joined as a defendant as all efforts to trace those entitled to the residuary estate have failed.

As regards the primary gift, the fact that it is a gift of income for an indefinite period is not of itself an objection, and, *prima facie*, it would be good if it does not infringe the rule against inalienability: *Re Chardon* (2). In that case there was a gift of £200 by a testator to his trustees to invest it and pay the income to a cemetery company during such period as they should continue to maintain and keep two specified graves in good order and condition with flowers and plants thereon as the same should have thitherto been kept by him, and he declared that, if the graves should not be kept in such order and condition, his trustees should pay and apply the income as provided in the will. ROMER, J., held that the gift was valid as it did not infringe either the rule against perpetuities or the rule against inalienability. Neither in that case nor in the present case is the rule against perpetuities involved, because in neither does any question arise as to the gift in question vesting within the period allowed by the rule. In *Re Chardon* (2) ROMER, J., held that the interest of the cemetery company was not inalienable on the ground that they could at any time dispose of it if they could find a purchaser. His grounds appear most clearly in a passage towards the end of his judgment where he says ([1928] Ch. 470):

"The cemetery company and the persons interested in the legacy, subject to the interest of the cemetery company, could combine tomorrow and dispose of the whole legacy. The trust does not, therefore, offend the rule against inalienability. The interest of the cemetery company is a vested interest; the interests of the residuary legatee, it being agreed on all hands that, subject to the interest of the cemetery company, the legacy falls into residue, are also vested."

This case has been the subject of criticism in TUDOR ON CHARITIES, 5th ed., appendix, p. 701. The criticism is based on the presence in the will of certain clauses which are omitted from the report. I do not propose to pause to consider the views expressed. It is sufficient for my purpose that the learned judge accepted the view, which he pointed out was common ground, that, subject to the interest of the cemetery company, the legacy to it fell into residue. ROMER, J., was able to hold the gift to the cemetery company valid, first, because he found no context in the terms of the gift which would operate to fetter the right of the cemetery company to dispose of the income, and, secondly, because, on the view which he accepted, those interested in residue, into which the legacy would fall on the determination of the interest of the cemetery company, could join with the cemetery company in disposing of the whole legacy.

The first question, therefore, is to decide whether the National Anti-Vivisection Society could dispose of the income which is the subject of the primary gift. This is, to my mind, a question which depends on the language of the gift. The income is to be paid half yearly to the treasurer for the time being of the society. In contrast, the direction in *Re Chardon* (2) was to pay the income to the cemetery company *simpliciter*, a direction which would include its assigns. The will in this case further provides that the income is to be at the disposal of

the committee for the time being for the purposes of the association. That, to my mind, means that the committee must apply the income received each half year for a particular purpose, that is, the purposes of the association, with the result that, in my judgment, the association takes the income on a trust, namely, to apply it towards the furtherance of its objects. Now, a trust of income for an indefinite period for a purpose not being charitable is void as a perpetuity or as tending to a perpetuity because it involves rendering the capital inalienable. Turning to the language of the will, by which a limit is sought to be set on the period of payment to the association, it appears to me that it can be no overstatement to say that it tends to a perpetuity, because it is hardly possible to imagine that the court could ever be satisfied on evidence that the condition on which the payment is to determine had been satisfied. On this short ground the present case is, in my view, distinguishable from *Re Chardon* (2) and the primary gift is void.

It remains to consider the validity of the gift over. The validity of this gift appears to me to turn on whether or not it is contingent. It is quite true that there is no magic in the words which may be used to introduce a gift over, but the fact that they can be reduced to "subject to" is not, in my view, the true test. The test appears to me to be whether or not the gift over is bound to take effect. If one can find a *dies certus* for the determination of the primary gift then, generally speaking, the gift over will not be construed as being contingent. The death of a person is a *dies certus*, for it must be predicated of every person that some day he must die. It is on this basis that such cases as *Maddison v. Chapman* (3) and *Re Shuckburgh's Settlement* (4) were decided. Cases where, on the failure of the primary gift, the property given falls into residue stand on a different footing. In such cases it does not matter that the prior interest may be of possibly unlimited duration: *Re Randell* (5), *Re Blunt's Trusts* (6). If, however, the gift over is not to residue and it is not possible to postulate a *dies certus*, then, in my judgment, the gift over is contingent, and the circumstance that the object of the gift over is charity makes no difference. In *Chamberlayne v. Brockett* (7), LORD SELBORNE, L.C., said (8 Ch. App. 211):

"On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*."

I will not repeat what I have already said regarding the language of the condition on which this gift over is to take effect. In my judgment, the gift over is contingent and fails. It follows, therefore, that the investments in question now held by the plaintiffs fall into the residuary estate.

In paying the income, as they have done, to the association and then to the National Anti-Vivisection Society up till now, the plaintiffs have acted throughout *bona fide* and in accordance with the generally held view that the primary gift was a good charitable trust: see *Re Foveaux* (8). It will, therefore, be proper to declare under the Trustee Act, 1925, s. 61, that they acted honestly and reasonably and ought fairly to be excused for any breach of trust which they may have committed and for omitting to obtain the directions of the court in the matter, and that they should be wholly relieved from personal liability.

Order accordingly. Costs of all parties to be taxed as between solicitor and client and paid out of the fund.

Solicitors: *Treasury Solicitor*; *Shield & Son* (for the National Anti-Vivisection Society); *Vizard, Oldham, Crowder & Cash* (for the Royal Society for the Prevention of Cruelty to Animals).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

## LEAF v. INTERNATIONAL GALLERIES.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.JJ.),  
February 28, March 1, 1950.]

*Misrepresentation—Innocent misrepresentation—Sale of goods—Misrepresentation as to quality of article sold—Rescission of contract—Acceptance by buyer of delivery—Claim to rescind contract after five years.*

**A** In March, 1944, the buyer bought from the sellers an oil painting of Salisbury Cathedral which was represented to him as a painting by Constable, a representation which was held to be one of the terms of the contract. In 1949 he found that the picture was not a Constable. On a claim by the buyer for the rescission of the contract on the ground that there had been an innocent misrepresentation,

**B** HELD: assuming that in a proper case a contract for the sale of goods passing by delivery could, after its completion by the delivery of the goods, be rescinded on the ground of innocent misrepresentation as to the quality of the chattel sold, the present claim was not competent because the buyer had lost the right to reject on that ground when he accepted delivery of the picture, or, at least, when a reasonable time had elapsed after his acceptance, and five years was more than a reasonable time.

**C** *Seddon v. North Eastern Salt Co., Ltd.* ([1905] 1 Ch. 326), considered and criticised.

[AS TO THE RIGHT TO RESCIND CONTRACTS GENERALLY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 96-118; and FOR CASES, see DIGEST, Vol. 35, pp. 55, 56, Nos. 494-510, and pp. 65-68, Nos. 616-647, and Digest Supp.]

**D** FOR THE PROVISIONS OF THE SALE OF GOODS ACT, 1893, see HALSBURY'S STATUTES, Vol. 17, p. 612.]

Cases referred to:

(1) *Solle v. Butcher*, [1949] 2 All E.R. 1107.

(2) *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 39 Digest 477, 996.

**E** (3) *Seddon v. North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326; 74 L.J.Ch. 199; 91 L.T. 793; 39 Digest 686, 2719.

(4) *Harrison v. Knowles and Foster*, [1918] 1 K.B. 608; 87 L.J.K.B. 680; 118 L.T. 566; 39 Digest 420, 527.

(5) *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258; Digest Supp.

**F** (6) *L'Estrange v. Graucob (F.), Ltd.*, [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164; Digest Supp.

(7) *Angel v. Jay*, [1911] 1 K.B. 666; 80 L.J.K.B. 458; 103 L.T. 809; 30 Digest 479, 1408.

(8) *Wilde v. Gibson*, (1848), 1 H.L. Cas. 605; 40 Digest 350, 2926.

**G** APPEAL by the buyer from an order of His Honour JUDGE DRUCQUER, sitting at the Westminster County Court, dated December 14, 1949, dismissing an action for the rescission of a contract for the sale of a picture on the ground of innocent misrepresentation.

The buyer had accepted the picture as a genuine Constable on the representation of the sellers, and it was only after five years that he became aware that it was not genuine. He then claimed rescission of the contract on the ground of innocent misrepresentation. The facts appear in the judgment of DENNING, L.J.

**H** *David Weitzman* for the buyer.  
*John Perrett and K. G. Jupp* for the sellers.

**SIR RAYMOND EVERSLED, M.R.:** I will ask DENNING, L.J., to deliver the first judgment.

**DENNING, L.J.:** In March, 1944, the buyer bought from the sellers an oil painting of Salisbury Cathedral. On the back of the picture there was a label



indicating that it had been exhibited as a Constable, and during the negotiations for the purchase the sellers represented that it was a painting by Constable. That representation, the judge has found, was incorporated as one of the terms of the contract. The receipt for the price, £85, was given in these terms: "Mar. 6, 1944. One original oil painting Salisbury Cathedral by J. Constable, £85." Nearly five years later the buyer was minded to sell the picture. He took it to Christie's to be put into an auction, and he was then advised that it was not a Constable. So he took it back to the sellers and told them he wanted to return it and get his money back. They did take the picture back temporarily for investigation, and they still adhered to the view that it was a Constable. Eventually the buyer brought a claim in the county court claiming rescission of the contract. In his particulars of claim he pleaded that the picture had been represented to be a Constable, and that he had paid £85 in reliance on that representation. The sellers resisted the claim. After hearing expert evidence the judge found as a fact, and this must be accepted, that the painting was not by Constable and was worth little.

The question is whether the buyer is entitled to rescind the contract on that account. I emphasise that this is a claim to rescind only. There is no claim in this action for damages for breach of condition or breach of warranty. The claim is simply one for rescission. At a very late stage before the county court judge counsel for the buyer did ask for leave to amend by claiming damages for breach of warranty, but it was not allowed. So no claim for damages is before us. The only question is whether the buyer is entitled to rescind. The way in which the case is put by counsel for the buyer is this. He says this was an innocent misrepresentation and that in equity he is entitled to claim rescission even of an executed contract of sale on that account. He points out that the judge has found that it is quite possible to restore the parties to the same position that they were in originally, by the buyer simply handing back the picture to the sellers in return for the repayment of the purchase price.

In my opinion, this case is to be decided according to the well known principles applicable to the sale of goods. This was a contract for the sale of goods. There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable, and that mistake was in one sense essential or fundamental. Such a mistake, however, does not avoid the contract. There was no mistake about the subject-matter of the sale. It was a specific picture of "Salisbury Cathedral." The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract: see *Solle v. Butcher* (1). There was a term in the contract as to the quality of the subject-matter, namely, as to the person by whom the picture was painted—that it was by Constable. That term of the contract was either a condition or a warranty. If it was a condition, the buyer could reject the picture for breach of the condition at any time before he accepted it or was to be deemed to have accepted it, whereas, if it was only a warranty, he could not reject it but was confined to a claim for damages.

I think it right to assume in the buyer's favour that this term was a condition, and that, if he had come in proper time, he could have rejected the picture, but the right to reject for breach of condition has always been limited by the rule that once the buyer has accepted, or is deemed to have accepted, the goods in performance of the contract, he cannot thereafter reject, but is relegated to his claim for damages: see s. 11 (1) (c) of the Sale of Goods Act, 1893 and *Wallis, Son and Wells v. Pratt and Haynes* (2). The circumstances in which a buyer is deemed to have accepted goods in performance of the contract are set out in s. 35 of the Act which provides that the buyer is deemed to have accepted the goods, among other things,

"... when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

In this case this buyer took the picture into his house, and five years passed before he intimated any rejection. That, I need hardly say, is much more than a reasonable time. It is far too late for him at the end of five years to reject this picture for breach of any condition. His remedy after that length of time is for damages only, a claim which he has not brought before the court.

Is it to be said that the buyer is in any better position by relying on the representation, not as a condition, but as an innocent misrepresentation? I agree that on a contract for the sale of goods an innocent material misrepresentation may in a proper case be a ground for rescission even after the contract has been executed. The observations of JOYCE, J., in *Seddon v. North Eastern Salt Co.* (3) are, in my opinion, too widely stated. Many judges have treated it as plain that an executed contract of sale may, in a proper case, be rescinded for innocent misrepresentation: see, for instance, WARRINGTON, L.J., and SCRUTTON, L.J., in *Harrison v. Knowles* (4) ([1918] 1 K.B. 609, 610); LORD ATKIN in *Bell v. Lever Bros., Ltd.* (5) ([1932] A.C. 224); SCRUTTON, L.J., and MAUGHAM, L.J., in *L'Estrange v. F. Graucob, Ltd.* (6) ([1934] 2 K.B. 400, 405). Apart from that, there is now the decision of the majority of this court in *Solle v. Butcher* (1) which overrules the first ground of decision in *Angel v. Jay* (7). It is unnecessary, however, to pronounce finally on these matters because, although rescission may in some cases be a proper remedy, nevertheless it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition. A condition is a term of the contract of a most material character, and, if a claim to reject for breach of condition is barred, it seems to me *a fortiori* that a claim to rescission on the ground of innocent misrepresentation is also barred. So, assuming that a contract for the sale of goods may be rescinded in a proper case for innocent misrepresentation, nevertheless, once the buyer has accepted, or is deemed to have accepted, the goods, the claim is barred. In this case the buyer must clearly be deemed to have accepted the picture. He had ample opportunity to examine it in the first few days after he bought it. Then was the time to see if the condition or representation was fulfilled, yet he has kept it all this time and five years have elapsed without any notice of rejection. In my judgment, he cannot now claim to rescind, and the appeal should be dismissed.

JENKINS, L.J.: I agree. So far as dealings in land are concerned there is a considerable body of authority to the effect that rescission on the ground of innocent misrepresentation will not be allowed after conveyance. For instance, there are the observations (1 H.L. Cas. 632) of LORD CAMPBELL to that effect in *Wilde v. Gibson* (8), and the doctrine has also been applied to leases in *Angel v. Jay* (7). In some of the cases, on the strength of the authorities dealing with sales of land, the proposition has been stated in general terms to the effect that no executed contract can be rescinded after completion on the ground of innocent misrepresentation. As appears from the recent decision of the majority of this court in *Solle v. Butcher* (1) it seems probable that the proposition thus generally stated is unduly wide. In particular, it cannot be assumed that it necessarily holds good with respect to a sale of chattels passing by delivery. For the purposes of this case, however, I find it unnecessary to decide how far it is possible to obtain, on the ground of innocent misrepresentation, rescission of a contract for the sale of chattels passing by delivery after the contract has been completed by delivery of those chattels, and I propose to confine myself to considering whether, assuming such a claim to be open, this is a case in which it should properly be allowed. In my judgment, that question must clearly be answered in the negative on the facts. It is true that the buyer bought the picture on the faith of the representation, innocently made, that it was a painting by Constable. It is true that this was a representation of great importance which went to the root of the contract and induced him to buy. Clearly if, before he had taken delivery of the picture, he had obtained other advice and come to the conclusion that

the picture was not a Constable, it would have been open to him to rescind. It may be that if, having taken delivery of the picture on the faith of the representation, he, within a reasonable time, took other advice and satisfied himself that it was not a Constable, he might have been able to make good his claim to rescission notwithstanding the delivery. That point I propose to leave open. In fact, he took delivery of the picture, kept it for some five years, and took no steps to obtain any further evidence as to its authorship, and, finally, when he was minded to sell the picture at the end of a matter of five years, the untruth of the representation was brought to light.

In those circumstances it seems to me to be out of the question that a court of equity should grant relief by way of rescission. It is true that the county court judge held that there had been no laches, and, of course, it may be said that the buyer had no occasion to obtain any further evidence as to the authorship of the picture until he wanted to sell, but, in my judgment, contracts such as this cannot be kept open and subject to the possibility of rescission indefinitely. Assuming that acceptance of delivery was not fatal to his claim, at all events, I think it behoves the buyer either to verify, or, as the case may be, disprove, the representation within a reasonable time or else to stand or fall by the representation. If he is allowed to wait five, ten, or twenty years and then re-open the bargain, there can be no finality. I do not think that equity will intervene in such a case, more especially in the present case as it cannot be said that, apart from rescission, the buyer would have been without remedy. The judge was clearly of opinion, and it seems to me that he was right, that the representation that the picture was a Constable amounted to a warranty. If it amounted to a warranty and that was broken, as on the findings of the judge it was, the buyer had a right at law to damages for breach of warranty. That remedy he did not choose to exercise. That being so, it seems to me that he has no justification now for coming to equity five years after the event and claiming rescission. Accordingly, it seems to me that this is not a case in which the equitable remedy of rescission, assuming it to be available in the absence of fraud in respect of a completed sale of chattels, should be allowed to the buyer. For these reasons, I agree that the appeal fails and should be dismissed.

**SIR RAYMOND EVERSHED, M.R.:** I also agree that this appeal should be dismissed, for the reasons which have already been given. On the facts of this case it seems to me that the buyer ought not now to be allowed to rescind this contract. In the circumstances it is unnecessary, as my brethren have already observed, to express any conclusion on the more general matter whether the so-called doctrine which finds expression in the headnote to *Seddon v. North Eastern Salt Co.* (3) ought now to be treated as of full effect and validity. The doubt on that matter is the greater since the observations of the majority of this court in *Solle v. Butcher* (1), but out of respect to the argument of counsel for the buyer and because the matter is one of interest to lawyers (see, for example, the article in the *LAW QUARTERLY REVIEW* of January, 1939, p. 90), I venture to add some observations which may be relevant when the general application of this doctrine has to be further considered.

The buyer's case rested fundamentally on this statement which he made: "I contracted to buy a Constable. I have not had, and never had, a Constable." Though that is, as a matter of language, perfectly intelligible, it, nevertheless, needs a little expansion if it is to be accurate. What he contracted to buy and what he bought was a specific chattel, namely, an oil painting of Salisbury Cathedral, but he bought it on the faith of a representation, innocently made, that that painting had been painted by Constable. It turns out that it was not so painted. Nevertheless, it remains true to say that the buyer still has the article he contracted to buy. The difference in value is, no doubt, considerable, but it is, as DENNING, L.J., has observed, a difference in quality rather than in the substance of the thing itself.



That leads me to suggest this matter for consideration. The attribution of works of art to particular artists is often a matter of great controversy and increasing difficulty as time goes on. If the buyer is right in saying that he is entitled, perhaps years after the purchase, to raise the question whether in truth a particular painting was rightly attributed to a particular artist, it may result in most costly and difficult litigation in which there will be found divergent views of artists and critics of great eminence, and the prevailing view at one date may be quite different from that which prevails at a later date. There is, moreover, a further point. The judge has found here that *restitutio in integrum* is possible, meaning thereby, as I understand it, that the picture itself retains the condition which it possessed at the time of the sale in 1944 and can, therefore, be returned to the sellers, and the sellers can return to the buyer the £85 which he paid. It can be well understood that, if the view for which counsel for the buyer contended is of general application, many cases will arise in which other controversies of equal difficulty and complexity may have to be determined—namely, whether in the interval there has been a change through wear and tear or otherwise in the article which has been sold. A set of chairs attributed to Chippendale after being used for six years might well be said to have suffered damage which appreciably diminishes their value. Again, the fashion in these things, and consequently their value, varies from time to time.

It seems to me, therefore, that, if the view of counsel for the buyer is to be accepted, there may arise matters for determination of great difficulty and complexity leading to uncertainty and considerable litigation. And as between one case and another the rule of equity may work somewhat capriciously. Those results, it seems to me, are undesirable. If a man elects to buy a work of art or any other chattel on the faith of some representation, innocently made, and delivery of the article is accepted, then it seems to me that there is much to be said for the view that on acceptance there is an end of that particular transaction, and that, if it were otherwise, business dealings in these things would become hazardous, difficult, and uncertain. A representation of this kind may either be a warranty or not, or equivalent to a warranty or not. If not, then the matters to which I have already referred seem to me to gain in importance. I need not elaborate the point by example, but, if the representation does amount to a warranty, then, as JENKINS, L.J., has pointed out, there is available to the buyer a remedy at law for the breach which is reasonably certain and capable of giving perfectly adequate compensation to the injured party. If such a remedy at law is available, there is less ground for invoking a rule of equity to supplement the law. Finally, I add this. True it is that since the observations of SCRUTTON, L.J., in *Bell v. Lever Bros., Ltd.* (5), and those of this court in *Solle v. Butcher* (1) much greater doubt may be entertained about the validity of the decision of JOYCE, J., in *Seddon v. North Eastern Salt Co.* (3) in 1905—forty-five years ago. The article in the LAW QUARTERLY REVIEW read to us by counsel for the buyer was written eleven years ago. There has been opportunity for Parliament to alter the law if it was thought to be inadequate. I am not saying that that is a ground on which we should conclude that the so-called doctrine of *Seddon v. North Eastern Salt Co.* (3) is well stated or is in all respects correct, but the fact that it has stood for such a length of time, even though qualified, is, I think, another consideration deserving of some weight when this matter has further to be debated and to be adjudicated on. I have added those remarks out of respect to the argument and because of the importance of the case, but I base my conclusion on those grounds which have already been stated by my brethren and which it would be mere repetition on my part to state again.

*Appeal dismissed with costs.*

Solicitors: *Hart-Leverson & Co.* (for the buyer); *Blyth, Dutton, Wright & Bennett* (for the sellers).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

## LEVIN v. ROTH.

[COURT OF APPEAL (Cohen, Asquith and Singleton, L.J.J.), February 23, 24, 27, 1950.]

*Equity—Unconscionable bargain with expectant heir—Bills of exchange given by reversioner for small consideration—Sale of reversion—Subsequent renewal of bills from time to time—Loss of right to application of equitable doctrine.*

APPEAL by the plaintiff from an order of CROOM-JOHNSON, J., dated July 20, 1948.

In 1937, when the parties met, the plaintiff was fifty-seven years old, and the defendant thirty-seven. Both were dental surgeons. The defendant was at that time entitled to a reversionary interest in one half of the residuary estate of his step-grandfather, expectant on the death of his step-grandmother. The value of the said residuary estate was about £30,000, and the defendant had borrowed £4,900 on the security of his interest from a reversionary interest society. On Feb. 1, 1937, under an agreement terminable at one month's notice, the plaintiff agreed to employ the defendant as his assistant at a salary of six guineas per week rising after a certain time to nine guineas. In July, 1937, the defendant gave notice determining the agreement, but the parties remained on friendly terms. On Aug. 24, 1937, the defendant signed two bills of exchange, one for £1,000 and one for £500, in favour of the plaintiff, and the plaintiff signed an agreement to the effect that he, having received the said two bills, promised not to present them for payment or deal with them in any other way until after the death of the defendant's step-grandmother. On Aug. 25, 1937, the parties entered into a service agreement which provided that the plaintiff should employ the defendant as his assistant at a salary of £8 per week from Aug. 27, 1937, until Aug. 1, 1938. The defendant left the plaintiff's employment at the end of July, 1938, and from time to time thereafter he renewed the bills, the last renewal being dated Aug. 1, 1946. On Aug. 2, 1938, the defendant assigned his reversion to the said reversionary interest society absolutely. In August, 1946, the defendant's step-grandmother died, and on June 25, 1947, the bills became due. The plaintiff claimed payment under the bills, with interest. CROOM-JOHNSON, J., felt unable to hold that the bills had been given for no consideration, however small the consideration might have been, and he found that, having regard to the evidence, the promise to pay the £1,500 was referable to the agreement of service entered into on Aug. 25, 1937. The learned judge held, however, that in view of the relationship between the parties at the time when the defendant was an expectant heir, the plaintiff had not discharged the onus which rested on him to show that the bills had not been obtained by an unconscionable use of power, but were fair, just and reasonable. The plaintiff appealed.

*Dare* for the plaintiff.

*Norman Richards* for the defendant.

Cases referred to:

- (1) *Chesterfield (Earl) v. Janssen*, (1750), 1 Atk. 301; 1 Wils. 286; 2 Ves. Sen. 125; 7 Digest 175, 133.
- (2) *Aylesford (Earl) v. Morris*, (1873), 8 Ch. App. 484; 42 L.J.Ch. 546; 28 L.T. 541; 37 J.P. 227; 12 Digest 110, 689.
- (3) *Brenchley v. Higgins*, (1900), 70 L.J.Ch. 788; 83 L.T. 751; 12 Digest 110, 695.
- (4) *Fry v. Lane*, (1888), 40 Ch.D. 312; 58 L.J.Ch. 113; 60 L.T. 12; 12 Digest 110, 691.

COHEN, L.J., said that he did not feel justified in differing from the learned judge on the question of consideration, but he was unable to accept the learned

judge's view on the question of the application of the equitable doctrine relating to unconscionable bargains with expectant heirs. He thought, on the whole, that he would have come to a different conclusion as to the application of the doctrine at the date (Aug. 24, 1937) when the bills were first given, but whether he came to that conclusion or not there was another ground on which the appeal should succeed. His Lordship continued: The bills, on the finding of the learned judge, were not bills given for no consideration. They have been renewed again and again since the defendant ceased, on Aug. 2, 1938, to be in the position of a reversioner. He had sold his reversion. The result is that again and again he has given new bills in exchange for the old bills, and he is no longer in a position to rely on the principles applicable to expectant heirs. Moreover, there was no evidence of any unconscionable conduct on the part of the plaintiff at the time of the renewals. In those circumstances, it seems to me that, applying what was said by LORD HARDWICKE, L.C., in *Chesterfield v. Janssen* (1), we are bound to hold that even if—which I doubt—the defendant was originally entitled to relief, his subsequent conduct in renewing the bills have deprived him of a remedy. I must confess that I have arrived at this conclusion with some reluctance, but I think it is the only possible conclusion on the evidence.

ASQUITH and SINGLETON, L.JJ., agreed.

*Appeal allowed with costs.*

Solicitors: *Simonds, Church Rackham & Co.* (for the plaintiff); *Le Brasseur & Oakley* (for the defendant).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

## THE BERWICKSHIRE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), January 30, 31, February 1, 15, 1950.]

*Shipping—Collision—Damages—Interest—Collision during war between British ship and ship belonging to enemy alien—Damages awarded to alien at end of hostilities—Time from which interest accrues.*

On June 23, 1940, following the surrender of France to Germany, the plaintiffs, the owners of a French fishing vessel, became enemy aliens. On Nov. 2, 1940, this vessel collided with an English vessel, the property of the defendants, and sank with the whole of her cargo and the effects of her crew. On Oct. 13, 1944, a provisional government in France was recognised by Great Britain. On July 24, 1947, in an action by the plaintiffs to determine liability for the loss, the defendants were found to be wholly to blame. In a subsequent claim for damages, the registrar allowed interest on the sum which he awarded, not from the date of the collision, but only from Oct. 13, 1944, *i.e.*, the date of the recognition of the provisional French government, on the ground that between those dates, owing to the war, the defendants were prohibited by law from making any payment to the plaintiffs.

Held: the plaintiffs were entitled to interest from the date of the collision to the date when the matter would have come before the registrar for assessment of damages but for an adjournment at the request of the plaintiffs.

*Dictum of LORD FINLAY, L.C., in Hugh Stevenson & Sons v. Akt. fur Cartonnagen Industrie* ([1918] A.C. 244), *applied*.



[As to INTEREST ON DAMAGES, see HALSBURY, Hailsham Edn., Vol. 30, p. 863, para. 1142; and FOR CASES, see DIGEST, Vol. 41, pp. 812, 813, Nos. 6737-6745.]

Cases referred to:

- (1) *Cooper v. Cooper*, [1936] 2 All E.R. 542; Digest Supp.
- (2) *Evans v. Barilam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; 157 L.T. 311; Digest Supp.
- (3) *The Hebe*, (1847), 2 Wm. Rob. 530; 5 Notes of Cases, 176; 5 L.T. 121; 41 Digest 812, 6741.
- (4) *The Gazelle*, (1844), 2 Wm. Rob. 279; 3 Notes of Cases, 75; 41 Digest 804, 6648.
- (5) *The Kong Magnus*, [1891] P. 223; 65 L.T. 231; 41 Digest 812, 6740.
- (6) *The Joannis Vatis* (No. 2), [1922] P. 213; 91 L.J.P. 196; 127 L.T. 494; 41 Digest 813, 6742.
- (7) *The Northumbria*, (1869), L.R. 3 A. & E. 6; 39 L.J. Adm. 3; 41 Digest 812, 6739.
- (8) *Biedermann v. Allhausen & Co.*, (1921), 37 T.L.R. 662; Digest Supp.
- (9) *N. V. Ledeboter & Van der Held's Textiel-Handel v. Hibbert*, [1947] K.B. 964; 177 L.T. 603; 2nd Digest Supp.
- (10) *Du Belloix v. Waterpark* (Lord), (1822), 1 Dow. & Ry. K.B. 16; 6 Digest 329, 2178.
- (11) *Wolff v. Oxholm*, (1817), 6 M. & S. 92; 2 Digest 160, 303.
- (12) *Hoare v. Allen*, (1789), 2 Dallas 102.
- (13) *Brown v. Hiatts*, (1872), 15 Wallace 177.
- (14) *Foxcraft v. Nagle*, (1791), 2 Dallas 132.
- (15) *Conn v. Penn*, (1818), Pet. C.C. 496.
- (16) *Stevenson (Hugh) & Sons v. Akt. fur Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.

MOTION to vary the registrar's report.

The plaintiffs, who were the owners of the *Anne de Bretagne*, a French fishing vessel, had claimed from the defendants damages in respect of a collision between the French vessel and the *S.S. Berwickshire*, an English vessel, the property of the defendants. At the time of the collision in 1940 the plaintiffs were enemy aliens, and, accordingly, no proceedings were taken until after the recognition by Great Britain of the French provisional government on Oct. 13, 1944. The defendants having been held alone to blame for the collision, the registrar awarded a sum by way of damages with interest to date only from the date of the recognition of the French government. The question for determination was whether or not interest should also be allowed for the period from the date of the collision to Oct. 13, 1944.

*Carpmael, K.C.*, and *Vere Hunt* for the plaintiffs.

*Naisby, K.C.*, and *Boyes* for the defendants.

*Cur. adv. vult.*

Feb. 15. LORD MERRIMAN, P., read the following judgment. This is a motion to vary the registrar's report of July 28, 1949, whereby he assessed the damages in respect of the total loss of the plaintiffs' vessel, the *Anne de Bretagne*, for which, by a judgment of this court on July 24, 1947, the defendants' vessel, the *Berwickshire*, was held to be alone to blame. It raises an interesting and important question about which there is no direct authority.

The material facts are as follows. After the surrender of France on June 23, 1940, the owners of the *Anne de Bretagne*, a French sailing vessel engaged in fishing off the Newfoundland Banks, became enemy aliens. On Nov. 2, when returning to her home port after a fishing expedition laden with a full cargo of green cod, she collided in the North Atlantic with the *s.s. Berwickshire*, an English vessel, and sank with the whole of her cargo and the loss of the effects

of her crew and of one passenger. Happily, no lives were lost. It was impossible at that time for her owners to take proceedings. Equally, it was impossible for the owners of the *Berwickshire* to admit liability and pay compensation for the loss of the *Anne de Bretagne*, since any such payment would not merely have been forbidden by the common law of England, but would have been in direct contravention of the Trading with the Enemy Act, 1939. Thus matters remained in abeyance until the conclusion of hostilities, or, at least, until the provisional government of General de Gaulle was recognised on Oct. 13, 1944.

The writ in the action was issued on Sept. 20, 1945. In November, 1945, bail was demanded and given in the sum of £29,000. At the hearing of the action on July 24, 1947, the *Berwickshire* was held alone to blame, but for one reason or another the claim for damages was not filed until Feb. 23, 1949. The claim was for £109,003 8s. 2d. together with interest and costs. Of this figure £77,126 7s. 2d. represents the cost of replacing the vessel and £2,925 her non-consumable stores and equipment. The registrar awarded £7,500 in respect of those two items together. His award is no longer challenged in this respect, nor is there now any challenge in respect of the disallowance of the considerable claim for loss of profit, amounting in round figures to £11,900, nor in respect of his award of £699 10s. for the crew's effects, nor the £75 awarded in respect of agency. As regards the loss of cargo, in respect of which the registrar awarded £4,000 on a claim of £15,396 12s., the defendants, at an early stage of the hearing before me, offered to increase the sum awarded by £5,600. This was accepted by the plaintiffs, and, accordingly, I order that the registrar's award in this respect be varied by substituting the sum of £9,600 for the sum of £4,000. The only actual controversy, therefore, was in respect of the claim for interest. The learned registrar has awarded interest, not from the date of the collision, but only from Oct. 13, 1944, the date of the recognition of General de Gaulle's government, and he awards it only until June 23, 1949. This is because the reference was postponed from that date at the plaintiffs' request. As to the correctness of his decision to limit the interest to this latter date there can be no question, nor is there any dispute that interest is rightly awarded from July 28, 1949, the date of his award, until payment.

Thus it will be seen that the real dispute is whether or no interest should be allowed for the period from the date of the casualty to Oct. 13, 1944. The learned registrar, in a carefully considered judgment, while acknowledging that it has always been recognised in Admiralty cases that interest is paid on damages and that since the Law Reform (Miscellaneous Provisions) Act, 1934, this principle is applied to all courts, including the Admiralty Court, held that it did not follow that where the one party is prohibited by law from having any commercial dealings with the other party the first party should necessarily pay interest for the period during which he had been prohibited from paying. He then dealt with the suggestion that payment could have been made to the Custodian of Enemy Property. As to this, the learned registrar was clearly right in rejecting the contention, and it was not pressed before me. Finally, after referring to the circumstances in which the plaintiffs became enemies of Britain and so remained until the liberation of France, he states his conclusions in these words:

“ During that period all commercial intercourse between British nationals and enemy aliens was prohibited, whether by common law or by the Trading with the Enemy Act, 1939. The effect of this prohibition was, in my opinion, not merely to suspend, but to cancel the payment of interest as between British nationals and enemy aliens, and to deprive me of discretion in the matter. Accordingly, I made no award of interest from the date of the collision until the date of liberation. If it had been a matter of discretion I should have reached the same result and should have allowed no interest to run between the collision and the liberation. The liberation of France

I date from the recognition by Britain of the de Gaulle government on Oct. 13, 1944."

It will be seen, therefore, that the learned registrar has determined this question on the ground that he is obliged to reject a claim for interest for this period as a matter of law rather than as a matter of the exercise of the discretion entrusted to him by s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934. Unless I am driven to the same conclusion of law as that held by the learned registrar, I also have a discretion, under s. 3 (1) of that Act, whether to award any interest at all, and, if so, at what rate, on what part of the damages, and whether for the whole or any part of the period between the collision and the judgment. It is quite clear from the approval of the decision in the Court of Appeal in *Cooper v. Cooper* (1), by LORD ATKIN ([1937] 2 All E.R. 649) in the House of Lords in *Evans v. Bartlam* (2), that my discretion would not be fettered by any previous exercise of the learned registrar's discretion. A

As I have already indicated, there can be no doubt that the principle of including in the damages for a collision at the discretion of the judge interest on the amount recovered, at a rate, for a period, and whether in respect of the whole or part of the amount recovered, all of which matters are also respectively at the discretion of the judge, was firmly embodied in the Admiralty jurisdiction at a time when the right to award interest by way of damages at common law depended, speaking generally, on the Civil Procedure Act, 1833, ss. 28 and 29, or on the express terms of a contract, or those imported into mercantile contracts by the custom of merchants, as, for example, on bills of exchange or promissory notes: see the notes to the common indebitatus count for interest, in BULLEN & LEAKE, 3rd ed., pp. 51-52. B C D

As to the Admiralty practice, it is unnecessary to multiply authorities. I need only refer to the *dictum* of DR. LUSHINGTON in *The Hebe* (3) (5 Notes of Cases, 182), and in *The Gazelle* (4) (2 Wm. Rob. 281), *The Kong Magnus* (5) ([1891] P. 236), per SIR CHARLES BUTT, P.; and *The Joannis Vatis* (No. 2) (6) ([1922] P. 223), per SIR HENRY DUKE, P. There is also a very clear statement of the principle by SIR ROBERT PHILLIMORE in *The Northumbria* (7). Distinguishing the authorities cited in support of the proposition that the right to award damages depended solely on the Civil Procedure Act, 1833, ss. 28 and 29, and that the Admiralty practice was erroneous as being at variance with the common law both before and since the passing of the statute, SIR ROBERT said (L.R. 3 A. & E. 10): E

"But it appears to me quite a sufficient answer to these authorities to say, that the Admiralty, in the exercise of an equitable jurisdiction, has proceeded upon another and a different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, *ex mora* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto*." F G

Dealing with the period from which the interest is to be reckoned, he points out (*ibid.* 11, 12) that the court should be guided by the principle of *restitutio in integrum*, and deals with the argument that the statutes limiting liability had adversely affected the established principles of the court, as follows (*ibid.* 12): H

"The question is, how are these principles affected by the statutes which limit the liability of the wrongdoer. In these statutes the legislature introduced a new principle, the object of which was to give some protection to the owner against the wrongdoing of his servant, the master of the vessel. They preserved the principle of *restitutio in integrum* in cases where, with his actual fault and privity, the damage had been inflicted on the sufferer; but with this exception, they limited his liability to a certain definite sum.



A In the latter case, therefore, this limited amount took the place of the *restitutio in integrum*; but the principle still remains, that the liability to this amount attaches from the time of the collision; and there seems no reason why interest should not accrue on the delay to pay that limited amount, as well as in the case where the amount is unlimited. Indeed, the equity of the thing is the other way, for to refuse this interest would be to diminish still further the natural right of the sufferer to full compensation for the injury which he has sustained. It is to be observed that the sufferer does not, where interest is awarded, obtain interest on the amount of his damage, but on the limited amount, or on his share of the limited amount, to which the statute has restricted the liability of the wrongdoer. B In the case of a vessel without cargo being sunk, it is clear that the interest would date from the time when the liability attached, that is, from the moment of the collision. Nor, when the case is examined, does it appear that a different rule ought to apply when the vessel carries cargo. Under the rule of *restitutio in integrum* the cargo-carrying vessel did not obtain interest from the date of the collision, because she received it in the shape of freight at the port of delivery; but where the amount of the liability is limited, and the sufferer does not receive full compensation, the reason C which fixes the date of the probable arrival at the port of delivery as the date from which interest shall run does not apply."

D Counsel for the defendants admitted that there was no authority binding me to hold in an Admiralty case that interest could not be recovered in respect of a period during which the payment either of the principal debt or of the interest was prohibited by law. He invited me, therefore, to decide this question on the basis that the award of interest as part of the damages for this collision was a matter for my discretion and not one of law. Counsel, however, rightly emphasised that it must be a judicial exercise of discretion, and urged on me the propriety of guiding and informing my discretion by considering the E decisions of common law judges in cases which were not widely dissimilar. In particular, he laid stress on two decisions under the Bills of Exchange Act, 1882, one of which arose out of the 1914-18 war, *Biedermann v. Allhausen & Co.* (8), decided by DARLING, J. and *N. V. Ledeboter and Van der Held's Textiel-Handel v. Hibbert* (9), decided by MORRIS, J.

F I note in passing, for whatever the distinction may be worth, that in the present case I am dealing with the enhancement of the damages arising *ex delicto* on the established Admiralty practice, whereas all the cases by which I am invited to guide the exercise of my discretion are cases of damages for non-payment of a debt arising *ex contractu*, and, moreover, that the bills of exchange cases depend on the provisions of the Bills of Exchange Act, 1882, which, by the very terms of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1) (c), are expressly excluded from the operation of that Act. G Nevertheless, having special regard to the fact that the Bills of Exchange Act, 1882, was intended to be a self-contained code declaratory of the common law, I might, in the absence of any other guidance, have felt myself impelled to follow the principle so clearly expressed by MORRIS, J., in *N. V. Ledeboter, &c. v. Hibbert* (9), and to confirm the learned registrar in acting on it. MORRIS, J., says ([1947] H K.B. 967):

"In the present case, although the defendant did not perform his contractual obligation to meet the bill at maturity, he could not lawfully have done so. Apart from the position at common law, there was express statutory provision which prohibited him from paying the plaintiffs. In these circumstances, in my opinion, he is not liable in damages for having failed to pay. He was obliged not to pay. There seems to me to be something incongruous in asking the court to award damages against a man for failing to do what

the law forbade him to do. This, in my view, disposes of the claim which is made."

This is in accord with the decision of DARLING, J., in *Biedermann v. Allhausen & Co.* (9). He said that (37 T.L.R. 663):

"With regard to interest it seemed that there could be no interest by way of damages until the day had arrived when payment became legal."

The same principle was expressed in the Court of King's Bench in *Du Belloix v. Waterpark* (Lord) (10). The action was by the payee against the maker of a promissory note, dated Dec. 27, 1787, at Paris, payable six months after date. The action was tried before ABBOTT, C.J., at the Guildhall sittings in January, 1822. ABBOTT, C.J., in reply to a question by the jury whether they were bound to give the plaintiff interest as well as principal, charged them that interest being the damage for the detention of the debt, the question was peculiarly for the jury's consideration, and the jury found a verdict for the principal sum only. On a motion for a rule to show cause why the amount of the verdict should not be increased by adding the interest due on the note from the day it became due until judgment, the Chief Justice is reported as saying (1 Dow. & Ry. K.B. 19):

"But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events during that portion of the time the interest could not have run, and it would even have been illegal to pay the bill whilst the plaintiff was an alien enemy."

I am bound to confess that I do not really understand, if the fact that the plaintiff was an alien enemy during the greater part of the time was a vital objection to his recovering any interest for that period, why the Chief Justice left the question of interest at large to the jury. However that may be, the court decided that the question of interest was peculiarly within the province of the jury. In that sense the passage in the Chief Justice's judgment is *obiter dictum*, but it plainly shows that, had he been sitting as a judge alone, he would have decided the question at common law in the same way as it was decided under the Bills of Exchange Act, 1882, in the two cases to which I have already referred.

Reference was also made to *Wolff v. Oxholm* (11). This was an action for the recovery of a debt contracted in England by a Danish subject resident in Denmark with a house of trade established here and in a time of peace between the two countries. The case raised, and was decided on, considerations of international law arising out of a Danish ordinance passed during a period of hostilities between this country and Denmark quashing certain proceedings instituted in peace-time for the recovery of the debt and the interest thereon. It was held that this ordinance, not being conformable to the usage of nations, did not bar the right of the plaintiffs to recover the debt and interest in the English court. It is true to say that neither in the argument nor in the judgment was any special reference made to the question of interest as distinct from the principal debt. It was sought to distinguish this case, not only on this ground, but also on the ground that the default had occurred before the war, and, therefore, interest had already begun to run. I do not understand, however, even if that be so, on what principle, if the *dictum* of ABBOTT, C.J., in *Du Belloix v. Waterpark* (Lord) (10), was right, that affects the right to recover in respect of the period during which the two countries were at war.

My attention was drawn to two American cases, *Hoare v. Allen* (12) and *Brown v. Hiatts* (13). Both were claims for interest on a mortgage accrued due in the first case during the War of Independence, and in the second during the

Civil War. Delivering the judgment of the Supreme Court in *Brown v. Hiatts* (13), FIELD, J., said (15 Wallace 185):

“As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted.”

It is clear, however, that the court drew no distinction between cases in which the claim for interest was based on the terms of the contract and those in which interest is allowed by law. Indeed, after a reference to *Hoare v. Allen* (12) and to *Foxcraft v. Nagle* (14), in which the former case had been followed in 1791, the learned judge continued (*ibid.*):

“The counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those to which the law allows interest, and contends that the revival of the debt in the first case, after the termination of the war, carries the interest as part of the debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle, which suspends its running during war. In the first case cited, from Pennsylvania, interest was stipulated in the contract. ‘A prohibition,’ says WASHINGTON, J., in *Conn v. Penn* (15), ‘of all intercourse with an enemy during the war, and the legal consequence resulting therefrom, as it respects debtors on either side, furnish a sound, if not in all respects a just reason, for the abatement of interest until the return of peace. As a general rule it may be safely laid down that wherever the law prohibits the payment of the principal, interest during the existence of the prohibition is not demandable.’”

This would, indeed, have been a formidable weight of authority had it stood alone, but I do not think that it does. In *Hugh Stevenson & Sons v. Akt. fur Cartonnagen Industrie* (16) an English company and a German company had carried on a partnership business in England until the outbreak of war between Great Britain and the German Empire operated as a dissolution of the partnership. Thereafter the English company continued to carry on the business and to use the partnership’s plant for that purpose. It was held by the House of Lords that the German company were entitled to a share of the profits made after the dissolution by the carrying on of the business by the English company with the aid of the German company’s share of the capital. The trial judge, ATKIN, J., had taken the view that they were not entitled to any share of the profits of the partnership since the date of the outbreak of war, and that view was supported by LAWRENCE, J., in a dissenting judgment in the Court of Appeal. Their Lordships, however, were unanimously of opinion that the case fell to be decided on the equitable principles governing the winding-up of a partnership, which, as LORD HALDANE said ([1918] A.C. 247):

“... depends on the principles which courts of equity apply to persons who are in possession of property under circumstances in which they are treated as standing in a fiduciary relationship. It is more than and different from the procedure which applies when the rights of parties arise merely out of the rules of the common law which apply to contracts.”

To decide otherwise than that the German partners were entitled to their fair share of the profits during the war would be to declare that the English partners were entitled to confiscate the property of the German partners for their own benefit, whereas in English law an enemy’s right to his property in this country is not extinguished, but his claim to receive it during the war is merely postponed.



As to the two American cases, LORD DUNEDIN (*ibid.* 248) expressly reserved his opinion whether those authorities would or would not be held as in accordance with the law of this country. LORD HALDANE made no comment on them. LORD FINLAY, however, said (*ibid.* 245):

"These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the courts of this country, does not appear to have formed the subject of any express decision in England. The judgment of LORD ELLENBOROUGH, however, in *Wolff v. Oxholm* (11), appears to me to imply that, in the view of LORD ELLENBOROUGH, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected."

LORD ATKINSON says (*ibid.* 255):

"Two American cases and one English (*Du Belloix v. Waterpark* (Lord) (10)), were cited going to establish that where the relation between the parties is that of debtor and creditor interest does not accrue to an alien enemy while he is an alien enemy. It is not very easy to ascertain what precisely was the principle upon which those decisions were based. As far as one can gather, however, it appears to me to be this: that interest is in the nature of damages payable by the debtor by reason of his withholding his debt, his default in not paying his debt, and since during war he cannot lawfully pay his debt to an alien enemy without committing a crime, he is not in any default in omitting to pay it, and should not therefore be mulcted in damages for not doing what he cannot do lawfully. This doctrine has been extended to a case where the debt was due under a covenant by a mortgagor to pay interest on the mortgage money, presumably on the ground that, though the covenant was in form absolute and independent of the payment of the mortgage debt, it was impliedly conditional on default being made in payment of that debt. I do not think these decisions are consistent with the principle of the decision in *Wolff v. Oxholm* (11), in which, as I read the report, interest which accrued due during the war with Denmark was recovered, and besides I think they have not any application to the present case."

LORD PARMOOR says (*ibid.* 259):

"In the course of the argument two American cases were called to the attention of your Lordships—*Hoare v. Allen* (12) and *Brown v. Hiatts* (13). These cases have not, in my opinion, any direct bearing in this appeal, and I should require further research and investigation before accepting them as an authority that interest is not payable though there is a stipulation for its payment. In such a case it is difficult to see any difference in principle between the payment of interest and the payment of a capital sum. The case of *Du Belloix v. Waterpark* (Lord) (10), illustrates this point. This was an action on a promissory note which did not contain a stipulation for payment of interest. In the absence of such a stipulation the judge directed the jury that interest was damage for the detention of the debt, and that the question whether it should be allowed was peculiarly for their consideration. The jury found a verdict only for the principal sum named in the note. The court held that the jury had been rightly directed and that the question of interest was entirely for them."

Referring to the passage in the judgment of ABBOTT, C.J., which I have quoted, LORD PARMOOR continues (*ibid.*):

"My Lords, in my opinion, this *dictum* would not apply either to a case

in which there is a stipulation for interest, or where there is a fiduciary relationship between the parties on the dissolution of a partnership."

In his judgment in *N. V. Ledeboter v. Hibbert* (9), MORRIS, J. ([1947] K.B. 969), cites these passages from the speeches of LORD FINLAY, LORD ATKINSON and LORD PARMOOR in full, but says that he does not read them as involving a rejection of the view expressed by ABBOTT, C.J., in *Du Belloix v. Waterpark (Lord)* (10). It may be putting it too high to speak of rejection, for, as I have already said, the appeal was decided on a broader principle, but, at least, it may be said that very slender support for the principle on which the decision of the learned registrar is based is afforded by such phrases as LORD FINLAY's: "It is difficult to see on what principle the interest is to be forfeited if private property is to be respected"; or LORD ATKINSON's: "It is not very easy to ascertain what precisely was the principle upon which those decisions were based," which is followed by an unfavourable comment on the supposed principle stated in terms indistinguishable from those employed in *N. V. Ledeboter v. Hibbert* (9), or LORD PARMOOR's: "In such a case it is difficult to see any difference in principle between the payment of interest and the payment of a capital sum."

I am not concerned to express any opinion whether *Biedermann v. Allhausen* (8), and *N. V. Ledeboter v. Hibbert* (9), were rightly decided on the express provisions of the Bills of Exchange Act, 1882. I think, however, that I derive much surer guidance on the question how I should exercise my discretion from these *dicta*. However the case may stand regarding payment of interest by way of damages for a breach of contract, in my opinion, the true principle underlying the award of interest in Admiralty is that in every £'s worth of damage in respect of which interest is ultimately awarded, the interest has accrued potentially from the moment when the damage was suffered until the liability has been adjudged and the amount finally ascertained.

The learned registrar speaks of the interest being, not merely suspended, but cancelled, by the outbreak of war, but the suggestion that there is some distinction in this respect between the sum awarded as damages and the interest thereon seems to me to be in conflict with the law as stated by LORD FINLAY in his speech in *Hugh Stevenson & Sons v. Akt. fur Cartonnagen Industrie* (16), when he says ([1918] A.C. 244):

"It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime."

After all, it is the injured plaintiffs who have been kept out of the damages justly due to them, and the wrongdoers, or their insurers, have had the use of the money meanwhile. In holding, as I do, that interest should run from the date of the casualty to June 23, 1949, I think that I am following a line of reasoning which LORD FINLAY, LORD ATKINSON and LORD PARMOOR would have applied to a case like the present.

No question has been raised regarding the fixing of the rate of interest at four per cent., which seems to me to be reasonable. Accordingly, I vary the registrar's report further by including interest at this rate from the date of the casualty, and I give judgment accordingly.

*Judgment for the plaintiff with costs, less half the costs of printing the record.*  
Solicitors: *Bentleys, Stokes & Lowless* (for the plaintiffs); *William A. Crump & Son* (for the defendants).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

## MIDDLETON v. BALDOCK

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Jenkins, L.J.J.),  
March 1, 2, 1950.]

*Rent Restriction—Possession—Dwelling-house let to husband—Subsequent desertion  
by husband—Wife remaining in occupation—Separate actions against husband  
and wife—No statutory ground pleaded by landlord—Husband's consent to  
possession.*

*Rent Restriction—Practice—Separate actions for possession against husband and  
wife—Consolidating actions—Joinder of parties in one action.*

A landlord claimed possession of a dwelling-house, to which the Rent Restrictions Acts, 1920 to 1949, applied, from the tenant merely on the ground that the contractual tenancy had come to an end and not on any ground specified by the Acts. A second action for possession of the same premises was brought against the tenant's wife on the ground that she was a trespasser. The tenant, who had deserted his wife and left her in the house, which was the matrimonial home, with some of his furniture, admitted the landlord's claim for possession and offered to give possession forthwith. At the hearing of the first action the wife's application to be joined as a defendant was refused. An order for possession against the husband was made, and when the second action against the wife was heard an order was also made against her. The Court of Appeal allowed the wife's application to be joined as a party in the action against the tenant, and gave her leave to appeal.

HELD: (i) where a husband had deserted his wife and the wife remained in the matrimonial home she was lawfully there and the husband remained in occupation by her; possession of a dwelling-house to which the Rent Restrictions Acts applied could only be ordered on one of the grounds specified in the Acts, and a tenant could not by agreement waive the statutory protection afforded by the Acts; and, therefore, the orders for possession were wrongly made.

*Brown v. Draper* ([1944] 1 All E.R. 246) and *Old Gate Estates, Ltd. v. Alexander* ([1949] 2 All E.R. 822), applied.

(ii) where it was brought to the attention of a court that there were separate actions for possession against a husband and his wife, *prima facie* either those actions ought to be consolidated or the two parties should be made parties in one action, so that the whole matter could be tried at the same time.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 333, para. 400; and FOR CASES, see DIGEST, Vol. 31, pp. 575-578, Nos. 7226-7289, and DIGEST Supp. and 2nd DIGEST Supp.]

Cases referred to:

- (1) *Barton v. Fincham*, [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 31 Digest 579, 7280.
- (2) *Thorne v. Smith*, [1947] 1 All E.R. 39; [1947] K.B. 307; [1947] L.J.R. 596; 2nd Digest Supp.
- (3) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.
- (4) *Old Gate Estates, Ltd. v. Alexander and Another*, [1949] 2 All E.R. 822;
- (5) *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792; 2nd Digest Supp.
- (6) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430; 2nd Digest Supp.

APPEAL by the wife of the tenant from two orders made by His Honour JUDGE FIELD, K.C., at the Bedford County Court, and dated Nov. 23, 1949, giving the landlord possession of a dwelling-house,



The landlord commenced two separate actions in respect of the same dwelling-house, to which the Rent Restrictions Acts applied, one against the tenant and the other against his wife. The tenant, who had deserted his wife and left her in the house, signed a document admitting the landlord's right to immediate possession. An application by the wife to be joined as a defendant in her husband's action was refused. A possession order was made against the husband and in the second action against the wife. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

*Heathcote-Williams, K.C.*, and *S. N. Bernstein* for the wife.

*H. W. Sabin* for the landlord.

**SIR RAYMOND EVERSLED, M.R.:** There were two actions in the Bedford County Court in one of which the plaintiff (the landlord) was a Mrs. Middleton and the defendant (the tenant) was a Mr. Baldock who had been the contractual tenant of the premises, 39, Wellington Street, Bedford. In the second action his wife, Mrs. Baldock, was the defendant. In both proceedings the landlord claimed possession. In neither proceeding did she allege any grounds for possession such as are set out in the Rent Restrictions Acts. She simply alleged that she was the owner, that the contractual tenancy had come to an end, and that the wife was a trespasser. The action against the husband came on first and the solicitors for the wife, who were attending the court for the purpose of dealing with the second action, then discovered for the first time that there was this separate proceeding against the husband for possession. The solicitors, accordingly, applied to the judge for their client, Mrs. Baldock, to be joined as a defendant in the first action so that the question of the possession of these premises should be litigated and determined in the presence of all three, the landlord, the tenant, and his wife. The judge did not assent to that suggestion, nor did he direct a consolidation of the two proceedings, but he tried first the husband's action and then the wife's action. The husband had deserted his wife. For some time prior to the proceedings the husband and the wife had lived together at 39, Wellington Street, Bedford, and it was their matrimonial home. The wife obtained an order for the payment by the husband of maintenance to her, and after his desertion she continued to live in the house where an appreciable quantity of her husband's furniture remained. The husband, having deserted his wife, was not concerned to protect her right to remain on the premises. On the contrary, he was anxious to relieve himself of any further obligations to the landlord in reference to the premises and to do whatever he was asked to do so that his wife should be evicted from them. He, therefore, proceeded, in the first action, to sign a document which I assume was laid before him by the landlord or her advisers and is in the following terms:

"I admit the plaintiff's title and her right to immediate possession and offer to give possession forthwith. I admit the claim for £5 7s. 3d."

When the first case (what I call the "husband's case") came on, the landlord proved this document. The judge thereupon came to the conclusion that the husband should be treated as admitting the right of the landlord to possession, and he made an order for possession.

The wife's action then came on. The wife proved the matters of fact I have stated and claimed that she was rightly in possession as the wife of the tenant and that no order ought to be made against her. The judge came to the conclusion—and having regard to what had happened in the husband's action I am inclined to think rightly—that, an order having been made against the husband, there could be no question of any right to remain in possession on the part of the wife, and he, therefore, made an order also against the wife. In my judgment, the order against the husband was made without jurisdiction and was erroneous, but it had been made and the husband was in no mood to appeal

against it. Unless the order could be got rid of, the wife's appeal in her own action was, for the reasons I have indicated, not likely to succeed. In those circumstances she was compelled to ask this court, in the exercise of the jurisdiction which we admittedly have, to add her as a party to her husband's action and give her leave to appeal. That we did. She, therefore, brings the appeal in that action and at the same time appeals in her own action, for, if she succeeds in the appeal in her husband's action, the foundation for the order made in her own action would go and she would be entitled to challenge that order also. The necessity for all that multiplicity of proceedings is, I think, most regrettable. A  
It seems to me, as a matter of practice and common sense, plain that where it is brought to the attention of a court that there are claims for possession against a husband and a wife, *prima facie* those claims ought either to be consolidated or the two parties should be made parties in one action, so that the whole matter B  
can be tried at the same time. Had that been done in this case there would have been a great saving of unnecessary trouble and expense.

The question now is: Was the order made against the husband rightly made? I have indicated my view that it was not, and I will now proceed to state my reasons. In the first place, it is clearly established that a landlord seeking possession in the courts against a tenant must, if he is to obtain an order, establish C  
that there is under the Rent Restrictions Acts jurisdiction to make the order for one or other of the grounds stated in the Acts. Those grounds are numerous and they may depend on the proof of matters of fact—for example, that the tenant is in breach of some covenant. If the tenant, when sued for possession on some such ground as I have indicated, chooses to admit the truth of the allegation on which the landlord's claim is based, I think it is also established (and was D  
so stated by SCRUTTON, L.J., in *Barton v. Fincham* (1)) that the judge can accept the admission as sufficient to found his jurisdiction and is not bound himself to investigate the matters of fact alleged. He has jurisdiction to make an order. If it afterwards turns out that the admission by the tenant was procured by the landlord by some impropriety, other remedies would become available for the deceived tenant. That did happen in *Thorne v. Smith* (2) where E  
BUCKNILL, L.J., observed that, if matters of fact on proof found the jurisdiction, the admission of the tenant of those matters of fact will give the court the requisite jurisdiction to make an order. If, again, the tenant goes out of possession and delivers up the premises to the landlord, equally there is nothing to prevent the landlord taking advantage of that fact and going into possession. By quitting the premises the tenant takes himself out of the protection of the F  
Acts, and, therefore, no proceedings are necessary against him. If some unauthorised person enters the premises after the tenant has effectively given up possession himself and remains there without any authority on the part of the tenant or of the landlord, it may be necessary for the landlord to bring an action for trespass against that third party. None of these illustrations, however, applies to the present case. As I have said, the actual individual in possession G  
was the tenant's wife and beyond any shadow of doubt, *vis-a-vis* the tenant, she was rightly there.

Counsel for the landlord has addressed to us an argument that since recent legislation it is no longer true to say that there is any agency in a wife, that is, any right which a wife enjoys on behalf of her husband when she is in possession of her husband's house, but I do not accept that argument. It seems to me that H  
Mrs. Baldoek, as the wife of Mr. Baldoek, who had deserted her, beyond doubt was entitled to be in possession and to enjoy any right the tenant had under contract, statute, or otherwise, to live on the premises. If matters had been otherwise and the wife had wronged the husband, or if, though not the guilty party, an appropriate court, on the husband's application, had ordered the wife to go out, the wife's right to say she was lawfully there would, of course, have come to an end, but that has not happened in this case. On the facts of this

A case, it seems to me, the conclusion inevitably follows that, as the wife was rightly in possession on her husband's behalf, the statement made by the husband that he admitted the landlord's right to immediate possession and offered to give possession was futile and irrelevant. His offer to give possession was one he was unable to perform and he wholly failed to perform it. The only way he could perform that promise would be by getting a court with competent jurisdiction in matrimonial matters to order his wife out or, possibly, if he adopted the more mediaeval method suggested by counsel for the landlord, by taking his wife by the scruff of her neck and throwing her out. In the absence of one of those methods, he was unable to give possession and he has failed so to do.

It follows, therefore, that the second type of case to which I have referred is inapplicable here. This is not a case in which possession has been given.

B It is, therefore, necessary for the landlord to get an order and she can only get it if she can found herself by appropriate allegation and appropriate proof on one or other of the grounds in the Rent Acts. That she has not done. Counsel for the landlord has suggested that the mere assertion by the landlord that she claims possession, if admitted by the tenant, is sufficient to found jurisdiction under the Acts, but, in the absence of actual possession which removes the premises altogether from the Acts, I reject that argument. It, therefore, follows C that the document which was the foundation of the judge's order in the husband's action was wholly ineffective for any of the purposes for which it was used ; that the judge, with the knowledge which he had that the wife was, in fact, in possession as the wife of the tenant, could not properly make the order he did ; and that that order must be set aside. Once that order is out of the way it follows D that there is no basis on which there could be made the order which was made in the wife's case. It follows also that both orders must be set aside.

E I have dealt with this matter on what I consider to be the general principle to be derived from looking at the cases cited and, in particular, *Barton v. Fincham* (1). This kind of question, though the circumstances were not by any means identical, has twice been before this court recently and I will, in conclusion, say just a word about those two cases. The first is *Brown v. Draper* (3). F There a husband, who was the tenant, having had disputes with his wife, departed from the premises, leaving his wife and child in occupation. He stopped paying the rent, but he did not revoke any authority that he had given, or must be taken to have given, to his wife to remain on the premises. The landlord brought proceedings against the wife alone, not joining the husband or bringing any proceedings against him. The county court judge made an order for possession against the wife, but this court set it aside. I think counsel for the landlord is entitled to say that the ground on which this court primarily founded itself was the absence as a party to the proceedings of the tenant, that is, the husband. It was pointed out that in his absence no effective order could be made against the tenant's wife. Therefore, the precise point with which we are here G concerned did not arise, but I am inclined to think that the reasoning of this court goes further than counsel for the landlord is disposed to concede. I would, however, like to read one or two passages from the judgment of the court delivered by LORD GREENE, M.R. ([1944] 1 All E.R. 247):

H " . . . the county court judge appears so to have held, that, in view of the statements made by Joseph Draper [the husband] in the witness-box, his right to claim the protection of the Acts has gone. We do not take this view. There are, we think, only two ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Acts. One is, as we have stated, by giving up possession. The other is by an order against the tenant for recovery of possession. We do not see on what ground it can be said that a tenant who remains in possession can, by a mere statement of his intentions and wishes in the witness-box, in an action to which he is not a party, confer on the court a jurisdiction of which the statute deprives it.



Unless and until Joseph Draper gives up possession the respondent can only obtain possession as against him by obtaining an order; and the power of the court to make such an order is limited by statute."

After saying that a tenant remaining in possession cannot lawfully contract out of the Act, LORD GREENE said (*ibid.*, 247):

"No contract, and *a fortiori*, no mere statement of his wishes or intentions, can deprive him of the statutory protection."

Although it contains the important phrase "in an action to which he is not a party," I do not think that the passage I have read bears anything like so limited a meaning as counsel for the landlord suggests. I think that LORD GREENE, M.R., was saying, though in very much better language, what I have tried to say, namely, that a tenant does not put an end to his statutory right by merely asserting that he does not desire to remain on the premises and that he proposes, or is willing, to go out while his wife is still, in fact, there. LORD GREENE, M.R., continued (*ibid.*, 248):

"Were the landlord now to take proceedings against Joseph Draper to recover possession, Joseph Draper could, in our opinion, say that he had changed his mind and that he now wished to avail himself of the protection of the Acts."

That, I think, again tends to support the view I have stated. If a husband merely states that he is willing to give up possession at some time, he can change his mind at any moment—at any rate, up to the making of an order. In this case the order was made, and I am willing to assume that any change of mind after the making of an order would be ineffective if the order was operative. I find it unnecessary to read the whole of LORD GREENE's judgment, but I must refer to what is said at the end because it is this passage which undoubtedly lends colour to the view put forward by counsel for the landlord that LORD GREENE, M.R., was not deciding, to put it at its lowest, what would have been the result had the facts been as they are in this case, namely, both parties being before the court and the husband then saying that he was willing to give up possession. LORD GREENE, M.R., said (*ibid.*, 249):

"... it follows that the court has no jurisdiction to make an order against the wife unless the husband is a party and an order is made against him as well. If the views above expressed are correct, they cover the present case; and the proceedings are defective for want of parties. The action, therefore, ought to have been dismissed. It may well be that, in the circumstances of this case, the [wife] will not secure any lasting benefit from this decision; since, if the landlord brings a fresh action, making Joseph Draper a party, it may be that Joseph Draper will submit to an order. On the other hand, he may change his intention . . ."

That, I concede, seems to suggest that if in such a case as the present, assuming the husband and the wife to be before the court in the same proceedings, the husband submits to an order—or even if they are not the same proceedings, but the husband submits to an order—then an order might be made which would be effective and would entitle the landlord also to possession against the wife. That part of the judgment was, I think, *obiter*. The set of circumstances which we have now to consider was not in the minds of the court, and the passage I have quoted is not, therefore, in my judgment, authority which compels us to take the view for which counsel for the landlord contended. Before leaving that case I add that it seems to me that there is no distinction between the tenant stating in the witness box that he is willing to give up possession and his writing it on a piece of paper and allowing the landlord to prove it.

The second and later case, *Old Gate Estates, Ltd. v. Alexander* (4), came before this court last year. In that case the plaintiffs had examined with some care the

decision of this court in *Brown v. Draper* (3) and had attempted to marshal their forces in accordance with the observations of LORD GREENE, M.R., in the earlier case. They were, however, defeated by a change of mind on the tenant's part. I do not say they would not otherwise have been defeated, but they were plainly defeated for the reason which I have given. In that case there was a tenant living with his wife and they quarrelled. The tenant left the matrimonial home and proceeded to purport to surrender it by a written agreement. His wife remained on with the furniture. The husband then, at the behest of the landlords, signed a further document purporting to revoke the wife's authority to remain on. The landlords had thus got two separate documents. In one the tenant said that he was willing to give up possession and did not resist the claim—indeed, he stated, without any foundation of fact, that he handed back the key. In the other, he said: "Please take this as formal notice of the revocation of any authority or leave which I may have at any time granted or given to you"—that was to his wife—"to occupy the said flat." Armed with both those documents the landlords thought that their position was a strong one, but by that time the husband and the wife had come together again and when the action came on they were both in possession together and the husband said: "I am very sorry, but I have now entirely changed my mind and I want to remain." This court said that he was entitled to remain. Again, because of the peculiar facts there, which are quite different from those in the present case, it cannot be said that that case is a direct authority governing the present, but, in my judgment, it goes a stage further along the road trodden earlier by *Brown v. Draper* (3) and lends very strong support to the view I have attempted to formulate. BUCKNILL, L.J., after referring to the passage from *Brown v. Draper* (3), which I have already read, said ([1949] 2 All E.R. 824):

"That passage is very appropriate to the present case because, in the first place, the tenant did nothing towards removing the furniture in the flat, and so long as it was there he retained possession to that extent. It was not open to the landlords to let the flat unfurnished while the furniture was there and the tenant could not remove his wife otherwise than by breaking the law and forcibly carrying her out. It is not necessary for this court to decide whether he could lawfully revoke his permission for her to live there, but in the absence of circumstances showing that she was in the wrong and had forced him to leave her I should have very great doubt whether any revocation of permission to an innocent wife to live in the matrimonial home in which the husband had lived with her and from which he had deserted her would have any valid legal effect."

SOMERVELL, L.J., said this (*ibid.*, 825):

"The wife and the furniture remained in the house. It is unnecessary to decide what would be the position if a husband had cleared the house of furniture, and his wife had insisted on remaining in the unfurnished house, and he had then given to the landlords a revocation of the licence to his wife. That case can be dealt with when it arises and it might turn on the question whether the landlords accepted that position as a proper surrender. The fact that the furniture was left in the house, however, seems to me in itself sufficient to prevent this tenant being able to establish that possession was surrendered."

Finally, DENNING, L.J., observed (*ibid.*, 825):

"The reason [why the husband cannot give possession] is because the wife has a very special position in the matrimonial home. She is not the sub-tenant or licensee of the husband. It is his duty to provide a roof over her head. He is not entitled to tell her to go without seeing that she has a proper place to go to. He is not entitled to turn her out

without an order of the court: see *Hutchinson v. Hutchinson* (5). Even if she stays there against his will, she is lawfully there, and, so long as she is lawfully there, the house remains within the Rent Acts and the landlord can only obtain possession if the conditions laid down by the Acts are satisfied."

Counsel for the landlord said that these last observations go further than is warranted by the law. It may be that some argument to that effect could be effectively addressed to the court and will be hereafter, but it is unnecessary to say any more on that topic in the present case, for here not only was there still some of the husband's furniture on the premises, but there is no attempt to show that there has been any revocation, or even attempted revocation (except perhaps by inference), of the wife's right to remain in the matrimonial home. If that is so, it seems to me that the principle of *Old Gate Estates, Ltd. v. Alexander* (4) covers the present case, and I would like to say that, as at present advised, I wholly associate myself with what DENNING, L.J., said in *Old Gate Estates, Ltd. v. Alexander* (4), though it may be that that is going further than is strictly necessary for the decision of this case. Counsel for the landlord says that it is not right that county court judges, when dealing with possession cases, should have to be involved in a trial of matrimonial disputes, and there is, of course, force in that, but in practice I doubt whether difficulties of the formidable nature suggested would, in fact, be experienced. If both husband and wife are before the court, in the great majority of cases I should not expect any real difficulty to arise. Whether difficulties may arise in some cases hereafter, they certainly do not, in my judgment, arise in this case, for here it is plain on the evidence that the husband deserted his wife and that his wife is rightly still in possession. There has been no effective revocation of any licence that she had, and the husband's furniture partly remains there also.

For all those reasons, I am clear that the order made in the husband's action was wrongly made and must be set aside, and it follows that the order made in the wife's action must also go. In the result, I think that the appeals in both actions should be allowed.

**DENNING, L.J.:** The protection of the Rent Acts is a personal privilege of the tenant which ceases when the tenant goes out of occupation. A sub-tenant to whom a part of the premises have been lawfully sub-let is protected by a special provision of the Act, but, apart from that provision, the privilege ceases when the tenant goes out of occupation. The tenant in this case, however, never went out of occupation. He left his wife there and he had no right to turn her out. Even if she stayed there against his will, he could not turn her out. Counsel for the landlord says, rightly, that husband and wife are no longer one in law. That is true, but there is still a special relationship between them which is recognised and regulated by the law, and one of the features of that relationship is that the husband cannot sue his wife for a tort. He cannot sue her, for instance, in ejectment or in trespass. He cannot as of right turn her out of the matrimonial home, even if he is the owner or the legal tenant of it. All he can do is to make an application to a court under s. 17 of the Married Women's Property Act, 1882, and ask the court in its discretion to order his wife out: see *Bramwell v. Bramwell* (6) and *Hutchinson v. Hutchinson* (5). In a case of the present kind, where the husband has deserted his wife and she has nowhere else to go, no court would order her out. She is, therefore, lawfully there, and, so long as she remains lawfully there, the husband remains in occupation by her. If he desires to cease to be in occupation—and to cease to be responsible for her occupation—he must go to the court and persuade the court, if he can, to order her out. Until that time arrives, she is lawfully there, and she can claim in his right, even against his will, to be there. The landlord can only get possession if the rent is unpaid or some other condition of the statute is satisfied entitling him to



possession. I agree with all that my Lord has said, and that the appeal should be allowed.

**JENKINS, L.J.:** I also agree. The wife's claim depends entirely on her being able to claim in right of her husband the protection accorded to him as a statutory tenant. The question, therefore, comes simply to this: Has the husband's interest as statutory tenant been determined or not? If, instead of the action against the husband in which he submitted to an order for possession, there had been nothing more than an agreement out of court either in the form of a notice to quit accepted by him or in the form of a purported surrender given by him, it would, I think, be plain, on the principles stated in *Brown v. Draper* (3) and in *Old Gate Estates, Ltd. v. Alexander* (4), that the husband's interest as a statutory tenant had not been effectively determined in that he had never actually given up possession of the premises, but had remained in possession of them through his wife. This case, however, does differ from those two cases in that here there has been an order of the court against the husband for possession of the premises. Was that an order which the county court judge ought to have made or had jurisdiction to make under the Rent Acts? In my judgment, it is reasonably plain that the judge ought not to have made that order and had no jurisdiction to make it. This matter was also discussed in *Barton v. Fincham* (1), and *Thorne v. Smith* (2). I think the principles deducible from those cases are that under the Acts the court only has jurisdiction to order possession on one or other of the specified statutory grounds. The court, however, is not always obliged to hear a case out, because, if the tenant appears and admits that the plaintiff is entitled to possession on one of the statutory grounds, the court may act on that admission and make the appropriate order. Again—and this, I think, is an extension of what I have just said—if there is a representation made by the plaintiff landlord to the defendant tenant to the effect, for instance, that the landlord wants the premises for his own occupation—which is one of the ingredients of a ground on which possession may be ordered—and the tenant accepts that representation and on that footing submits to an order, the order can validly be made, subject to the possibility that in the event of the representation turning out to have been false the efficacy of the order may be destroyed. In my judgment, the court cannot go further than that and exercise a general jurisdiction to make a consent order without inquiry or investigation simply because the tenant appears in court and says: "I consent to an order," or goes into the witness box and says he does not contest the plaintiff's right. I think that necessarily follows from the principle that possession can only be ordered on one or other of the statutory grounds and that the tenant cannot waive the statutory protection by agreement.

There is only one authority to which I want to refer, because I think it bears on that point, and that is a passage from the judgment of SCRUTTON, L.J., in *Barton v. Fincham* (1) where he said ([1921] 2 K.B. 298):

"We were asked to order a new trial, apparently that an attempt might be made to bring the case under s. 5 (1) (c) [of the Act of 1920, that being the sub-section under which an order for possession can be given where a tenant has given notice to quit] but the landlord had not put the case forward in his particulars or apparently in his argument, and there are no findings of fact relevant to the case. The point being fought was the effect of the agreement. It was urged that the effect of our decision [that the tenant could withdraw from the agreement] would be to prevent agreements in court. If the tenant is willing to go out, I do not see why any order is wanted; let him go; but as at present advised I do not see any reason why the judge on being satisfied that a tenant is then ready to go out (not that he was once willing but has changed his mind) should not make an order for possession."

I refer to that passage because it looks at first sight as though SCRUTTON, L.J., was saying that in any case in which the tenant appears and expresses his willingness to go out forthwith the county court judge can properly make an order by consent without any investigation whatever. In my judgment, SCRUTTON, L.J., did not mean that, but when he said "on being satisfied that a tenant is then ready to go out," it seems to me that he clearly must have meant "on being satisfied that the tenant is then ready to go out and is able to give possession." I think his observations must be limited at least to that extent. So limited, they do not conflict with the conclusion arrived at by my brothers in this case, with which I agree, for, if the judge had made any investigation as to the position, as he was invited to do by the wife's solicitors before the case against the husband came on, I think he would inevitably have come to the conclusion that the husband's admission of the landlord's right and his expression of willingness to go out of possession was wholly idle inasmuch as the house was occupied by his wife whom, so far as could be seen, he had no means of ejecting. For these reasons I agree that the order for possession made against the husband should be set aside and the wife's appeal should be allowed.

*Appeals allowed with costs.*

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Halliley & Morrison*, Bedford (for the wife); *E. W. Long & Co.*, agents for *Burgess & Chesher*, Bedford (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

## GRIFFIN v. LONDON TRANSPORT EXECUTIVE.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), March 3, 1950.]

*Factory—Premises used for substantial repair of vehicles—"Running repairs" and "minor adjustments"—Factories Act, 1937 (c. 67), s. 151 (1).*

By the Factories Act, 1937, s. 151 (1), the expression "factory" includes, *inter alia*, "the following premises in which persons are employed in manual labour, that is to say:— . . . (vi) any premises in which the construction, reconstruction or repair of locomotives, vehicles or other plant for use for transport purposes is carried on as ancillary to a transport undertaking . . . not being any premises used for the purpose of housing locomotives or vehicles where only cleaning, washing, running repairs or minor adjustments are carried out."

A tramcar depot belonging to a transport undertaking included a repair shop in which were effected, besides small repairs and adjustments, substantial repairs necessitated by collisions. New parts, made elsewhere, were fitted into tramcars to replace damaged parts, and vehicles were sometimes retained undergoing repair for a considerable time.

HELD: repairs which were necessitated by a collision could not be called "running repairs," which meant repairs becoming necessary in the ordinary running of the vehicle, nor were the repairs at the depot restricted to minor adjustments, such as the tightening of nuts, the replacement of small parts and fuses, and, therefore, the depot was a factory within the meaning of s. 151 (1) (vi).

[FOR THE FACTORIES ACT, 1937, s. 151 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1113.]

ACTION for damages for personal injuries suffered by the plaintiff and alleged by him to be due to a breach by the defendants of their duty under the Factories Act, 1937, s. 25 (3).

The plaintiff suffered injuries through falling into a pit at a repair shop in a tramcar depot where he was employed by the defendants. He claimed that

the defendants were liable for their failure to fence the pit in accordance with the requirements of the Factories Act, 1937, s. 25 (3). The defendants contended that the repair shop was used for "running repairs" and "minor adjustments," and that, therefore, the premises were not a factory within the definition in s. 151 (1) (vi) of the Act.

*Jukes* for the plaintiff.

A *Beresford, K.C.*, and *F. G. Paterson* for the defendants.

LORD GODDARD, C.J.: This is an action brought by an employee of the defendants, the London Transport Executive, to recover damages because he broke his leg by falling through an opening in the floor at a depot at New Cross. It is an ordinary depot or garage for tramcars, which are taken in when out of service. Certain repairs are also done to tramcars there, and there is a repair shop separated from the part in which the plaintiff works by a brick wall with a door in it. This repair shop is under the supervision and management of a larger depot at Charlton, and if parts are damaged and have to be replaced, the Charlton depot makes the replacements and sends them down to New Cross, where they are fitted in the repair shop. Quite substantial repairs may be done to tramcars in the depot itself, for instance, after collisions.

C I have to decide, first, whether this depot was a factory within the definition in the Factories Act, 1937, s. 151. There is no direct evidence with regard to the repair shop, but I think the depot will have to be considered to be a factory within the meaning of the Act. Section 151 provides:

D " (1) . . . the expression 'factory' . . . also includes the following premises in which persons are employed in manual labour, that is to say:— . . . (vi) any premises in which the construction, reconstruction or repair of locomotives, vehicles or other plant for use for transport purposes is carried on as ancillary to a transport undertaking or other industrial or commercial undertaking, not being any premises used for the purpose of housing locomotives or vehicles where only cleaning, washing, running repairs or minor adjustments are carried out . . . "

E In this depot, repairs are from time to time carried out when tramcars are brought in as a result of collision, and it seems impossible for me to say that only running repairs or minor adjustments are carried out there. Repairs which are the result of collision cannot, by any fair construction, be called running repairs. A private chauffeur commonly advertises that he is capable of doing running repairs, but that does not mean that he holds himself out as being capable of effecting repairs which are the result of a collision. A fair definition of running repairs would be repairs of defects which arise in a vehicle in the course of its ordinary running. Minor adjustments are the adjustments which have to be carried out from time to time, when nuts work loose, electrical equipment requires small corrections, small parts, or fuses and so forth. I think those are the sort of running repairs and minor adjustments envisaged in the Factories Act. But I cannot say that, in a place where vehicles may be kept a considerable time for repair after collisions, only running repairs and minor adjustments are carried out. Therefore, I find that this depot does come within the definition in s. 151 of the Factories Act.

H [His LORDSHIP then found that the repair pits were "openings in the floor" which had not been properly fenced by the defendants in breach of the requirements of the Factories Act, 1937, s. 25 (3), and attributed the plaintiff's accident as to two-fifths to such breach of statutory duty, and as to three-fifths to his own negligence. He assessed the damages including special damage at £455, and gave judgment for the plaintiff for £182 with costs.] *Judgment for the plaintiff with costs.*

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]



*Re HALL (deceased).*

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 1, 1950.]

*Administration—Grant to sole administrator—Possible life interest—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 160 (1), s. 162 (1) (as amended by the Administration of Justice Act, 1928 (c. 26), s. 9.)*

In 1898 the deceased married one F.D. and the following year a child was born. In 1905, by agreement, the deceased separated from his wife, who, with the child, went to live in Canada, and from 1906 onwards, in spite of numerous inquiries, nothing further was heard of her or of the child. In 1947 the deceased died intestate leaving him surviving three brothers, including the applicant, and two sisters. The value of the deceased's estate amounted to some £1,200. The sisters and two of the brothers having renounced their right to a grant of letters of administration of the estate, the applicant applied for a grant to him alone. The question for determination was whether the court had power under the provisos to s. 162 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928, to make such a grant.

**HELD:** the proviso to s. 162 (1), as amended, related to the class of persons who were suitable for appointment, and not the number, and, therefore, two administrators should be appointed in accordance with s. 160 (1).

[AS TO THE DISCRETIONARY POWER OF THE COURT TO GRANT ADMINISTRATION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 246-248, paras. 424-430; and FOR CASES, see DIGEST SUPP.]

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 160 (1) and s. 162 (1), as amended by the ADMINISTRATION OF JUSTICE ACT, 1928, s. 9, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 776, 777.]

Cases referred to:

- (1) *Re White*, [1928] P. 75; 96 L.J.P. 157; 138 L.T. 68; Digest Supp.
- (2) *Re Herbert*, [1926] P. 109; *sub nom. In the goods of Herbert*, 95 L.J.P. 53; 135 L.T. 123; Digest Supp.

MOTION for grant of administration.

For the applicant it was argued that (i) there was *prima facie* evidence on which the court could find, within s. 160 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that no life interest was subsisting, since all efforts to trace the deceased's wife had failed, and (ii) by the proviso to s. 162 (1) of the Act of 1925, as amended by s. 9 of the Administration of Justice Act, 1928, the court had a discretionary power to grant administration to one person only. It was, however, stated on behalf of the applicant that, should it be decided that two administrators were necessary, the applicant's wife was willing to act.

*William G. H. Cook* for the applicant.

**WILLMER, J.:** I have no doubt that this is a proper case for a grant. The question is whether, in the circumstances of this case, a grant can be made to a single administrator in respect of an estate which exceeds £1,000\*, having regard to the provisions of s. 160 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 160 (1) provides that:

"... administration shall, if ... a life interest arises under the will or intestacy, be granted ... to not less than two individuals."

\* As to the appointment of a single administrator where the net estate does not exceed £1,000, see the direction of the President of the Probate, Divorce, and Admiralty Division (ANNUAL PRACTICE, 1949, p. 3670).

A The grounds on which it has been argued that a grant might properly be made to a single administrator are: (i) That the evidence is sufficient to justify the conclusion that the deceased's wife is dead. I find that there was not sufficient evidence to enable me to reach such a conclusion, and, therefore, there may be a life interest subsisting. (ii) That, even if the wife is alive, the court had jurisdiction to make such a grant by virtue of the proviso to s. 162 (1) of the Act of 1925, as amended by s. 9 of the Administration of Justice Act, 1928. Section 162 (1), as amended, provides:

B "In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof . . . Provided that—(a) where the deceased died wholly intestate as to his estate, administration shall be granted to some one or more persons interested in the residuary estate of the deceased, if they make an application for the purpose . . . and (b) if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the court thinks fit."

D In *Re White* (1), which was decided in 1927, the Court of Appeal held that the court had no power to make a grant to a single administrator. It is argued that the effect of the amendment to s. 162 (1) is that that decision is no longer binding, and that the position as stated in *Re Herbert* (2) is restored. I have been referred to a note in HALSBURY'S STATUTES, 2nd ed., vol. 9, p. 778, in which this opinion is expressed†. In my view, however, the position has not been altered as a result of the amendment. I am not satisfied as a matter of construction that the proviso which was substituted by the Act of 1928 was intended to enable the court to dispense with a second administrator in a case such as the present. The new proviso deals with the *class* of persons who are suitable for appointment as administrators and not with the *number* of such persons. Had the legislature intended to dispense with the requirements of s. 160 (1) it would have been easy to make that intention clear in the amending statute. I have come to the conclusion, therefore, that two administrators must be appointed, and, as the applicant's wife is willing to act and is a suitable person to do so, an order will be made appointing her on condition that she files her consent.

Order accordingly.

G Solicitors: *Blyth, Dutton, Wright & Bennett*, agents for *Jasper & Nicholson*, Southampton (for the applicant).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

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† See also note to s. 162 (1) in the ANNUAL PRACTICE, 1949, p. 3274.

## CUNLIFFE v. GOODMAN.

[COURT OF APPEAL (Cohen, Asquith and Singleton, L.JJ.), February 22, 23, March 7, 1950.]

*Landlord and Tenant—Repair—Covenant to repair—Breach—Landlord's intention to pull down premises—Onus on tenant to prove definite decision or intention—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1).*

On the termination of a tenancy the landlord was considering demolishing the premises and erecting on the site blocks of flats or maisonettes, but she had not then definitely decided whether to do so or not as the carrying out of such a scheme was conditional on her obtaining the permission of the local authority and building licences, and, even if the necessary permission and licences were obtained, the scheme might not prove financially attractive by reason of restrictive conditions on letting and selling imposed as a condition of the grant of building licences, or by reason of the cost of the scheme which had not then been fully worked out. In an action by the landlord against the tenant for breach of a covenant to leave the premises in repair, the tenant contended that he was under no liability, by reason of the provisions of s. 18 (1) of the Landlord and Tenant Act, 1927, that no damages shall be recovered for a breach of covenant to repair at the termination of a lease if it is shown that the premises would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

HELD: to prove that the premises "would at or shortly after the termination of the tenancy have been or be pulled down" within the meaning of s. 18 (1) a tenant must show that, at the date of the termination of the lease or tenancy agreement, the landlord had definitely decided or had a definite intention (whether or not that decision or intention was revocable, or was, in fact, subsequently altered) to pull down the premises. To show a conditional decision or intention to pull down was not sufficient. On the facts of the present case the intention of the landlord to pull down was conditional only, and, accordingly, the tenant could not avail himself of s. 18 (1).

*Salisbury v. Gilmore* ([1942] 1 All E.R. 457), distinguished.

*Decision of LORD GODDARD, C.J. ([1949] 2 All E.R. 946), reversed.*

[AS TO DAMAGES FOR BREACH OF A COVENANT TO LEAVE IN REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 220, 221, para. 241; and FOR CASES, see DIGEST, 2nd Supp.]

FOR THE LANDLORD AND TENANT ACT, 1927, s. 18 (1), see HALSBURY'S STATUTES, Second Edn., p. 902.]

Case referred to:

(1) *Salisbury v. Gilmore and Marcel*, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 2nd Digest Supp.

APPEAL by the landlord from a decision of LORD GODDARD, C.J., given on Nov. 16, 1949, and reported [1949] 2 All E.R. 946, whereby he had dismissed the landlord's claim for damages for breach of covenant to leave the premises in repair and to reinstate them as a dwelling-house on the ground that the landlord was not entitled to damages, since it appeared that the premises would at or shortly after the termination of the tenancy have been or be pulled down, within the meaning of s. 18 (1) of the Landlord and Tenant Act, 1927. The facts and relevant documents are set out in the judgment of COHEN, L.J.

*Lloyd Jones, K.C.*, and *Lewis F. Sturge* for the landlord.

*Salt, K.C.*, and *C. D. Myles* for the tenant.

*Cur. adv. vult.*

Mar. 7. The following judgments were read.



**COHEN, L.J.:** In this action the landlord seeks to recover damages for alleged breaches of repairing covenants contained in a tenancy agreement dated June 10, 1943, by which the landlord let to the tenant, a manufacturing chemist, premises known as No. 1 Abdale Road, Shepherd's Bush, London, for the duration of the war at a yearly rent of £150, subject to the proviso that either party might terminate the agreement on giving three months' notice in writing after the cessation of hostilities. The material tenant's covenants were in the following terms:

"4. To keep the said premises in good and sufficient repair during the said term And in particular will reinstate the premises at the end of the term hereby granted as a private dwelling-house and replace all the fixtures removed during the tenancy except the bath and wash basin which were handed over to the landlord at the commencement of the tenancy. . . .10. During the tenancy to keep and on the expiration or sooner determination of the tenancy quietly to deliver up to the landlord the premises in a good and tenantable state of repair and condition together with all fixtures (except any tenant's fixtures)."

The tenancy was duly determined on Nov. 30, 1945, and on May 8, 1946, this action was begun. At the trial before LORD GODDARD, C.J., breaches of covenant were admitted and it was agreed that, if damages were payable in the events which happened, they were properly assessed at the sum of £565. The tenant, however, contended that he was relieved from liability under the provisions of s. 18 (1) of the Landlord and Tenant Act, 1927. The first part of the sub-section provides for damages for diminution of the value of the reversion and then goes on:

" . . . in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

LORD GODDARD, C.J., upheld the tenant's contention, being of opinion that the present case was indistinguishable from the decision of this court in *Salisbury v. Gilmore* (1). That case, he considered, decided that if, at the time when a tenant leaves the premises and the lease comes to an end, the intention of the landlord is to pull down the premises, the landlord cannot, by changing his mind afterwards, recover damages for the breach. He found that intention proved to exist in the present case at the material date, Nov. 30, 1945, and, accordingly, he dismissed the action. From that decision the landlord appeals.

The evidence on which LORD GODDARD, C.J., found the intention to pull down proved was documentary. [His LORDSHIP reviewed the correspondence and continued:] The views of LORD GODDARD, C.J., on this correspondence are summed up in the following paragraph from the transcript of his judgment:

"The letters clearly show that not only had the landlord before notice to quit intended to build, but after the termination of the tenancy she still retained that intention and actively pursued her negotiations for that purpose, and through her architect and solicitor was taking all necessary steps in that intention."

Taking this view of the correspondence, it followed that, in applying the decision of *Salisbury v. Gilmore* (1), LORD GODDARD, C.J., held that the tenant had brought himself within s. 18 (1) of the Act and was entitled to judgment. Counsel for the landlord contends (i) that LORD GODDARD, C.J., has misconstrued the decision in *Salisbury v. Gilmore* (1); and (ii) that he was wrong

in finding on the correspondence a definite intention on the part of the landlord persisting at Nov. 30, 1945, to rebuild the premises. To deal with the first argument I must refer to the report of *Salisbury v. Gilmore* (1). The facts are sufficiently set out in the first paragraph of the headnote ([1942] 2 K.B. 38):

"In 1926 the first plaintiff demised to the first defendant, G., premises for a term of fourteen years from Sept. 29, 1925, by a lease which contained a tenant's covenant to leave the premises in repair at the expiration of the term. The second defendant, M., was the assignee of the term. In 1937 M. asked for a renewal of the lease but was informed that the plaintiffs (who had become the landlords in 1936) intended to pull down the premises at the expiration of the lease. On Sept. 29, 1939, M. vacated the premises and left them out of repair, being still under the impression that the premises were being pulled down. It was not till he received a letter dated Dec. 5, 1939, from the plaintiffs' agents claiming damages for breach of covenant that he became aware that the scheme for forthwith pulling down and rebuilding the premises had been abandoned."

It is to be observed that in that case the plaintiffs had given to the defendants definite notice of their intention to pull down the premises and had not withdrawn that notice at the material date. Moreover, although, no doubt, local authorities had certain powers under the London Building Acts and the Town Planning Acts, the war time restrictions were not in force by the material date. LORD GREENE, M.R., in his judgment, stated that the point of time in relation to which the fate of the building was to be considered was the termination of the lease. He also recognised that the onus of proving the intended fate of the building was on the tenant and that he had to discharge that onus at a date necessarily subsequent to the termination of the lease. He summed up his conclusions as to how the tenant was to discharge the onus which rested on him in these words ([1942] 1 All E.R. 461):

"I am of opinion that, if the tenant can show at the trial that at the moment when the covenant fell to be performed the building was one which was going to be pulled down at or shortly after the termination of the tenancy, he is entitled to the relief which the sub-section gives. The question then arises, what is the test by which the fate of the building as at the relevant date—namely, the date at which the covenant ought to be performed—is to be ascertained? I have already pointed out that a building may be destined for demolition either because the landlord has so determined or because some extraneous authority has decided to exercise its powers in that behalf. I have also pointed out that the crucial date is the date of the termination of the lease. Once that date has passed, the tenant is no longer in a position to fulfil his covenant, and, if it is shown that before that date arrives the landlord has decided to pull down the building and that this intention is still existing at that date, the requirements of the sub-section are, in my opinion, satisfied."

He then held on the facts of the case that the tenant had discharged the onus which rested on him, and, therefore, he found it unnecessary to consider either (a) whether the plaintiffs by their conduct had debarred themselves from asserting that before the material date they had abandoned their intention to pull down, or (b) whether any damage to the reversion had been proved. MACKINNON, L.J., decided both these points in favour of the defendants and did not express any opinion as to the test to be applied in deciding whether the tenant had discharged the onus which rested on him. GODDARD, L.J., as I read his judgment, agreed with LORD GREENE, M.R., in thinking that intention was the test, an opinion he repeated in the present case.

In the result, I respectfully agree with LORD GODDARD, C.J., that the *ratio decidendi* of the decision in *Salisbury v. Gilmore* (1) is to be found in the passages

from the judgment of LORD GREENE, M.R., which I have read. Counsel for the landlord, however, says that in that passage, LORD GREENE, M.R., was distinguishing between "intention" and "decision" and was laying down that it is not enough to prove an intention, but that the tenant must show a decision. I do not so read his judgment. I do not think that LORD GREENE, M.R., was distinguishing between "intention" and "decision." On referring to the SHORTER OXFORD DICTIONARY, I find under "decision" "(2) The making up of one's mind," and under "intention" "(5) That which is intended: purpose." I think that what LORD GREENE, M.R., was laying down was that what the tenant has to prove is the making up of the landlord's mind to carry out the purpose of pulling down the premises. Such a decision or intention would be revocable, but "revocable" must be distinguished from "conditional."

Counsel for the landlord next argued that the fact that the war-time building restrictions are now in force was sufficient to distinguish this case from *Salisbury v. Gilmore* (1). He pointed out that both LORD GREENE, M.R., and GODDARD, L.J., emphasised the fact that such restrictions were not in force at the date material in that case (Sept. 29, 1939), GODDARD, L.J., saying at ([1942] 1 All E.R. 464):

"He [the plaintiff] never applied his mind to the question before Oct. 5, and until that date his intention was unchanged, nor was there any enactment or regulation then in force which could have prevented the carrying out of the scheme."

I do not, however, read the judgment as holding that, had the regulations been in force, the decision would necessarily have been different. I think they were merely reserving the question. In the present case our attention has not been directed to any regulation absolutely prohibiting buildings of the character proposed on behalf of the landlord. The regulations only make building without licence illegal and enable the authority to impose conditions if they grant a licence. The existence of such regulations is, no doubt, a factor to be borne in mind in deciding what was the intention of the landlord at the material date, but it is not conclusive on the point.

The third point of counsel for the landlord—and it is the point which has caused me most difficulty—was that the evidence in this case, which was purely documentary, did not justify the conclusion of LORD GODDARD, C.J., that on Nov. 30, 1945, the landlord had a definite intention to pull down the premises. Counsel submitted that the proper inference was that the landlord's intention to re-build was conditional on licences being obtained and satisfactory arrangements being made for the provision of finance, and that on Nov. 30, 1945, she had not reached a final decision on the point. He contended that in any event the onus was on the tenant to prove a definite intention and that onus had not been discharged. Counsel for the tenant argued that the conclusion of LORD GODDARD, C.J., was justified by the correspondence. During the course of the discussion

my mind has fluctuated between these two arguments, but, on the whole, I have come to the conclusion that the landlord is entitled to succeed. It is clear that the intention which must be proved against the landlord is a definite intention. This intention may be revocable, but it must not be provisional. Reading the correspondence as a whole, I have come to the conclusion that the landlord never reached more than a provisional decision. She would obviously not re-build unless the proposed scheme would provide an adequate return on the capital she would have to sink in it. It was plain that she could not reach a judgment on this point until she knew (a) what conditions the authorities would impose as to rent, etc., (b) what the proposed buildings would cost, and (c) what interest she would have to pay in order to finance the scheme. The financial aspect was plainly present to her mind throughout, and, reading the correspondence as a whole, I find it impossible to conclude that the tenant has discharged the onus which rests on him of proving that before Nov. 30, the landlord had



decided to pull down the building and that that intention was still existing at that date. For these reasons I would allow the appeal. Before parting with the case, I should add that before LORD GODDARD, C.J., the landlord raised the subsidiary point that, in any event, s. 18 (1) had no relation to the covenant to reinstate the premises as a private dwelling-house. LORD GODDARD, C.J., came to the conclusion that he ought to construe this reinstatement as part of the word "repair." Before us counsel for the landlord decided not to press this argument.

**ASQUITH, L.J. :** I agree and will only add a few sentences out of respect for LORD GODDARD, C.J., from whose judgment we feel constrained to differ. The question to be answered is whether the tenant (on whom the onus lies) has proved that on Nov. 30, 1945, the landlord "*intended*" to pull down the premises on this site. This question is, in my view, one of fact. If the landlord did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was *no* evidence of a positive "intention" or that the word "intention" was incapable, as a matter of construction, of applying to anything so tentative and so indefinite. An "intention," to my mind, connotes a state of affairs which the party "*intending*"—I will call him X.—does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition. X. cannot, with any due regard to the English language, be said to "*intend*" a result which is wholly beyond the control of his will. He cannot "*intend*" that it shall be a fine day to-morrow. At most he can hope or desire or pray that it will. Nor, short of this, can X. be said to "*intend*" a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents, and cross currents of circumstance that not merely is it likely not to be achieved at all, but, if it is achieved, X's volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence.

If there is a sufficiently formidable succession of fences to be surmounted before the result X. aims at can be achieved, it may well be unmeaning to say that X. "*intended*" that result. Here there were a number of such fences. The approval of the London County Council as the town planning authority for London had to be obtained, and it was refused in respect of the first re-building plan. A building licence had to be obtained from the Hammersmith Borough Council. The first plan never reached the stage at which such a licence could usefully be applied for. As to either plan a licence, if forthcoming, might have been granted on terms, and these terms might have deprived the project of all commercial attraction—deprived it of the character of a "business proposition." Such licences are often granted conditionally on a maximum selling price for the structure as re-built, or, if it be not sold but let, conditionally on a maximum rent, and in respect of the second scheme a maximum rent of an unattractive level was, in fact, proposed by the local authority. This leads me to the second point bearing on the existence in this case of "intention" as opposed to mere contemplation. Not merely is the term "intention" unsatisfied if the person professing it has too many hurdles to overcome or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while. A purpose so qualified and suspended does not, in my view, amount to an "intention" or "decision" within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available

A and have resulted in such a decision. In the present case it seems to me that, assuming the landlord was both before and after Nov. 30, 1945, disposed to demolish and re-build if she could do so on remunerative terms, she never got, in respect of the first scheme, to a stage at which she could decide on its commercial merits, nor, in respect of the second, to the stage of actually deciding that the scheme was commercially eligible unless, indeed, she must be taken, not merely to have repudiated her architect's authority, but to have decided that it was commercially ineligible. In the case of neither scheme did she form a settled intention to proceed. Neither project moved out of the zone of contemplation out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision. For these reasons and those given by my Lord I think the appeal should be allowed.

B SINGLETON, L.J.: The judgment of LORD GODDARD, C.J., was based primarily on the decision of this court in *Salisbury v. Gilmore* (1). There is a considerable difference on the facts between that case and the present case. In *Salisbury v. Gilmore* (1) the facts were beyond dispute. The landlords had determined to pull down the premises at the termination of the tenancy and they had intimated to the tenant their intention. They had put forward a scheme which had been approved by the London County Council and the city corporation, and the necessary permission had been obtained before the termination of the tenancy. It is true to say that the headnote in that case (in the Law Reports ([1942] 2 K.B. 38)) and certain parts of the judgments lead one to the view that an intention on the part of the landlords to pull down the premises at or shortly after the termination of the tenancy is sufficient to absolve the tenant from his contractual obligation, but examination of the judgment of D LORD GREENE, M.R., seems to me to show that the headnote is a little too wide. I draw attention to two passages in his judgment. He said ([1942] 1 All E.R. 461):

E “... If the tenant can show at the trial that at the moment when the covenant fell to be performed the building was one which was going to be pulled down at or shortly after the termination of the tenancy he is entitled to the relief which the sub-section gives,”

and later he said (*ibid.*):

“... if it is shown that before that date arrives the landlord has decided to pull down the building and that this intention is still existing at that date, the requirements of the sub-section are, in my opinion, satisfied.”

F In other words, if the landlord has arrived at a decision to pull down and if that decision stands at the date at which the tenancy ends, it matters not that the landlord subsequently changes his mind. It follows from this that there must be a decision on the part of the landlord. In one sense an intention to pull down may be the same thing, but it is not so unless it is a clearly formed intention, or a firm intention, in the sense that the landlord has made up his mind. Contemplation by the landlord is clearly not enough. If the landlord is considering what he should do and has a scheme put forward which is accepted by the authorities from whom permits have to be obtained, that is evidence that he has formed an intention to pull down and probably evidence that he has come to a decision. In the present case the scheme put forward was turned down by the London County Council who refused to sanction it on Oct. 8, 1945, that is, before the termination of the tenancy on Nov. 30, 1945. Another scheme was put forward by the architect on Dec. 28, 1945 (after the termination of the tenancy) and was approved by the London County Council on Mar. 22, 1946. The approval of the London County Council is subject to conditions which might or might not be agreeable to the landlord, and the approval of the Hammersmith Borough Council and the obtaining of a building licence were necessary before anything could be done. In the meantime there had been correspondence between the landlord's agent and the tenant's agent on the question of dilapidations and a

firm of builders acting for the landlord had been in communication with the Hammersmith Borough Council seeking a licence to do the necessary repairs.

In these circumstances I do not see that the tenant showed at the trial that at the moment when the covenant fell to be performed the building was one which was going to be pulled down at or shortly after the termination of the tenancy. In other words, he did not show a decision on the part of the landlord, nor a firm intention. On the facts the landlord was contemplating pulling down and re-building and probably she would have done so if she could have obtained approval of a scheme which was attractive commercially. On the other hand, the Hammersmith Borough Council might have inserted as a term of their approval to a scheme conditions as to selling price or as to rents which would have made it not worth the landlord's while to pursue the matter further. The landlord was not called as a witness, but, still, the onus was on the tenant, and, in my view, he did not discharge it. I agree that the appeal should be allowed.

*Appeal allowed with costs.*

Solicitors: *Atkins, Walter & Locke* (for the landlord); *Amphlett & Co.* (for the tenant).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

## *Re CAREY (deceased). WARDLE AND ANOTHER v. CAREY AND OTHERS.*

[CHANCERY DIVISION (Danckwerts, J.), March 8, 1950.]

*Will*—"To pay the income of the residuary trust fund up to the sum of £1,000 per annum to L. for her life"—*Whether deficiency of income may be supplied out of surplus of subsequent years.*

By his will a testator gave his residuary estate to his trustees on the usual trusts for sale and conversion, and, in the events which happened, to hold his residuary trust fund (as therein defined) on trust "to pay the income of the residuary trust fund up to the sum of £1,000 per annum to [his daughter] for her life so long as she shall remain single . . . and as to the remainder of the income of the residuary trust fund upon trust to pay the same during the life of my said daughter" to the testator's brother and sisters or their children. The testator further provided that, if the income should amount to more than £1,500, "such excess in income" was to be divided equally between his daughter, brother and sisters.

**HELD:** on the true construction of the will, the daughter was not entitled to make up to £1,000, out of the income surplus to £1,000 in any subsequent year, the income of any year which did not amount to £1,000, but she was only entitled to the income produced in any one year up to a maximum of £1,000.

*Re Coller's Deed Trusts* ([1937] 3 All E.R. 292), *applied*.

Cases referred to:

- (1) *Re Coller's Deed Trusts*, [1937] 3 All E.R. 292; [1939] Ch. 277; 106 L.J.Ch. 326; 157 L.T. 84; Digest Supp.
- (2) *Stelfox v. Sugden*, (1859), John. 234; 39 Digest 153, 456.

**ADJOURNED SUMMONS** to determine whether, on the true construction of the will of Robert Frederick Carey, deceased, and in the events which had happened, the testator's daughter, Lilian Jepson Carey, was, from the date of the death of the testator's widow, Agnes Carey, during her life entitled to the whole income of the testator's residuary estate up to an aggregate limit of £1,000 per annum,



or was only entitled in each year to the income of the said residuary estate for that year up to a limit of £1,000.

By his will dated Feb. 15, 1911, the testator gave, devised and bequeathed all his real and personal estate not thereby otherwise disposed of to his trustees on the usual trusts for sale, conversion and investment, to pay his funeral and testamentary expenses, debts and legacies, and to stand possessed of the residue (called his residuary trust fund) on trust to pay the income thereof to his wife, Agnes Carey, (in the events which happened) during her life. He directed that on the death of his wife the residuary trust fund be held on trust "to pay the income of the residuary trust fund up to the sum of £1,000 per annum to the said Lilian Jepson Carey for her life so long as she shall remain single . . . and as to the remainder of the income of the residuary trust fund upon trust to pay the same during the life of my said daughter" to the testator's brother and sisters or the child or children of any of them who should have predeceased him or who should have died in the lifetime of Agnes Carey or Lilian Jepson Carey, "provided that if my estate should realise an income of over £1,500 then I direct my trustees to stand possessed of such excess in income in trust for my daughter and my said brother and sisters in equal shares." In the event of his daughter's dying without leaving a child or children, the testator directed that his trustees should stand possessed of his residuary trust fund "both capital and income" on trust for his brother and sisters or the child or children of any of them then dead. The testator died on Dec. 29, 1912, and his will was proved on Feb. 4, 1913, by the executors named therein. In 1934, the testator's widow, Agnes Carey, died. At the date of the summons the testator's brother and all his sisters were dead, and Lilian Jepson Carey was a spinster of advanced age.

*Winterbotham* for the plaintiffs, the trustees of the will.

*T. A. C. Burgess* for the daughter of the testator.

*Wilfrid Hunt* for the persons interested in the residuary trust fund subject to the interest of the daughter.

**DANCKWERTS, J.** (having stated the facts): After the death of the testator's widow, the gross income of the residuary estate was less than £1,000 in the years 1935, 1936, 1937, 1939, 1940, 1941 and 1943, but exceeded £1,000 in the years 1938, 1942, and in all the years since 1943. It was not contended on behalf of the daughter that she could, in any year in which the income was less than £1,000, have recourse to the surplus income of earlier years, but it was argued that she had the right to resort to the income surplus to £1,000 in subsequent years to make up a deficiency in any year. Such a construction involves construing the provision as creating a continuing charge on the income of the residuary estate during the life of the daughter. In my judgment, the provision for the daughter cannot be so construed. The will points to annual accounts, and each year must be treated separately, so that, if there is an excess of income over £1,000 in any year, that excess must be distributed to the persons entitled, while, if the income in any year is less than £1,000, the daughter takes what is available.

The principle applied in the case of annuities gives me some assistance. In *Re Collier's Deed Trusts* (1) pursuant to a deed of family arrangement the residuary estate of the testator was to be held on trust to pay three life annuities in the form of weekly sums, of which one was payable to the widow during her widowhood. The deed also contained a trust during the widowhood of the widow to pay or apply the whole or any part of the balance of the income on certain trusts. **ROMER, L.J.**, said ([1937] 3 All E.R. 295):

"... it is plain that the weekly sums are not charged upon corpus. **FARWELL, J.**, so held, and the appellant does not challenge that decision. But the judge also held that the weekly sums were not a continuing charge upon income. In so holding, he based his decision upon the direction in

the deed as to the surplus income arising during the widowhood of the appellant, following the reasoning of SIR W. PAGE WOOD, V.-C., in *Stelfox v. Sugden* (2). In my opinion, he was right in so doing. I think that the direction in question shows unmistakably that the parties to the deed intended that the weekly sums in any year should be paid out of the income of that year, and out of that alone. Suppose, for instance, that, during the first few years of the appellant's widowhood, there was a surplus of income, after paying the three weekly sums, and that the trustees, in the exercise of their discretion, had applied the whole of such surplus for the widow's benefit. Suppose, further, that, during the remainder of her widowhood, the income is insufficient to pay the weekly sums. It can hardly have been within the contemplation of the parties that the widow, or her legal personal representatives, should, in such circumstances, be paid the arrears of her weekly sum out of the income accruing after her re-marriage or death. In my opinion, the express trust contained in the deed for distribution of the surplus income is a reasonably plain indication that the weekly sums were not intended to be a continuing charge upon the income of the trust fund."

In the present case it was not contended that the charge extended beyond the death of the daughter. On the true construction of this will, the distribution of surplus income is to be made each year, and any intention that the benefit to the daughter should be cumulative is thereby negatived. The daughter is only entitled in each year to the income of the residuary estate up to a limit of £1,000.

*Declaration accordingly.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Maples & McCraith*, Nottingham (for the plaintiffs and the first defendant); *Gregory, Rowcliffe & Co.*, agents for *Wells & Hind*, Nottingham (for the remaining defendants).

*[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]*

## BOISSEVAIN v. WEIL.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Radcliffe), January 16, 17, March 21, 1950.]

*Currency Control—Loan in foreign currency—Promise to repay in sterling—Parties resident in foreign country in military occupation of enemy—Defence (Finance) Regulations, 1939 (S.R. & O., 1939, No. 950), reg. 2 (1).*

While, owing to war conditions in 1944, the parties were involuntarily resident in Monaco, which was in the military occupation of the enemy, the appellant, a Dutch subject, lent to the respondent, a British subject, a sum of money in French currency. The respondent drew cheques in blank for the full amount on an English bank, wrote a letter addressed to the bank informing it of the circumstances, and instructing it, on presentation or as soon as the law permitted, to honour the cheque in sterling. She also signed a document acknowledging the debt, certifying that she had posted the letter to the bank, and undertaking, in case the appellant failed to obtain payment on presentation of the cheque, to repay the sum borrowed in cash not later than one month after the declaration of an armistice, with additional provisions in the event of her death before payment was made. In an action by the appellant for the recovery of the amount lent,

**HELD:** the transaction was prohibited by the Defence (Finance) Regulations, 1939, reg. 2 (1), which, having regard to the Emergency Powers (Defence) Act, 1939, s. 3 (1), had extra-territorial force and applied

to all British subjects wherever they might be, other than in one of the excepted territories, who bought or borrowed foreign currency, and, therefore, the appellant was not entitled to repayment of the money lent.

*Semble*: even if the appellant could have put forward a claim for repayment on the ground of money had and received, a claim which, in the circumstances was not open to him, he would not have been entitled to succeed for the courts could not impute a promise to repay money, the borrowing of which was forbidden by law.

*Dictum* of LORD SUMNER in *Sinclair v. Brougham* ([1914] A.C. 452), *applied*.

*Decision of COURT OF APPEAL* ([1949] 1 All E.R. 146), *affirmed*.

[FOR THE DEFENCE (FINANCE) REGULATIONS, 1939, reg. 2 (1), see HALSBURY'S STATUTES, Vol. 33, p. 703.]

Case referred to:

(1) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 12 Digest 282, 2317.

APPEAL from a decision of the Court of Appeal (TUCKER, ASQUITH and DENNING, L.JJ.), dated Dec. 13, 1948, and reported [1949] 1 All E.R. 146, reversing an order of CROOM-JOHNSON, J., made on Apr. 23, 1948, and reported [1948] 1 All E.R. 893, whereby he gave judgment for the appellant in an action for money lent.

The appellant, a Dutch subject, claimed from the respondent repayment of £6,000, money lent in the form of francs while the parties were resident in Monaco at a time when the principality was in the military occupation of the enemy. The respondent, in addition to giving a written acknowledgment of the debt, drew cheques, which she gave to the appellant, for the amount borrowed. CROOM-JOHNSON, J., held that the contract was governed by the law of Monaco; was neither contrary to the English common law, the Trading with the Enemy Act, 1939, s. 1, or the Defence (Finance) Regulations, 1939, regs. 2 (1), 3A (1) and 3C (1); and, therefore, was enforceable. The Court of Appeal held that the proper law of the contract was English law, and that the contract was illegal by virtue of the Defence (Finance) Regulations, 1929, reg. 2 (1), and could not be enforced either by an action for money lent or by an action on the cheques or for money had and received.

*Sir David Maxwell Fyfe, K.C.*, and *B. M. Goodman* for the appellant.

*Salmon, K.C.*, and *Stenham* for the respondent.

The House took time for consideration.

Mar. 21. The following opinions were read.

**LORD SIMONDS**: My Lords, I have had the privilege of reading the opinion which my noble and learned friend, LORD RADCLIFFE, is about to deliver and I agree so fully in his reasoning and conclusions that I do not propose to add anything on the main question in the appeal, *viz.*: What was the effect of the Defence (Finance) Regulations, 1939, reg. 2 (1), on the transaction under review. It is only on another aspect of the case that I wish to make some observations.

The appellant's claim against the respondent, as stated in his statement of claim, was simple and unequivocal. It was for the sum of £6,000 lent by him to the respondent with interest from June 9, 1945, at the rate of five per cent. per annum. Particulars of the sum of £6,000 were given, by which it was alleged that three several sums of £2,000 were lent—on June 10, June 15 and July 8, 1944. By amendment it was alleged that on each of these dates the appellant lent to the respondent 320,000 francs which she agreed to repay to him in sterling at the agreed rate of 160 francs to the pound, and it was further alleged that she agreed to pay interest on the said loans at five per cent. per annum



with payment as from one month after the termination of hostilities between Great Britain and Germany. This, the only issue raised on the pleadings, is that with which alone the court was properly concerned, but it appears that, both before the learned trial judge and before the Court of Appeal, the appellant was, despite the objection of counsel for the respondent, allowed to raise a very different alternative issue, *viz.*, that, if the appellant could not recover under his claims as pleaded, then he could recover against the respondent on the footing that he had made to her a payment for which the consideration wholly failed, and, therefore, he was entitled to recover the money paid to her as money had and received, and for this purpose the so-called principle of "unjust enrichment" was invoked. To me, my Lords, it appears that such a procedure cannot be justified. Had an amendment been duly made and the issue properly raised it would have been a very different matter. Then the respondent would have been in a position in her turn to amend her defence and plead to the new issue, and it is at least possible that her advisers would have found material on which they could rely to displace such new case as the appellant might make. I do not think I am going too far if I say that substantial injustice is likely to be done if such a departure is made from the ordinary course of practice and pleading. I should, therefore, had I been fully aware at the outset of all the circumstances, have at an early stage moved your Lordships that counsel for the appellant should not be allowed to raise this issue on appeal. It happened, however, that it was only at the conclusion of the appellant's argument that I, in common with the rest of your Lordships, fully appreciated how serious had been the departure from any issue pleaded, how different the relief claimed—320,000 francs to be converted into £ sterling at the proper rate of exchange, which assuredly would not be 160 to the £—from that appearing on the face of the writ, and how scanty, through no fault of the respondent, were the materials on which a judgment on this issue must be formed, but my belated appreciation of the situation had this advantage at least, that I had heard all that was to be said on the application of the doctrine of "unjust enrichment" to the present case and saw no ground for thinking that the Court of Appeal had come to a wrong conclusion on it. I had, therefore, the less reluctance in suggesting to your Lordships that counsel for the respondent should not be called on to meet a case which should never have been allowed to be raised. In my opinion, the appeal should be dismissed with costs.

**LORD NORMAND:** My Lords, I have had the advantage of reading in print the opinion of my noble and learned friend LORD RADCLIFFE. I find myself in complete agreement with all that he has said and I will not detain your Lordships by adding anything of my own. I agree also with my noble and learned friend on the Woolsack on the impropriety of including the question of "unjust enrichment" without specific notice in the pleadings.

**LORD MORTON OF HENRYTON:** My Lords, I agree with my noble and learned friend on the Woolsack that the issue of "unjust enrichment" was not open to the appellant in these proceedings, and I have formed no opinion on this issue. On all other issues, I agree entirely with the opinion which is about to be declared by my noble and learned friend LORD RADCLIFFE. The result is that the respondent, Mrs. Weil, cannot be compelled in these proceedings to repay to the appellant the sums which he lent to her in response to her entreaties in order to save her son, a Jew, from a German concentration camp. The appeal must be dismissed.

**LORD MACDERMOTT:** My Lords, I am of opinion that this appeal must fail on the grounds that reg. 2 (1) of the Defence (Finance) Regulations, 1939, forbade the respondent to borrow French francs from the appellant as she did, and that the courts of this country cannot uphold the appellant's

claim to recover on foot of a promise to make repayment in respect of the sum so borrowed. I need not detail my reasons for these views. I have had the advantage of reading in print the opinion of my noble and learned friend LORD RADCLIFFE, and I agree so completely with his reasoning and conclusions on these matters that there is nothing I can usefully add regarding them. I express no view, one way or the other, whether the appellant would be entitled to relief had he sued on some different basis, such as "unjust enrichment" or deceit. The pleadings do not raise any issue of the kind and amendment at this late stage is out of the question, if only because it is possible that further evidence, relevant thereto, might have been adduced by the respondent had such issue been raised before the trial.

**LORD RADCLIFFE:** My Lords, on June 10, 1944, the appellant placed in the respondent's hands Bank of France notes for 320,000 francs. The respondent had applied to him for a loan, since she was, apparently, in need of money wherewith to try to purchase for her son exemption from being deported to Germany. It was common ground throughout that whatever money was made available by the appellant should be repaid in sterling. The site of this transaction was the principality of Monaco, in which French francs are legal currency. Of the two parties, the respondent had taken up residence on the south coast of France some twenty years ago, though retaining at all times British citizenship, and at the outbreak of war in 1939 was ordinarily resident in Monte Carlo. The appellant, who is a Dutch subject with a domicile in Holland, had been living in France on business before the war, and in 1941 had succeeded in escaping from that country to what may have been the somewhat greater security of the principality of Monaco.

The agreement which the parties came to was accompanied by, if it did not consist of, certain documents which the respondent signed and handed to the appellant. There is no need to refer to their contents in any detail. Evidently she had told him that she had an account at the Baker Street branch of the National Provincial Bank in London. Accordingly, there was a cheque for £2,000 sterling, signed by her and drawn on that branch of that bank. The space for the payee's name was left blank. There was a letter signed by her and addressed to the manager of that branch, stating that she had issued the cheque, requesting him to honour it "on presentation or as soon as the law permits it", and recognising the debt of £2,000 sterling as an obligation binding her estate in the event of her dying before presentation, and another letter, similarly signed and addressed to her solicitor in London, asking him to give his full attention to seeing that the cheque was paid as soon as the law allowed it. Lastly, there was a letter in French over the signature of the respondent certifying that she had addressed her letter to the bank manager and given her cheque of the same date, and undertaking that, if payment could not be obtained on presentation of the letter and cheque, she would pay the sum due directly and in cash not later than one month after the declaration of an armistice between Great Britain and Germany or earlier if her account at the National Provincial Bank had been released prior to the armistice. She added an undertaking that the £2,000 should bear interest at the rate of five per cent. per annum after becoming due. The appellant's name nowhere appeared in these documents. In fact, a blank space was left wherever a payee or obligee's name was due to appear. No doubt, this precaution was taken for reasons of security, but, equally, it must be beyond doubt on the evidence available that on June 10, 1944, Mrs. Weil, a British subject resident in Monaco, borrowed 320,000 French francs in Monaco from Mr. Boissevain, a Dutch subject also resident there at that date, on an undertaking to repay the money in sterling in London at the rate of 160 francs to the £ as soon as, but not before, the law of this country would allow such a payment to be made. This transaction was repeated in all its essential features on two further occasions. On June 15,

1944, and again on July 8, 1944, the appellant paid over to the respondent a further sum of 320,000 French francs and on each occasion secured a further set of documents to the purport that I have set out. Thus, the respondent assumed a liability to pay in London the sum of £6,000 in all, no part of which she has hitherto made available, nor, it appears, did she have at the date of her promise or at any time since any account at the branch of the National Provincial Bank on which her cheques were drawn. The action out of which the present appeal comes represents the appellant's endeavour to obtain from the courts of this country a judgment against the respondent for this sum of £6,000. My Lords, I think that this endeavour must fail, because I am satisfied that the respondent broke the law of this country and committed an offence when she borrowed these sums in francs from the appellant. If that is so, he can get no relief in respect of that transaction from an English court, and it would afford no material assistance to him if I were to express my sympathy with him in the predicament in which he is placed, or my distaste for the attitude which the respondent appears to have taken up against her benefactor. Before I come to the legal issues involved, it is necessary to say something of the course of the proceedings in the courts below.

The endorsement on the appellant's writ stated explicitly that he was claiming from the respondent the sum of £6,000 which he had lent to her in francs and which she had promised to repay in sterling. By further particulars he made it plain that he was asserting the existence of an oral contract to this effect which had been confirmed in writing by the several documents that I have noticed above. To this claim the respondent delivered a defence which raised a number of separate grounds of defence, among them a plea that by virtue of reg. 2 (1) of the Defence (Finance) Regulations, 1939, the loans to her and the alleged agreements relating to them were contrary to the regulations, and were, accordingly, invalid and illegal. On these pleadings the action came to trial. The appellant was called as a witness and gave evidence on his own behalf. The respondent was not called to give evidence, but two affidavits sworn by her as to the facts of her place of residence were admitted by agreement. The learned trial judge, after considering and rejecting various of the respondent's grounds of defence for reasons which are not now material, since those grounds were abandoned by her counsel when the case came to the Court of Appeal, proceeded to consider the bearing of the Defence (Finance) Regulations on the case. The regulations to which he referred were regs. 2 (1), 3A (1) and 3c (1). As to the first two, he expressed the view that, on the facts found by him, the loan transactions were not within their terms. I have not been able to extract from his judgment with any certainty what were the considerations that led him to this view, but I think that he was influenced partly by what he regarded as the practical difficulty of the Treasury in war time authorising any transaction between two persons resident in Monaco, and partly by his finding that the transactions were, in truth, transactions of loan and not in any sense exchange transactions or transactions in currency, direct or indirect. Since I have come to the conclusion that reg. 2 (1) is decisive of this case, I need not refer to the learned judge's interpretation of reg. 3c (1) which, also, he held not to apply. So holding, he entered judgment for the appellant for £6,000 with costs.

It will be convenient at this point to set out in full the contents of reg. 2 as it stood in June, 1944. It ran as follows:

"(1) Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer. (2) In this regulation the expression 'authorised dealer' means, in relation to any transaction in respect of gold, a person authorised by or on behalf of the Treasury



to deal in gold, or in relation to any transaction in respect of foreign currency, a person authorised by or on behalf of the Treasury to deal in foreign currency."

This regulation the Court of Appeal have unanimously held to apply to the transactions which are here in question, and to produce the result that the appellant cannot recover the sterling debt arising from the loan agreement.

A Accordingly, by the order of the Court of Appeal dated Dec. 13, 1948, it was ordered that the judgment of the trial judge should be wholly set aside and that judgment should be entered for the respondent. It is from that order that appeal is now taken to your Lordships' House.

B My Lords, it would seem to follow that, if the appellant is to succeed, he must displace the conclusion that reg. 2 (1) applies to his case. That is a simple issue, even if its solution gives rise to some difficulty. The Court of Appeal did not find it necessary to consider any of the respondent's other grounds of defence, of which the only one that was maintained before them appears to have been based on reg. 3c, and, of course, had your Lordships not been in agreement with the Court of Appeal that reg. 2 (1) does apply here, it would have been necessary to consider the bearing of this reg. 3c. The appellant's  
C counsel did, indeed, devote a large portion of his argument to the submission that reg. 2 (1), when rightly understood, did not extend so far as to bear on this transaction. I will explain in a moment why I do not agree with that submission, but, before I do so, I must notice an alternative argument that was addressed to us on behalf of the appellant.

D The alternative argument took this shape. Let it be assumed, it was said, that reg. 2 (1) did forbid the respondent to obtain this loan and that, accordingly, the loan agreement itself cannot be enforced in an English court. Nevertheless, the fact remains that she obtained 960,000 francs, and the appellant in the result got nothing at all out of the transaction except the loss of the money that he had advanced. Surely, it was urged, in circumstances such as these a right of action must arise in the appellant on the ground of the unjust enrichment of the respondent. I do not propose to give any detailed attention to the meaning of the phrase "unjust enrichment" as a principle of liability, since I think that such a claim, however phrased, must fail in this case, but I take it to be a less technical, if more dignified, description of the count for money had and received to a plaintiff's use which has long been an established cause of action under our system of law. It is, I think, plain that no such claim  
E was open to the appellant on the pleadings in the action. His whole case was confined to an enforcement of the terms of the loan agreement. Moreover, if his rights were to be no higher than a right to get his money back, I do not see how he could have looked for a judgment in sterling of £6,000, since the contractual rate of 160 francs to the £ was much more favourable to him than the rate ruling at the date in 1948 when the action was tried. There is no doubt,  
G however, that in both the courts below the appellant did, in fact, conduct an argument to the effect that he was entitled to judgment by virtue of the principle of unjust enrichment without being called on either to abandon the argument or properly to define the issue by amendment of his pleading. The trial judge refers to such a claim in his judgment, but he did not decide it, since he was in favour of the appellant on his main grounds. The Court of Appeal considered  
H it as an alternative contention and rejected it on its merits. Your Lordships were informed that this plea was not entertained by the Court of Appeal without a protest by counsel on behalf of the respondent to the effect that it was not open on the pleadings, a protest which in the result must be treated as having been overruled. I am not clear whether an objection as definite was taken before the trial judge, but at least no suggestion was made to us that the respondent's counsel had at any stage consented to this issue being decided on the pleadings as they stood, and that perhaps is the only thing that matters.

The course that has been taken of allowing this plea to be entertained without the issue having been properly raised at the trial might have placed your Lordships in a serious difficulty. For it would, I think, have been impossible to allow the appeal to succeed on this ground with any confidence that the respondent had been given the opportunity to which she was entitled of placing before the court all the facts that might be relevant to the determination of the issue. I am not unaware that the trial judge made findings to the effect that the respondent had deliberately misled the appellant as to the existence of her alleged banking account in London, and that he had no knowledge as to the use to which she had put the moneys that she obtained from him. There is no reason whatsoever to suppose that these findings represented other than the true facts of the case, but the fact remains that, without the issue of unjust enrichment fairly joined between the parties, no one can be certain that the respondent might not have given some evidence or the appellant made some answer in cross-examination that would have had a material bearing on the point. In particular, it would have been relevant to know how much, if anything, either of the parties knew of the Finance Regulations which had been made by this country, and whether either of them knew more than the other. My Lords, I think that this difficulty disappears in the case before you when it is recalled that a further examination of the facts, while it might conceivably have produced material that would have aided the respondent, could not well have improved the position of the appellant. His counsel were content to base his claim on the facts as found by the trial judge, which included his holding that the parties must not be treated as *in pari delicto*, assuming, of course, that some offence against our Defence Regulations was committed by the respondent. If, even on the basis of those facts, the appellant's claim fails, it becomes unnecessary to consider what course of action would have been appropriate had a more favourable view of its merits commended itself to your Lordships.

For my part, I agree with all that was said by TUCKER, L.J., in the Court of Appeal on this point. If reg. 2 did extend to this transaction, it forbade the very fact of borrowing, not merely the contractual promise to repay. The act itself being forbidden, I do not think that it can be a source of civil rights in the courts of this country. It is very well to say that the respondent ought not in conscience to retain this money and that that consideration is enough to found an action for money had and received, but there are two answers to this. Firstly, when the transaction by which the money has reached the respondent is actually an offence by our laws, the matter passes beyond the field in which the requirements of the individual conscience are the determining consideration. Secondly, an action in this country cannot by its very nature lead to a return of what was borrowed. Our courts are not being asked, and could not be asked, to make a personal order on the respondent to return to the appellant the francs that he handed to her. What is sought is a judgment in sterling. After all, we must not forget the realities of the matter. It is an accident of circumstance that at the time of the trial the franc rate may have been less favourable to the appellant than 160 to the £. Suppose it had stood at the contractual rate. Then, if this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it. I would borrow the words which LORD SUMNER used ([1914] A.C. 452) in *Sinclair v. Brougham* (1):

"The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid."

His principle is surely right whether the action for money had and received does or does not depend on an imputed promise to pay.

A I think then that the Court of Appeal were right in saying that, if reg. 2 applied to the case, the appellant's action must fail. Now, that this operation was a borrowing of foreign currency within the meaning of the regulations, seems to me inescapable. "Foreign currency" is defined by reg. 10 as meaning  
B any currency other than sterling, unless the context otherwise requires, and here there is nothing in the context that permits, let alone requires, another meaning. Any person subject to the regulation, who receives notes of a currency other than sterling on an undertaking to repay what he receives, borrows foreign currency. What else can one say of it? One may speculate  
C whether the makers of this regulation may have had in mind some more limited and specialised meaning for the words when they spoke here of borrowing and lending currency, but, in truth, there is no material on which to feed the speculation and your Lordships are bound to treat these words as meaning no less than what they so plainly say. The range of what they prohibit, so understood, is, indeed, exceedingly wide, and it is this very width that lends plausibility to the suggestion that there must be implied some qualification  
D either of the class of persons affected or of the kind of transaction that is brought under control. Two instances have been used in argument to illustrate what is said to be the unacceptable absurdity of reading the regulation according to its literal meaning. There is the case of the escaping prisoner of war who borrows some money in the country through which he passes, promising to make it good if he can make good his escape, and there is the case of the British subject resident in a foreign country who raises some every-day loan from a friend or, perhaps, his banker there against his promise to repay in the same  
E currency. Can it be thought that such harmless transactions were intended to be made criminal offences by this regulation? For my part, I think that the escaping prisoner of war can be left out of consideration. His would have been a wholly exceptional case and would have been so treated. It would be quite unreasonable to base any particular construction of this general regulation on its circumstances. The British subject resident abroad presents more difficulty and does legitimately raise the query whether it can be right to interpret the regulation as governing his merely local transactions, but I think that it must be so interpreted. Section 3 (1) of the Emergency Powers (Defence) Act, 1939, makes it imperative that defence regulations should be construed  
F as applying to all British subjects, with certain immaterial exceptions, unless a contrary intention appears from the regulation itself. It is impossible to extract any such contrary intention from this regulation. The references which it contains to the Treasury's dispensing power and to the permitted operations of dealers authorised by the Treasury appear to me to be neither here nor there. Certainly they are quite insufficient to justify a construction more  
G limited than the Emergency Powers (Defence) Act, 1939, presumptively enjoins. And here I would add that when a regulation contains a general dispensing power such as the power that is given to the Treasury by reg. 2, it is very difficult to press to a result any argument for a limited interpretation which is based on the absurdity of its literal construction.

H The particular qualification for which the appellant's counsel contended amounted to asking your Lordships to introduce an implied exception for British subjects who found themselves for the time being in enemy territory or territory which the enemy has overrun or occupied. I am ready to assume that Monaco could be so characterised at the material date, but I mean no disrespect to all that was urged on behalf of the appellant in support of this exception if I say that I can see no indication that would warrant your Lordships in putting such a construction on this regulation. If we did, we should be making a new regulation, not interpreting an existing one, nor.



stated as a general exception in favour of British subjects behind the enemy line, does it commend itself to me as very probable feature of war time legislation. Finally, the circumstance that the repayment in London was not to take place until the law permitted appears to me irrelevant since it is the actual obtaining of the loan that the law forbids.

There is only one further matter that I wish to notice before I conclude. Fully as I agree with the Court of Appeal's view that reg. 2 (1) prohibited this borrowing and therefore renders the appellant's claim for repayment unmaintainable, I do not find it possible to base my view either on the circumstance that this transaction was an exchange of francs for sterling, or on the fact, if it be a fact, that the proper law of this contract was the law of England. Indeed, it seems to me an unmaintainable proposition that if a British subject who is within the ban carries out such a transaction in foreign currency as the regulation describes, he commits or does not commit an offence according to whether the proper law of the transaction is English or foreign. These defence regulations were concerned with prohibiting certain acts under the sanction of severe penalties, and their interpretation cannot be assisted by considering in what circumstances the rules of private international law would uphold or reject contracts arising from those acts. I think that both the sterling element and the proper law factor are really irrelevant. I think so because I can find no warrant in the regulation itself for the assumption that it was specially designed for the support or the defence of sterling. Other regulations are, no doubt, directed specifically to this and, appropriately, base their provisions on distinctions between persons resident inside and persons resident outside the United Kingdom or the sterling area, as the case may be, and payments made to such persons. Regulation 2 says nothing of this. One can deduce from what it says no more than that it intended, just so far as it could, to restrict all dealings in foreign currency and gold to a group of dealers authorised by the Treasury. There were obvious advantages in this, but there is no warrant for supposing that the British government was interested only in dealings in which sterling was involved. There was the currency of our allies to be considered and, for that matter, there was the currency of our enemies, against whom the government had organised a Ministry of Economic Warfare. If it be said that, unless there is some implied limitation of the regulation to sterling transactions, it struck blindly, and perhaps needlessly, at all sorts of people and operations, I can see the force of the criticism, but I do not think that it alters the meaning of the words or should lead your Lordships to forget that in August, 1940, when the regulation first assumed its present amplitude, the tide of war itself was beating blindly on many innocent people.

*Appeal dismissed with costs.*

Solicitors: *William Charles Crocker* (for the appellant); *Pettiver & Pearkes* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

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## JACOBS v. LONDON COUNTY COUNCIL.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Radcliffe), January 17, 18, 19, March 21, 1950.]

*Judgment—Judicial decision as authority—Ratio decidendi or obiter dictum—Decision based on more than one ground.*

- A *Negligence—Licensee—Liability of landlord—Defective paving of forecourt of shop—Forecourt in occupation of landlord—Shop let to tenant—Injury to customer—Invitee or licensee.*

*Nuisance—Defective paving of forecourt adjoining highway—Need to cross forecourt to reach shop—Injury to customer leaving highway to visit shop—Liability of occupier of forecourt.*

- B The landlords of a housing estate had laid out a forecourt between the pavement of the highway and the entrance to some shops which they had let. Anyone going to one of the shops from the highway had to cross the forecourt which remained in the occupation of the landlords. While on her way to make a purchase at one of the shops, the appellant stepped from the pavement of the highway on to the forecourt and caught her foot in the cover of a stop-cock which projected about an inch and a quarter above the surrounding surface of the forecourt at a distance of about two feet from the highway. The landlords were not aware of this danger. In an action by the appellant against the landlords claiming damages for negligence, or, alternatively, nuisance, the county court judge found, on the plea of negligence, that the appellant was an invitee on the forecourt. He gave judgment for her on both grounds, but his order was reversed on both points by the Court of Appeal. On an appeal by the appellant to the House of Lords, it was contended by the landlords, on the plea of negligence, that *Fairman v. Perpetual Investment Building Society* ([1923] A.C. 74) was an authority for holding that, on the facts of the present case, the appellant was a licensee while on the forecourt, and not an invitee, but the appellant contended (a) that the observations of the House of Lords in *Fairman's* case (*supra*) that the appellant in that case was a licensee and not an invitee on the premises where she suffered damage were *obiter dicta*, and, accordingly, not binding on the House, and (b) that, in any event, the circumstances of the two cases were not similar.

- F HELD: (i) the question of the status of the appellant, Mrs. Fairman, was an issue clearly raised in *Fairman's* case (*supra*), and the deliberate conclusion of the House that she was a licensee on the premises where she suffered damage was a *ratio decidendi* of the case, and, accordingly, it was an authority binding on the House. Where a judge had given more than one reason for his decision, there was no justification for regarding one of those reasons as *obiter dictum*.

- G Observations of GREER, L.J., in *London Jewellers, Ltd. v. Attenborough* ([1934] 2 K.B. 222), and of PICKFORD, L.J., in *Cheater v. Cater* ([1918] 1 K.B. 252), *approved*.

- H (ii) the facts of the present case were not distinguishable in principle from those in *Fairman's* case (*supra*), except, if at all, to the disadvantage of the appellant in this case, as the forecourt, though not dedicated to the public, was, apparently, open to the public at large, whether or not they were intending to enter a shop or even to look into its windows; it could not be said that a member of the public had any common interest with the landlords in the forecourt, and the appellant had no higher right than any other member of the public; she was a licensee; and the landlords were not liable to her in damages for negligence.

*Fairman v. Perpetual Investment Building Society* ([1923] A.C. 74), followed.

(iii) to sustain her claim that the landlords were liable to her because the condition of the stop-cock and the surrounding paving-stones constituted a nuisance adjoining the highway whereby she had suffered injury, it was necessary for the appellant to prove that she, as a member of the public using the highway, had suffered special damage through the existence of the nuisance, but, on the facts, she was not using the highway when she met with the accident, as she had deliberately left it to go to the shop, A and, therefore, her claim in nuisance failed.

*Bromley v. Mercer* ([1922] 2 K.B. 126), and *Howard v. Walker* ([1947] 2 All E.R. 197), referred to.

*Owens v. Scott & Sons (Bakers), Ltd.* ([1939] 3 All E.R. 663), not approved.

*Per curiam*: It will help to keep sight of the differences between cases of nuisance and cases of negligence if two propositions are maintained—(i) B that negligence is not necessarily an element in nuisance, and (ii) that, where the nuisance in respect of which a private person sues is a “public nuisance,” he has no personal right of action unless he can prove special damage beyond that suffered by other members of the public.

*Decision of the COURT OF APPEAL* ([1949] 1 All E.R. 790), affirmed.

[AS TO DUTY TO INVITEES AND LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-612, paras. 851-860; and FOR CASES, see DIGEST, Vol. 36, pp. 35-49, Nos. 208-306.] C

Cases referred to:

- (1) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 92 L.J.K.B. 50; 128 L.T. 386; 87 J.P. 21; 36 Digest 37, 213. D
- (2) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.
- (3) *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1934] 2 K.B. 206; 103 L.J.K.B. 429; 151 L.T. 124; Digest Supp.
- (4) *Folkes v. King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; E Digest Supp.
- (5) *Cheater v. Cater*, [1918] 1 K.B. 247; 87 L.J.K.B. 449; 118 L.T. 203; 30 Digest 183, 508.
- (6) *Erskine v. Adeane*, (1873), 8 Ch. App. 756; 42 L.J.Ch. 849; 29 L.T. 234; 38 J.P. 20; 12 Digest 127, 841.
- (7) *Miller v. Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 31 F Digest 99, 2380.
- (8) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 36 Digest 15, 59.
- (9) *Boylan v. Dublin Corpn.*, [1949] I.R. 60.
- (10) *Wringe v. Cohen*, [1939] 4 All E.R. 241; [1940] 1 K.B. 229; 109 L.J.K.B. 227; 161 L.T. 366; 2nd Digest Supp. G
- (11) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest 38, 223.
- (12) *Crane v. South Suburban Gas Co.*, [1916] 1 K.B. 33; 85 L.J.K.B. 172; 114 L.T. 71; 80 J.P. 51; 36 Digest 42, 258.
- (13) *Proctor v. Harris*, (1830), 4 C. & P. 337; 36 Digest 50, 311.
- (14) *Flower v. Adam*, (1810), 2 Taunt. 314; 36 Digest 28, 144. H
- (15) *Coupland v. Hardingham*, (1813), 3 Camp. 398; 26 Digest 441, 1582.
- (16) *Barnes v. Ward*, (1850), 9 C.B. 392; 19 L.J.C.P. 195; 36 Digest 130, 862.
- (17) *Harcastle v. South Yorkshire Ry. & River Dun Co.*, (1859), 4 H. & N. 67; 28 L.J.Ex. 139; 32 L.T.O.S. 297; 23 J.P. 183; 7 Digest 286, 157.
- (18) *Howard v. Walker*, [1947] 2 All E.R. 197; [1947] K.B. 860; [1947] L.J.R. 1366; 177 L.T. 326; 2nd Digest Supp.



- (19) *Bromley v. Mercer*, [1922] 2 K.B. 126; 91 L.J.K.B. 577; 127 L.T. 282; 36 Digest 69, 436.  
(20) *Harrold v. Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 36 Digest 69, 443.  
(21) *Owens v. Scott & Sons (Bakers), Ltd. & Wastall*, [1939] 3 All E.R. 663; Digest Supp.

**A** APPEAL by the plaintiff, Mrs. Jacobs, from a decision of the Court of Appeal (TUCKER, ASQUITH and SINGLETON, L.JJ.), dated Mar. 24, 1949, and reported [1949] 1 All E.R. 790, allowing an appeal by the defendants, the London County Council, from an order of His Honour JUDGE HUNTER, K.C., made at Ilford County Court on Oct. 6, 1948, whereby he awarded damages to the plaintiff in respect of injuries suffered by her through the defective condition of the forecourt of a block of buildings on a housing estate belonging to the defendants. The facts appear in the opinion of LORD SIMONDS.

*Beresford, K.C.*, and *Monier-Williams* for the appellant.

*H. E. Francis* for the respondents.

The House took time for consideration.

**C** Mar. 21. The following opinion was read.

**LORD SIMONDS:** My Lords, on June 9, 1947, the appellant, Mrs. Jacobs, who lives at No. 255, Bennett's Castle Lane, Dagenham, in the county of Essex, left her house to visit a shop, No. 240, Bennett's Castle Lane, which is let by the respondents, the London County Council, to Smith Gard & Co., Ltd., pharmaceutical chemists. Bennett's Castle Lane is a highway vested in Ilford Borough Council and is within a large area laid out by the respondents as a housing estate known as the Becontree Estate. On that part of the estate which abuts on Bennett's Castle Lane the respondents built a number of shops (including No. 240) with flats above them. The frontages of these shops were set back from the pavement a distance of about ten feet six inches and the intervening space, which constituted a series of forecourts, was levelled and paved with paving-stones similar to those of the pavement of the highway. These forecourts were not fenced, but the paving-stones were so laid that there was a continuous line indicating which was forecourt and which was pavement. To the casual passer-by, however, the pavement of the highway and the forecourts were indistinguishable. Though there was at one time a dispute whether the forecourts were let with the adjoining shops, it is now clear that, at least so far as No. 240 is concerned, the forecourt was not included in the demise to Smith Gard & Co., Ltd., but was at all material times in both the ownership and the occupation of the respondents. In the forecourt in front of No. 240 at a distance of about two feet from the line marking the boundary between the pavement and the forecourt, there was a stop-cock which controlled the water supply to the flats above the shop. The paving-stones surrounding this stop-cock had sunk so that it projected to the extent of an inch and a quarter above them. The appellant, having on June 9, 1947, walked along the pavement until she was nearly opposite the shop, turned to her left and walked towards it. Perforce she crossed the forecourt and in doing so she caught her toe against the projecting stop-cock. She fell and sustained a somewhat serious injury in the fracture of her right patella.

**H** In consequence she commenced an action against the respondents in the Ilford County Court claiming damages. Her action was, in the first place, framed in negligence. She alleged that the respondents, as occupiers of the forecourt, had committed a breach of their duty to her as an invitee thereon. Alternatively, she laid her claim in nuisance, alleging that the condition of the stop-cock and surrounding paving-stones constituted a nuisance adjoining the highway whereby she had suffered injury. In the course of the proceedings the appellant's husband was joined as plaintiff, but nothing turns on this, or on the

fact that, as I have already indicated, it was at one time in issue whether the respondents or Smith Gard & Co., Ltd., were occupiers of the forecourt. The learned county court judge found that the appellant had not herself been guilty of any negligence in not observing the condition of the paving-stones and stop-cock and that she was using reasonable care for her own safety. He further held that she was an invitee on the forecourt. Unfortunately, in an otherwise very clear judgment the learned judge did not state on what facts or for what reason he came to this conclusion. In regard to the respondents, he found that they did not take reasonable care to guard against such danger, or even to acquire knowledge of such danger arising, and that they ought to have known of it and failed to do so owing to their lack of reasonable care in the matter of inspection. On the alternative plea of nuisance also the learned judge found in favour of the appellant. In his opinion, the appellant, being lawfully on the land of the respondents and being injured by reason of a nuisance on their land, was entitled to succeed on this ground also. He thereupon awarded her general and special damages. The respondents appealed to the Court of Appeal (TUCKER, ASQUITH and SINGLETON, L.JJ.), who unanimously reversed the judgment of the learned county court judge on both points.

On the first ground of claim, that of negligence, the question turns wholly on the category into which the appellant is to be placed. If she was an invitee on the forecourt of No. 240, then her claim is conceded by the respondents to be valid. If she was only a licensee, then she concedes that it is not. Invitee or licensee? That, then, is the question. For the respondents it is contended that the question is concluded in favour of licensee by the decision of this House in *Fairman v. Perpetual Investment Building Society* (1). For the appellant it is contended that the relevant observations of the noble and learned Lords who heard that case were *obiter dicta* and that it is not an authority binding on this House to the effect that a person in the position of the appellant, Mrs. Fairman, is in the category of licensee and not invitee, and, further, that in any event the circumstances of Mrs. Jacobs were different from those of Mrs. Fairman and Mrs. Jacobs, at any rate, was an invitee. My Lords, the appellant was, I think, encouraged to adopt the first branch of her contention by the observations of SCOTT, L.J., in *Haseldine v. Daw & Son, Ltd.* (2). That learned lord justice (differing on this point from GODDARD, L.J.) expressed the opinion ([1941] 3 All E.R. 166) that the observations of the learned lords in *Fairman's* case (1) on this question were all *obiter dicta* and he felt at liberty to state a different view of the law. So far as I have been able to discover, the opinion of SCOTT, L.J., has not received any support either in judicial decision or text-book of authority, and for a quarter of a century *Fairman's* case (1) has been regarded as a definitive statement of the law. However, in the present case the learned lords justices who heard the appeal thought that the matter admitted of sufficient doubt to justify the admission of an appeal to this House. Hence it falls to your Lordships to determine what *Fairman's* case (1) decided and for what proposition of law it is an authority, binding alike on this House and on every court of law in this country.

My Lords, I can entertain no doubt that *Fairman's* case (1) decided that Mrs. Fairman was a licensee on the premises where she suffered damage and that that decision was the *ratio decidendi*, or a *ratio decidendi* (it matters not which), of the case. It is not, I think, always easy to determine how far, when several issues are raised in a case and a determination of any one of them is decisive in favour of one or other of the parties, the observations on other issues are to be regarded as *obiter*. That is the inevitable result of our system. For while it is the primary duty of a court of justice to dispense justice to litigants, it is its traditional role to do so by means of an exposition of the relevant law. Clearly, such a system must be somewhat flexible, with the result that in some cases judges may be criticised for diverging into expositions which could by no means

be regarded as relevant to the dispute between the parties, and, in other cases, other critics may regret that an opportunity has been missed for making an oracular pronouncement on some legal problem which has long vexed the profession. However this may be, there is, in my opinion, no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decided two things would decide nothing. A good illustration will be found in *London Jewellers, Ltd. v. Attenborough* (3). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in *Folkes v. King* (4), in which the court had given two grounds for its decision, the second of which [as stated by GREER, L.J. ([1934] 2 K.B. 222), in *Attenborough's* case (3)] was that:

"... where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick."

In *Attenborough's* case (3) it was contended that, since there was another reason given for the decision in *Folkes' case* (4), the second reason was *obiter*, but GREER, L.J., said ([1934] 2 K.B. 222) in reference to the argument of counsel:

"I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to SWIFT, J., and which commended itself to me in *Folkes v. King* (4), but that view is not open to us in view of the decision of the Court of Appeal in *Folkes v. King* (4). In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the *ratio decidendi* and neglect the second, or to pick out the second reason as the *ratio decidendi* and neglect the first; we must take both as forming the ground of the judgment."

So, also, in *Cheater v. Cater* (5) PICKFORD, L.J., after citing a passage from the judgment of MELLISH, L.J., in *Erschine v. Adeane* (6), said ([1918] 1 K.B. 252):

"That is a distinct statement of the law and not a *dictum*. It is the second ground given by the lord justice for his judgment. If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a *dictum*."

The principle, which can be thus simply stated, is not always easy of application, particularly where the judgments of an appellate court consisting of more than one judge have to be considered. An illuminating discussion of the difficulties that may then arise will be found in an article, "*Ratio Decidendi* and *Obiter Dictum* in Appellate Courts," by PROFESSOR PATON and G. SAWER in *THE LAW QUARTERLY REVIEW*, vol. 63, p. 461. It does not, however, appear to me that *Fairman's case* (1) should cause any difficulty. In that case the defendants owned a block of flats which they let to various tenants, the defendants keeping possession and control of the common staircase giving access to the flats. The stairs were made of cement reinforced by iron bars embedded in the cement and running along the whole length of the tread. Owing to the wearing away of the cement, in some cases irregular depressions were scooped out behind the iron bars. The plaintiff, who lodged with her sister in a flat on the fourth floor, of which the sister's husband was tenant, while descending the stairs, caught her heel in a depression so formed, and fell and was injured. The trial judge found that the defendants were not guilty of negligence; that the state of the staircase was not dangerous at the time of the accident; and that the depression which caused the plaintiff to fall was not in the nature of a concealed danger or trap, but was obvious and could have been seen by the



plaintiff if she had looked. He accordingly gave judgment for the defendants and his judgment was affirmed by the Court of Appeal. When the case came on appeal to this House, it was clear that it was important for the appellant to establish as high a degree of responsibility in the respondents as possible, and it was clear too that, if she was an invitee, that degree was higher than if she was a licensee. Accordingly, her counsel, after referring to *Miller v. Hancock* (7) and stating the difference to which I have referred, urged that the appellant was "indirectly the invitee of the respondents." And so also counsel for the respondents opened his argument by saying: "*Qua* the respondents the appellant was not an invitee." Thus, while, no doubt, much argument ranged round other questions—what was the true inference to be drawn from the evidence, what was the measure of liability if the plaintiff was in fact an invitee, what was really decided in the much debated case of *Miller v. Hancock* (7), and so on—yet it was an issue clearly raised: What was the status of the appellant, invitee or licensee? And that issue was thus decided. LORD BUCKMASTER, finding himself unable to agree with the trial judge, held that the state of the staircase was a dangerous trap so that the appellant was entitled to succeed, whatever her status. It is possible that he would have decided in favour of invitee. That appears to be the purport of his final observation ([1923] A.C. 84). LORD ATKINSON decided (*ibid.*, 85) that she was, *quoad* the landlord, when using the stairs, "at most merely his licensee." LORD SUMNER, after stating the relevant facts, said (*ibid.*, 92): "I think that the plaintiff was the defendants' licensee not their invitee," and went on to explain why. LORD WRENBURY, at an early stage of his opinion, said (*ibid.*, 95):

"It is well to define at the outset what, in my judgment, is the relation between the plaintiff and the landlord in respect of which she can sue."

He proceeded to define it thus (*ibid.*):

"She was, I think, the invitee of the tenant, and, in consequence, the licensee of the landlord."

Finally, LORD CARSON agreed in the conclusion reached by LORD BUCKMASTER. I do not find in his speech any reference to the immediate question. Thus, three of the five noble and learned Lords who heard the appeal decided that Mrs. Fairman was a licensee, not an invitee. To treat their deliberate conclusions as *obiter* would not be consonant with the principle which is, in my view, essential to our system of case law and precedent.

This House, then, is bound by *Fairman's* case (1). The question remains whether the facts of the case now under appeal distinguish it in principle. I have already set out the facts on which in *Fairman's* case (1) the plaintiff was held to be a licensee. It would, in my opinion, be an unjustifiable refinement of the law for this House, which declared Mrs. Fairman to be a licensee, to declare Mrs. Jacobs to be other than a licensee. I can find no essential distinction between the two sets of facts. If there is one, it is, I think, to the disadvantage of Mrs. Jacobs, inasmuch as the forecourt on which she walked and fell was apparently, though not dedicated as a highway, open to the public at large, whether or not they were intending to enter the shop or even to gaze into its windows. I do not think that she had a higher right than any other member of the public, of whom it would be impossible to predicate that he had any common interest with the respondents in the forecourt. My Lords, I have deliberately used the expression "common interest," because in *Mersey Docks and Harbour Board v. Procter* (8) (a case heard in this House just three months after judgment had been delivered in *Fairman's* case (1), LORD SUMNER said ([1923] A.C. 272):

"The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none."

It is possible that this House may on some future occasion have to examine further what for the purpose of this distinction constitutes a common interest, but it is clear that LORD SUMNER did not think that there was a common interest between Mrs. Fairman and the landlords of the block of flats in which she was the lodger of their tenant. *A fortiori*, as I think, there is no common interest here.

A Finally, my Lords, on this branch of the case I would say that I do not intend either to cast any doubt on, or to affirm, the authority of cases which have long been cited as examples of such a common interest, *e.g.*, the so-called dock cases and railway cases where the defendants were carrying on the business of a dock or railway undertaking and the plaintiffs, being lawfully on their premises, suffered injury thereon. It is not necessary to do so, and such a task should only be assumed where the facts of the case demand it, and then only after a more  
B exhaustive examination of the authorities than the present appeal requires.

Since writing this part of my opinion, my attention has been called to a case recently tried in Eire. I refer to *Boylan v. Dublin Corpn.* (9) in which the Irish Supreme Court distinguished *Fairman's* case (1). On that I make no comment, but I observe that BLACK, J., in a reasoned judgment ([1949] I.R. 77), supported the view expressed by SCOTT, L.J., in *Haseldine's* case (2) that the opinions  
C given by the House in *Fairman's* case (1) on the question of licensee or invitee were *obiter*. The learned judge's observations led me to re-consider what I had written, but I am unable to come to a different conclusion. As I have already said, I recognise that the dividing line is difficult to draw, but it would, I think, be to deny the importance, I would say the paramount importance, of certainty in the law to give less than coercive effect to the unequivocal statement of the  
D law made after argument by three members of this House in *Fairman's* case (1). Nor, perhaps I may add, are your Lordships entitled to disregard such a statement because you would have the law otherwise. To determine what the law is, not what it ought to be, is our present task.

It remains to examine the appellant's alternative claim, *viz.*, that the respondents were liable to her because the condition of the paving-stones round  
E the stop-cock constituted a nuisance adjoining the highway. As I have said, the learned county court judge on this ground also decided in her favour. He held that she was lawfully on the land of the respondents (as she undoubtedly was) and that the principles laid down in *Wringe v. Cohen* (10) were applicable. It was clear, however, that the learned judge was in error in thinking that that case was relevant, for it decided no more than that, where premises on a highway  
F become dangerous and constitute a nuisance so that they collapse and injure a passer-by or an adjoining owner, the occupier or owner of the premises, if he has undertaken the duty to repair, is answerable, whether he knew or ought to have known of the danger or not. I cite the headnote ([1940] 1 K.B. 229) which, I think, accurately states the decision, though I would observe that the dispute was between adjoining owners, the premises of one having been damaged  
G by the defective condition and collapse of the other, and reference to highway and passer-by were, alike, strictly unnecessary. But in any case learned counsel for the appellant did not, either in the Court of Appeal or in this House, rely on the authority of *Wringe v. Cohen* (10), but claimed that as a user of the highway she had suffered injury by reason of a nuisance adjoining the highway caused by the respondents. That, at least, is how I understand the claim to  
H have been formulated in this House. My Lords, the answer given by the Court of Appeal to the claim so formulated is that the appellant was not at the time of her accident a user of the highway. She was, as they held and, I think, rightly held, a licensee on the land of the respondents, who failed in no duty that they owed to her in that capacity. It is the validity of this answer that must be examined. But at the risk of provoking the criticism, to which at an earlier stage of this opinion I referred, I would make some preliminary observations.

In a recent article, "The Boundaries of Nuisance," in *THE LAW QUARTERLY*

REVIEW, vol. 65, p. 480, to which I would express my indebtedness, PROFESSOR NEWARK observes that in the American RESTATEMENT OF TORTS (ch. 40), the word "nuisance" has been eschewed as being "attended with so much confusion and uncertainty of meaning." That drastic step is not open to your Lordships. To-day, as at any time during the past five hundred years, a plaintiff may found his claim in nuisance and call it nuisance. The confusion, however, is a real one and, in relation to the boundaries of nuisance and negligence, has led PROFESSOR WINFIELD to say, in his TEXTBOOK OF THE LAW OF TORT, 4th edn., p. 472:

"Until quite recently there was a hybrid action of nuisance and negligence. Sometimes it looked as if negligence were the substance of the action and nuisance were an untechnical term; sometimes the exact reverse would be the truth, and then, again, 'negligent' has figured as a persistent term in the plaintiff's declaration only to be persistently ignored by the court in deciding on grounds of nuisance."

Yet, as LORD SUMNER (then HAMILTON, L.J.) said ([1913] 1 K.B. 413) in *Latham v. R. Johnson & Nephew, Ltd.* (11),

"... the differences between cases of nuisance and cases of negligence must never be lost sight of."

It will, as I think, help to keep sight of those differences, if two propositions are maintained, first, that negligence is not necessarily an element in nuisance, and, second, that, where the nuisance, in respect of which a private person sues, is a "public nuisance," he has no personal right of action, unless he can prove special damage beyond that suffered by other members of the public. It may also be useful to remember how far from its former scope and meaning nuisance has strayed, largely, I suppose, by reason of the impact of the law of public nuisance on the original conception of that tort. For of this there is no doubt, that, originally, nuisance meant nothing else than an unlawful interference with a man in respect of the use and enjoyment of his land, whereby he suffered damage, by an act done by another on his own, not on the plaintiff's, land, and for this purpose "land" at a very early date included, not only a corporeal, but also an incorporeal hereditament, such as a private right of way.

In the present case the appellant's case rests, not on the unlawful interference with her enjoyment of any corporeal or incorporeal hereditament, but on the proof of a public nuisance in respect of which she, as a member of the public, suffered special damage. This may be somewhat elaborated. As stated in PRATT AND MACKENZIE'S LAW OF HIGHWAYS, 18th ed., p. 107:

"Nuisance may be defined, with reference to highways, as any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely, and conveniently passing along the highway."

The question, then, may be stated with particularity. Has the appellant proved the existence of a public nuisance as so defined in reference to the highway, Bennett's Castle Lane? And further, has she proved that she, as a member of the public using that highway, suffered special damage? On the first question I feel great difficulty. The learned county court judge has not, I think, addressed his mind to it. For, while saying that "the stop-cock and surrounding stones constituted a nuisance," he adds that "the cases as to nuisances on land adjoining a highway are not in point." Yet the appellant's claim in nuisance must fail *in limine* unless the nuisance of which she complained was in respect of some act or omission on the highway or the land adjoining it. I gravely doubt whether there is any finding which would justify your Lordships in holding that a public nuisance was proved, and I should myself hesitate long before I came to the conclusion that the owner of land adjoining the highway was guilty of a public nuisance because he allowed a stop-cock on that land to protrude by so little



from the surrounding stone. I do not ignore that the learned judge found the appellant guilty of no negligence, but it does not follow, because she was not guilty of negligence, that her accident was caused by any act or omission of the respondents which amounted to a public nuisance. It is not, however, on this point only that the appellant's claim cannot be sustained. I turn to the second question and quote again the learned judge. He said:

A       “ The appellant did not stray on the forecourt by accident. She went there deliberately. But she was there lawfully, not as a trespasser.”

He had, indeed, already held that she was an invitee on the land of the respondents. At any rate, whether as licensee or invitee, she was there lawfully and had claimed that the respondents, as occupiers of the land, owed her in that capacity a certain duty of care.

B       I would not say, my Lords, that an alternative claim in negligence and nuisance can never be permissible: see, *e.g.*, *Crane v. South Suburban Gas Co.* (12). But it is, I think, essential to keep in mind where the accident takes place and why the plaintiff is in that place. For the confusion, to which I have referred and of which, among a hundred examples in the reports, I would mention such cases as *Proctor v. Harris* (13), *Flower v. Adam* (14) and *Coupland v. Hardingham* (15), must be increased if a plaintiff can allege that, being on the defendant's land, he was as invitee owed a duty of care, and can then, it being found as a fact that he was truly on the defendant's land, but only as licensee, allege that he was still a user of the highway. The duty which every citizen owes not to commit a public nuisance at peril of an indictment or of an action by a member of the public who has suffered special damage is one thing, and the duty of care which an occupier of land owes to his invitees or licensees on it is another. I decline to introduce a third category, a duty which the occupier of land owes to one who was lately on the highway just because he was lately on it. It is then, as I see it, a question of fact whether the appellant suffered injury while using the highway, and it is clear that she did not. The learned judge has, in fact, so found. If so, her claim must fail, for it is then irrelevant whether or not the respondents have been guilty of some act or omission “ whereby the public are prevented from freely, safely, and conveniently passing along the highway.” She was not, in fact, passing along the highway at all. Nothing that I say is intended to cast any doubt on the proposition that a man may be regarded as the user of a highway though he has diverged from it accidentally, as in *Barnes v. Ward* (16), or has made a false step, or become giddy, and thus left it: see *Hardcastle v. South Yorkshire Ry. and River Dun Co.* (17), *per* MARTIN, B. (28 L.J.Ex. 141). But the House was referred to no case, and my researches have led me to none, where a plaintiff has deliberately left the highway to go elsewhere and, having left it and having suffered injury on the adjoining land, has then been held entitled to recover on a claim of public nuisance in respect of which he suffered special damage. Far as the law of nuisance has travelled beyond its original limits, this further extension appears to me to be justified neither by reason nor by authority.

My Lords, it does not escape me that in the result a distinction which may appear to be capricious will exist between two cases, the one of a person who, like the appellant, suffers an injury on land adjoining the highway, the other of a person who suffers similar injury on the highway itself. The distinction has, in fact, been commented on in *Howard v. Walker* (18). But, my Lords, such distinctions must exist in the law so long, at least, as a distinction exists between public and private property, and it is ultimately on that distinction, perhaps, that the different fates of my hypothetical victims depend. I have said that no authority has been cited contrary to the view which I have submitted to the House. On the other hand, there are cases which, I think, clearly support that view. For I can see no essential difference in the fact, if, indeed, it is the

fact (for there was no evidence of it), that the appellant did not know where the highway ended and the forecourt began. Her rights in this respect are the same whether the stop-cock was two feet from the highway or two feet from the shop front. I shall follow TUCKER, L.J., in looking back no further than *Bromley v. Mercer* (19). In that case a child, while on a visit to the defendants' premises, which abutted on the highway, was injured by a heavy stone which fell from the wall on her. It was contended, and the learned commissioner, who heard the case at *nisi prius*, so held, that the defendants were liable to her in nuisance. But in the Court of Appeal her claim was rejected. LORD STERNDALÉ, M.R., pointed out ([1922] 2 K.B. 129) the fallacy of saying that

"... where there is a nuisance to the highway everyone who comes in proximity to it has a right of action which he can carry about with him on to private premises."

SCRUTTON, L.J., said (*ibid.*, 131):

"... the only person who can successfully sue for damages is one who is injured in using the highway. There is no authority for the extension of the law which the learned commissioner has made, and in my opinion it is erroneous."

The learned lord justice further pointed out that in *Harrold v. Watney* (20) the plaintiff, who was held entitled to recover damage, was actually using the highway. To the same effect as *Bromley v. Mercer* (19) was *Howard v. Walker* (18), a recent decision to which I have already referred. There the plaintiff, after leaving a shop, suffered injury on its forecourt on her way to the highway. There, too, LORD GODDARD, C.J., rejected a claim laid in nuisance on the ground that it was not as a user of the highway that she suffered injury but while she was on the forecourt as a visitor or invitee of the tenant. Consistently with what I have already said, I regard these as clearly right decisions. On this second branch of the case I must add that *Owens v. Scott & Sons (Bakers), Ltd.* (21) on which the appellant relied, cannot be regarded as in harmony with the cases that I have cited. For these reasons, I am of opinion that this appeal should be dismissed.

**LORD NORMAND:** My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the Woolsack.

**LORD MORTON OF HENRYTON:** My Lords, I also concur.

**LORD MACDERMOTT:** My Lords, I agree.

**LORD RADCLIFFE:** My Lords, I agree that this appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Shaen, Roscoe & Co.* (for the appellant); *J. H. Pawlyn*, Solicitor to the London County Council (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

DOLLFUS MIEG ET COMPAGNIE S.A. v.  
BANK OF ENGLAND.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Cohen, L.JJ.),  
January 30, 31, February 1, 2, 3, 17, March 6, 1950.]

*Conflict of Laws—Impleading foreign sovereign States—Gold bars belonging to French company seized by Germans and carried off to Germany—Discovery by allied forces—In possession and under control of governments of United States, United Kingdom and France—Deposit with Bank of England for purpose of applying agreement by allied governments on restitution of monetary gold—Action by French company against bank claiming delivery of bars or damages for conversion.*

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In May, 1938, a French company purchased sixty-four identifiable gold bars and lodged them in a private vault at Limoges of which it retained the key. In 1944, the bars were seized by the Germans and taken to Germany, where they were found by the United States forces in 1945, after the invasion of Germany by the allied armies. In September, 1946, a Tripartite Commission for the Restitution of Monetary Gold was set up by the governments of the United Kingdom, the United States of America, and France to implement the terms of Part III of the Paris Agreement on Reparation, dated Jan. 14, 1946, whereby all the monetary gold found in Germany by the allied forces was to be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany. In March, 1948, the Bank of England was requested by the Treasury to open a gold set-aside account in the name of the Treasury on account of "the governments of the United States, the United Kingdom and France," the account to be operated by the representatives of those three governments on the Tripartite Gold Commission "for the deposit and eventual distribution of a portion of the gold looted by Germany from the occupied States of Europe and recovered by the allied occupation forces." Under the terms of the contract the bank was to make charges in connection with the account. In July, 1948, under the orders of the Tripartite Commission, the sixty-four gold bars were conveyed to England and deposited in the gold set-aside account which had been opened by the bank pursuant to the request of the Treasury. After 1940, it was the normal practice of the bank, when gold bars were deposited by a customer, to ascertain the gold content of the bars deposited and to credit the customer with the quantity of ounces of fine gold discovered on assay, but not thereafter to treat the specific bars deposited as segregated in any way to the particular contract of deposit. When the sixty-four gold bars were deposited with the bank, it was known that the French company had, or might have, an interest in them, and on July 16, 1948, the Tripartite Commission wrote a letter to the bank saying that they had received a request from the French government that the bars should be set aside and that "the commission would be grateful, providing such action does not present insuperable technical or administrative difficulties, if you could see your way to having these bars set aside intact on arrival, if they can be identified, pending receipt of a further communication from the commission on the subject." On July 19 the bank replied, agreeing to the commission's proposal. On Oct. 25, 1948, the bank wrote to the commission informing them of the fine gold content of the bars, "which amount has accordingly been set aside to-day for account of H.M. Treasury o/a the governments of the United States, the United Kingdom and France," and adding, "in view of the circumstances outlined in your letter . . . these bars have been temporarily segregated pending the receipt



of instructions as to their disposal." In an action by the company against the bank claiming (*inter alia*) delivery of the bars, and, alternatively, damages for their conversion, the bank applied for an order setting aside the writ and staying all further proceedings on the grounds (a) that the sixty-four gold bars were in the possession or under the control of the governments of the United States of America, France, and the United Kingdom, and (b) that the action impleaded two foreign sovereign States, *viz.*, the governments of the United States of America and France, who declined to submit to the jurisdiction of the court. JENKINS, J., made an order in favour of the bank, and the company appealed. During the course of the hearing of the appeal, it was found that, although the bank had intended that the bars should be kept apart from the pool and be held as individual bars for the three governments, it had failed to take one of the various steps necessary to create an exception to its general rule and had inadvertently sold thirteen of the bars.

HELD: as (a) it was not the custom of the bank to segregate bars to the particular contract of deposit, and (b) although it had intended to do so in this case, it had failed to take one of the steps necessary to create an exception to its general rule, the sixty-four gold bars were not at any relevant date in the possession or under the control of the three governments, and, therefore, the company's action against the bank should be allowed to proceed.

As the matter was one of public importance, and as the facts on which the Court of Appeal based their conclusions were not before the judge, the court thought it right to express their views on the main points which had been debated before them and with which the judge had dealt.

HELD: (i) (SIR RAYMOND EVERSHED, M.R., *dissenting*) assuming that, under the contract between the bank and the Tripartite Commission on behalf of the three governments, the gold bars were returnable in specie by the bank to the three governments on demand, the bars had not ceased to be under the control of the three governments when deposited with the bank; "control," within the meaning of LORD ATKIN's proposition in *Compania Naviera Vascongado v. Cristina S.S.* ([1938] 1 All E.R. 721), covered the right to tell the possessor what was to be done with the property; and the immunity of a foreign sovereign State from process in the municipal courts was not lost by a temporary bailment for safe custody of property of which that State had had *de facto* possession.

(ii) if the company had failed to show that they were entitled to pursue a claim for the return of the bars, they would also be disentitled to proceed with a claim for damages for detinue or conversion of the bars.

(iii) the cases dealing with the administration of trust property in this country, which appeared to establish a limitation on the immunity enjoyed by a foreign sovereign State which was included among the persons interested under the trusts, had no application to the facts of this case.

*Per curiam*: There is something to be said for the view that, where a foreign government seeks to stay proceedings, the court should be satisfied by evidence that the law of that country grants immunity on the basis that is being sought here.

*Per SOMERVELL, L.J.*: The suggestion that the principle of immunity is limited to cases where a foreign sovereign is impleaded or relief *in rem* is sought is inconsistent with authority and with the language used in the *Cristina* case (*supra*) and in *Haile Selassie v. Cable and Wireless, Ltd.* ([1938] 3 All E.R. 384).

*Decision of JENKINS, J.* ([1949] 1 All E.R. 946), *reversed on the facts which were not before the judge.*

[AS TO IMMUNITY OF FOREIGN GOVERNMENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 27-29, para. 30; and FOR CASES, see DIGEST, Vol. 1, pp. 48-50, Nos. 384-400.]

Cases referred to:

- (1) *Compania Naviera Vascongado v. Cristina S.S.*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.
- (2) *Haile Selassie v. Cable and Wireless, Ltd.*, [1938] 3 All E.R. 384; [1938] Ch. 839; 107 L.J.Ch. 380; 159 L.T. 385; Digest Supp.
- (3) *Ancona v. Rogers*, (1876), 1 Ex.D. 285; 46 L.J.Q.B. 121; 35 L.T. 115; 37 Digest 158, 34.
- (4) *The Parlement Belge*, (1880), 5 P.D. 197; 42 L.T. 273; 11 Digest 537, 394.
- (5) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; *sub nom. Spain Republic Government v. Arantzazu Mendi*, 108 L.J.P. 55; Digest Supp.
- (6) *The Winkfield*, [1902] P. 42; 71 L.J.P. 21; 85 L.T. 668; 3 Digest 113, 373.
- (7) *The Amazone*, [1940] 1 All E.R. 269; [1940] P. 40; 109 L.J.P. 49; 163 L.T. 375; Digest Supp.
- (8) *Long v. The Tampico*, (1883), 16 Federal Reporter 491.
- (9) *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, (1938), 303 U.S. 68.
- (10) *Gladstone v. Musurus Bey*, (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L.J.Ch. 155; 7 L.T. 477; 11 Digest 537, 392.
- (11) *The Broadmayne*, [1916] P. 64; 85 L.J.P. 153; 114 L.T. 891; 1 Digest 109, 131.
- (12) *The Messicano*, (1916), 32 T.L.R. 319; 1 Digest 162, 706.
- (13) *The Crimdon*, [1900] P. 171; 69 L.J.P. 103; 82 L.T. 660; 1 Digest, 162, 709.
- (14) *The Davis*, (1869), 10 Wallace, 15.

**E** INTERLOCUTORY APPEAL by the plaintiffs, a French company, from an order of JENKINS, J., dated Apr. 6, 1949, and reported [1949] 1 All E.R. 946, granting an application by the defendants, the Bank of England, for an order to set aside the writ and all subsequent proceedings in an action by the plaintiffs, on the ground that the court had no jurisdiction to entertain the action.

The plaintiffs were the owners of some gold bars which had been seized and removed to Germany by the Germans during their occupation of France. In 1948, with the object of carrying out the provisions of an agreement by the allied governments dated Jan. 14, 1946, the bars were deposited by the governments of the United States, the United Kingdom and France in a "gold set-aside account" which had been opened on their behalf at the Bank of England at the request of the Treasury. In the action against the bank the plaintiffs claimed (a) delivery of the gold bars, or, alternatively, damages for their conversion; (b) an injunction restraining the bank from dealing with or parting with possession of the bars; and (c) damages for their detention. On its application to set aside the writ and stay all further proceedings, the bank contended (a) that the bars were in the possession or under the control of the governments of the United States of America, France, and the United Kingdom; and (b) the action impleaded two foreign sovereign States, *viz.*, the governments of the United States of America and France, who declined to submit to the jurisdiction of the court. The case proceeded on the basis that the bars were returnable *in specie* to the three governments on demand, and JENKINS, J., held that the bars were in the possession or under the control of the three governments and that the action was an attempt to sue indirectly the governments concerned, two of which were foreign sovereign States who could not be directly sued, and, accordingly, he granted the bank's application. The plaintiffs

appealed, and at the conclusion of the argument before the Court of Appeal the court were informed that further investigations had shown that the bank had inadvertently sold thirteen of the sixty-four bars which were the subject-matter of the action. Evidence was given that it was the practice of the bank, since 1940, not to segregate bars deposited with it to the particular contract of deposit, but to credit the customer with the quantity of ounces of fine gold discovered on assay. It had, however, intended to depart from its regular practice in the case of these particular bars, as the result of a request made by the representatives of the three governments when depositing them. The facts appear in the judgments of SIR RAYMOND EVERSLED, M.R., and COHEN, L.J.

*Sir Andrew Clark, K.C., and R. O. Wilberforce* for the plaintiffs.

*Cross, K.C., and J. R. C. Lee* for the defendants, the Bank of England.

*H. L. Parker and Denys Buckley* for the Crown.

*Cur. adv. vult.*

Mar. 6. The following judgments were read.

**SIR RAYMOND EVERSLED, M.R.:** The facts of this case have been fully stated by JENKINS, J., in the court below, and are summarised in the judgment of my brother COHEN which I have had the advantage of seeing. I do not, therefore, find it necessary to relate them anew in this judgment. One small lacuna has been filled since the hearing by JENKINS, J. The learned judge observed ([1949] 1 All E.R. 951) that there was only available to him the order of the French government establishing the Tripartite Commission for Restitution of Monetary Gold. In this court we have also seen the order of the British government recorded in the LONDON GAZETTE dated Sept. 27, 1946. The matter is, however, unimportant since the due establishment of the Tripartite Commission by acts of the three governments concerned has not been, and is not, contested. Moreover (at any rate as the argument has developed in this court), save for the fact that the deposit of the gold bars in question with the Bank of England was effected by the commission and that the claim for immunity on the part of the French government and the government of the United States of America has, in fact, arisen out of their co-operation with the British government in the Tripartite Commission, the objects and jurisdiction of the commission have no relevance to the appeal.

One other substantial matter of fact has, however, been expanded by fresh evidence put before this court by consent. In his judgment ([1949] 1 All E.R. 954), the learned judge set out the letters passing between the secretary-general of the Tripartite Commission and Mr. Hilton Clarke on behalf of the Bank of England on July 16 and 19, 1948, in reference to the terms on which the bank agreed to hold the bars in suit. Counsel for the plaintiffs read an extract from a further letter from the Bank of England to the commission dated Oct. 25, 1948 (*i.e.*, one week after the issue of the writ in this action), the material part of which is as follows:

"In this connection I have to inform you that the fine gold content of the bars in question has been established as 25,679.605 fine ounces, which amount has accordingly been set aside to-day for account of H.M. Treasury o/a the governments of the United States, the United Kingdom and France. I would mention that in view of the circumstances outlined in your letter under reference these bars have been temporarily segregated pending the receipt of instructions as to their disposal."

He also drew attention to the pencil note of the bank's official on the letter of July 16, 1948: "My reaction is that we can help if the French take the gold away immediately." On this material counsel for the plaintiffs argued that the three governments could not now claim to be either in "possession" or "control" of the sixty-four bars in any intelligible sense of the language of LORD ATKIN in *Compania Naviera Vascongado v. Cristina S.S.* (1), since, after the ascertain-



ment of the fine gold content of the bars at 25,679.605 fine ounces, that quantity of fine ounces of gold was placed to the credit of the relevant account and the governments could not claim any rights in respect of the specific bars or any bars. An affidavit was then put in on the bank's behalf, sworn by one of its officers, Mr. L. J. Menzies. From this affidavit it was made apparent that the normal practice (since 1940) of the Bank of England, when gold bars are deposited by a customer, is to ascertain the gold content of the bars deposited, to credit the customer with the quantity of ounces of fine gold discovered on assay, but not thereafter to treat the specific bars deposited as segregated in any way to the particular contract of deposit. Mr. Menzies further stated that in the present case, although the fine ounce content of the bars had been ascertained on Oct. 25, 1948, and the requisite number of ounces of fine gold thereupon credited to the gold set-aside account of the three governments, the bars nevertheless continued to remain segregated, and still so remained. He stated that this departure from regular practice was adopted "in view of the commission's request referred to in the bank's letter of July 19, 1948," *i.e.*, to enable effect to be given to a request, if made (having regard to the plaintiffs' claim), for delivery of the bars to the Bank of France.

After all the arguments had been concluded, it then and for the first time appeared (according to the statement made to us by counsel for the bank) that, in fact, notwithstanding the "segregation" to which Mr. Menzies had deposed, certain of the bars had been sold by the bank to outside purchasers. An opportunity having been given by the court for further investigation of the true state of facts, a further affidavit was sworn by Mr. Menzies on Feb. 16. The narrative disclosed by this further affidavit was startling. It now appears that, to give effect to the special arrangement made by the bank with the commission, instructions were given to the appropriate officer of the bank for three steps to be taken, *viz.*, (i) the making of a separate stack or pile of the sixty-four bars, (ii) the placing on such stack of a warning notice that the bars were not to be dealt with save after reference to "higher authority," and (iii) the attachment of a similar warning notice to the cards "which constitute the Bullion Office records of the sixty-four bars"; that the third of such steps was never, in fact, taken; and that so long ago as "on various dates between Dec. 30, 1948, and Jan. 26, 1949," thirteen of the sixty-four bars were sold and delivered by the bank to outside purchasers. Even before the filing of the second affidavit of Mr. Menzies, I should have felt doubt whether it would have been right for the court, on such an application as is now before us, to proceed on the basis which had been assumed before JENKINS, J., *i.e.*, on the basis that at all material times and as part of the contract of bailment between the commission and the bank, the sixty-four bars in suit were held by the bank, segregated from all other customers' gold and specifically allocated to that contract. For this is, after all, an application to stay proceedings *in limine*, and on such an application it is not common nor proper to assume favourably to the applicant matters of fact which may be in any doubt. Moreover (and this is a matter to which I shall later return), counsel for the plaintiffs has maintained with no little force that a plaintiff in an action *in personam* of this character should *prima facie* not be concerned with or embarrassed by the alleged rights of a purely contractual nature between the defendant and a third party *inter se*. I should, therefore, in any event have been inclined to think, even before Mr. Menzies' second affidavit, that the true legal relationship between the bank and the commission, on the assessment of which the bank's claim to immunity might well depend, ought to be more closely investigated before any safe answer to the question before us could be given.

However that may be, the further evidence by Mr. Menzies has, to my mind, destroyed at a single blow the whole premise on which the judgment below proceeded, and on which the bank's claim for a stay has necessarily rested. I

am not to be taken as casting blame on any individual, still less as impugning in the smallest degree the good faith of any officer of the bank or any of its advisers. But the fact that, at a time when there was pending an application by the bank to stay proceedings based essentially on the proposition that the possession or control of the bars remained with the bank's customer, thirteen of the sixty-four bars could be disposed of by an officer of the bank, and that such sale was so clearly within the ordinary scope of his duties that it should for nearly twelve months pass wholly unnoticed by those concerned on the bank's behalf to litigate before the court the claim to immunity, emphasises in the clearest possible way, in my judgment, the caution with which applications of this kind for a stay of proceedings ought to be received by the court. And the matters to which I have referred further show—conclusively, to my mind—that it is quite impossible for the bank on the present application to establish either limb of the argument which is fundamental to its application, *viz.*, that the bars were either in the possession or under the control of the three governments. So far as concerns the thirteen bars which have been sold by the bank, it is manifestly impossible, in my view, for the bank any longer to invoke the rule of immunity in answer to the plaintiffs' claim for damages for their conversion. And I am glad to be able to record that, if and so far as it may be necessary or relevant for the plaintiffs to rely for any purpose on the sale by the bank, no point will be taken by the bank on the ground that such sale occurred after the date of the writ. But further, the circumstances relating to the sale of the thirteen bars make it, to my mind, no less impossible for the bank on the present application to assert that any of the sixty-four bars were at any relevant date in the possession or under the control of the three governments. For the purposes of the present application it must, in my judgment, be taken as established that (a) in the absence of special terms in the contract of bailment, gold bars deposited by a customer with the Bank of England were never, after ascertainment of their fine gold content, segregated or treated by either party to the contract as segregated from other gold deposited by the bank's customers or otherwise allocated to the particular contract, (b) of the several essential steps proposed to be taken in the present case so as to create an exception to the general rule, one was never, in fact, taken, and, consequently, (c) at no relevant date were any of the gold bars in suit, within any sensible use of the words, in the possession or under the control of the three governments. In the result, the whole basis of the learned judge's decision having been destroyed, the appeal must, in my judgment, succeed. The plaintiffs' action must be allowed to proceed. The bank will, of course, be entitled to set up such defences as it desires. In the circumstances, it is strictly unnecessary to consider further any of the difficult questions that have been argued. Since, however, the matter is one of obvious public importance on which the learned judge expressed certain conclusions, and out of respect to the careful arguments addressed to us, I think it right to express my own view on the substantial points that have been debated.

For this purpose I assume that the sixty-four gold bars have remained specifically allocated to the contract between the bank and the Tripartite Commission and segregated from other customers' gold accordingly. On this assumption, can the bars fairly be said to be in the "possession or control" of the three governments, within the meaning of that phrase as used by LORD ATKIN in his speech ([1938] 1 All E.R. 721) in the *Cristina* case (1)? Since both parties to the appeal have accepted, without qualification, the validity of LORD ATKIN's propositions, and have further been content (as I understand them) to treat those propositions as exhaustive, as SIR WILFRID GREENE, M.R., stated them to be ([1938] 3 All E.R. 388) in *Haile Selassie v. Cable and Wireless, Ltd.* (2), it is necessary, as a premise to what follows, to cite the relevant passage from LORD ATKIN's speech. It is as follows ([1938] 1 All E.R. 720):

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“The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted on to our domestic law which seem to me to be well-established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle, as to whether it extends to property used only for the commercial purposes of the sovereign or to personal private property. In this country, it is, in my opinion, well-settled that it applies to both.”

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Counsel for the bank has conceded that for the purpose of the appeal—and I repeat that the present application on the bank's behalf is one for the stay of the proceedings *in limine*—the three governments must be treated as having no title of any kind to the sixty-four bars. In the course of the argument examples were taken, for the purpose of testing its validity, of articles such as a picture or (the example given by MELLISH, L.J., in *Ancona v. Rogers* (3)) a gentleman's silver or gold plate which, having been “looted” by the Germans, was re-captured and then deposited by the conquering forces (themselves claiming no title thereto) with a bank or other depositary on terms comparable to those I am assuming in the present case. Such examples, I am aware, may raise the further question of the extent to which the rule of immunity applies to chattels in the possession of a sovereign Power but not used by it for public purposes. Notwithstanding that question, the examples are useful. Under modern conditions it may be natural to suppose that gold bars must be rightly held by governments rather than by individuals. The examples, therefore, bring into bolder relief the implications and consequences of the bank's claim if, notwithstanding the absence of any title, it is held to be well founded. Though the question is one of difficulty and complexity, and though we have been greatly assisted by the arguments and researches of the learned counsel, no parallel case has been found, no case in which the claim of immunity has been raised by a party in a position comparable to that of the Bank of England in this appeal. So to say is to cast no reflection on the propriety of the bank's contentions. The bank has, admittedly, in raising the plea of immunity, acted on the direction of the three governments, and the Solicitor-General has appeared in this court and in the court below on behalf of His Majesty's Government, or on behalf of all three governments, as *amicus curiae*. But it is the case of the plaintiffs that the three governments are neither necessary nor proper parties to this action. The circumstance, to my mind, illustrates the point that there is a real distinction, as regards this matter of immunity, between actions *in rem* and actions *in personam*. At any rate, there is here presented for the first time the spectacle of a claim by an owner of property which is not only resisted, but is said to be incapable of litigation in our courts, by an English defendant who, being in actual custody of the goods claimed, sets up, not the title of his bailor, but some other rights, said to be “possessory,” although the defendant is in no sense the mere servant or agent (in the common meaning of the word) of that third party.

In his speech in the *Cristina* case (1), LORD MAUGHAM expressed his own caution in regard to the so-called doctrine of immunity. Thus he said ([1938] 1 All E.R. 737):

“... but it seems to me that the claim by the Spanish government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country



without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions *in rem* against vessels belonging to a foreign government and employed in the ordinary operations of commerce. For my part, I think that such a claim ought to be scrutinised with the greatest care. In these days, and in the present state of the world, diplomatic representations made to a good many States afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign government."

Again, later in his speech, he said (*ibid.*, 738):

"... but there is no authority for the view that, if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within DICEY'S rule [DICEY ON CONFLICT OF LAWS, c. 4, r. 52], he would, in my opinion, be bound to prove his title."

I venture respectfully to share LORD MAUGHAM'S misgivings, and all the more since the admission of counsel for the bank that his plea in the present case involved the result (which, in my judgment, LORD MAUGHAM and also LORD WRIGHT would have repudiated) that, if a foreign sovereign "wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner," not, it is true, by stating merely that he claimed it, but by the allegation (which could be sufficiently made on his behalf by the third person) that, as an ordinary bailor, he retained "possession or control" of the jewellery within the meaning of LORD ATKIN'S formula. As LORD MAUGHAM himself observed, by reference to the well-known judgment of BRETT, L.J. (5 P.D. 207) in *The Parlement Belge* (4), the doctrine of immunity rests on the regal dignity of the sovereign, "his absolute independence of every superior authority." It was also observed (*passim*) in the opinions of the House in the *Cristina* case (1) that, though the doctrine of immunity must be regarded as part of our municipal law, it has become such on the footing that it has been reciprocally applied by other civilised nations. Thus it is legitimate to approach the solution of the present case by asking: (i) whether the regal dignity of foreign sovereigns is challenged by the plaintiffs' writ, and (ii) whether there is any evidence that a similar immunity to that asserted by the bank would be extended by the courts of France and the United States of America to the British government. I am inclined to think that a negative answer to both questions should be given.

However that may be, it is clear that in this court the question has to be determined as a matter of authority by reference to LORD ATKIN'S propositions. The vital question then is: According to the proper acceptance of the language used by LORD ATKIN, can these bars—and the same question can be asked of the picture or the plate in the hypothetical cases I have been given—be fairly regarded as being in either (a) the possession or (b) under the control of the three sovereign States? JENKINS, J., answered both questions in the affirmative. It is with great hesitation that I express a view differing from that entertained by JENKINS, J., and my difficulties have been enhanced by the realisation that both my brethren in this court would, on the assumed facts, have reached the same conclusion as the learned judge below, but I have been unable to persuade myself that on any significance of the word "possession" known to our law—and, indeed, any significance which I have been able to express or define—the three governments had or have, in the admitted absence of any title whatever, "possession" of the sixty-four bars claimed by the plaintiffs. And though I think, on the assumed facts, that the case for attributing "control" to the three governments is less difficult, I am inclined to a similar conclusion on this alternative also.

Before giving my reasons for the conclusion to which I have felt compelled, I would like to deal (if, as I hope, I can) with one point which was pressed on us, and which has commended itself to my brethren. It is said that, immediately prior to the deposit of the bars in question, they were indubitably in the "possession," *i.e.*, the actual or *de facto* possession, of the three governments or one of them, for they were in the hands either of the American military forces or of the Tripartite Commission, and these persons were the mere servants or agents of the United States government or of the three governments. So far, I agree. Any claim, therefore, by the plaintiffs to the bars against the United States army authorities or the commission must have been liable to be stayed as impleading directly or indirectly the sovereigns concerned. Again, I agree. It is then said that, assuming immunity at that stage, to suppose the immunity to be lost as a result of doing the very thing which (having regard to the character of the property in question) it would be the normal and natural thing to do, *viz.*, deposit it with a bank, is, on the face of it, contrary to common sense and is to introduce unnatural and unnecessary refinements into our law. In my judgment, this reasoning either involves a confusion of title or proprietorship with possession, or loses sight of the basis on which rests the doctrine itself. If, immediately before the deposit, the United States army or the commission held the bars "in right of conquest," then I agree that that right should not reasonably be treated as lost by the mere act of deposit, but the argument, in my view, forgets that the phrase "right of conquest" involves some significance of title or ownership. On this application it is conceded that the three governments assert no title at all. They are in the position of mere finders of another's property.

Secondly, the non-availability of process against the United States army forces or the commission (as the case may be) would surely rest on the circumstance that by such process the sovereigns would themselves be directly or indirectly impleaded. Nor am I persuaded on other grounds that the result would be to draw fine distinctions. In the case of any doctrine which has definable limits, the case must sooner or later be found which is near the boundary line. It will be none the worse for that, so long as the question on which side of the line it falls can be answered by reference to logic or principle. If I, a foreign sovereign, find the valuable (and identifiable) property of an English citizen, I may, so long as it remains physically in the hands of myself or one of my servants, successfully challenge the owner's right to sue, on the ground that my regal dignity is offended. But if I choose to part with the possession of the property to some third party who is neither my servant nor (in the sense of the term) my agent, it does not seem to be unreasonable to say that I have thereby lost my immunity. It is conceded in the present case that the bank is not the "servant" of the three governments, or of any of them. At the time of the deposit of the bars, and assuming, as for present purposes I do, that the bars are still specifically allocated to the original contract of deposit, the position of the bank is admittedly that of a bailee. It is unnecessary now to consider any special rights which the bank might have by way of lien in respect of its unpaid charges or otherwise, for counsel for the plaintiffs has not, in this court, based argument on them. Nor, though he has kept the point open, has he addressed any argument in this court on the point that the bars are expressed to be held for His Majesty's Treasury, albeit on account of the three sovereign States. The bailment with the bank was a bailment for reward, and must for present purposes be regarded as a revocable bailment. Physically, beyond doubt, the bars are, as a consequence, in the possession (and also under the control) of the bank. It is, however, said—and this is the turning point in the case—that the bars, nevertheless, remain either in the possession or under the control of the bailors in some sense, and (more particularly) in the sense used by LORD ATKIN.

As regards "possession," the learned judge in the court below based himself

on the decision of this court in *Ancona v. Rogers* (3), and counsel for the plaintiffs was, in my judgment, right in saying that this part of the judge's judgment was its "linch-pin." We have been referred to many passages in POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW, HALSBURY'S LAWS OF ENGLAND, and other text-books, and there is no doubt that in certain conditions a bailor will be regarded as having "possession" of the goods bailed by him, *i.e.*, for the purposes of maintaining an action for trespass. But, in my opinion, the conditions are that the bailor either owns the goods, or has some right or title thereto which he can (and must) allege against the third party. This follows, in my judgment, from the history of the bailor's right to sue in trespass, which is discussed in HOLDSWORTH'S HISTORY OF ENGLISH LAW, vol. III, p. 348, and vol. VII, pp. 422, 430, and I think that it is also inherent in the notes in BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS, 3rd ed., p. 414. "Possession" in such a case means a right to possession which, as is stated in POLLOCK AND WRIGHT ON POSSESSION, p. 145, is "one of the constituent elements of the complete right of property . . ." In *Ancona v. Rogers* (3) there was no doubt that the bailor was the proprietor of the furniture in suit, and the language of MELLISH, L.J., cited by JENKINS, J. ([1949] 1 All E.R. 959) must, in my judgment, be read in the light of that fact. The vital passage in the judgment now appealed against is as follows (*ibid.*, 960):

"Setting aside, as without relevance here, cases of palpably unlawful possession, as of stolen goods deposited by the thief with a receiver, I fail to see how the question whether goods remain in point of law in the possession of a bailor after he has delivered them to a bailee for safe custody can be made to depend on whether the title under which the bailor was in possession of them at the time of such delivery is, or is not, claimed by some third party to be invalid."

It is at this point in his judgment that, with all respect, I part company with the judge. In my judgment, there is neither logic nor authority for the view that a bailor who can, and does, assert no title of any kind to the goods bailed (*e.g.*, a thief or mere finder) may bring an action for trespass against a third party who either has acquired physical possession of the goods, or threatens so to do, or who claims the goods as his own.

In the result, therefore, it seems to me that the three governments cannot claim to have either physical possession of the bars (for that is plainly in the bank), or legal possession of them in any definable sense. Then what sort of possession is it that they are said to have? It is claimed that LORD ATKIN did not use the word "possession" in any strict sense, or by reference to the significance given to the word by English law. In what sense, then, did he use it? I think, for my part, that he meant "*de facto* possession." In the *Cristina* case (1) the Spanish republican government were held by all their Lordships to have *de facto* possession of the ship, because the master and crew, who were, in fact, in actual control and charge of the ship (as a driver and his mate would be in actual control or charge of a steam or motor vehicle on land) asserted that they so "held" the ship as servants or agents on behalf of the Spanish government. In the case of a ship, such *de facto* possession *via* the master and crew is plainly intelligible—by no other means can there be *de facto* possession at all. But, in my judgment, there is no analogy between such a case and a contract of bailment of chattels with a bank. Each of its own kind is a well understood relationship. The doctrine of immunity is, after all, a legal doctrine, and must be capable of being understood and expressed by lawyers. The "possession" of the *Cristina* by the Spanish republican government was a result understood by and having a meaning to lawyers from the facts of that case. If I am right in my view that, *vis-a-vis* the plaintiffs, the three governments were not in any sense in legal possession of the sixty-four bars, and had no right in law to such possession, then I cannot see that, in any proper sense of the word, they can be



said to have been "in possession" of them at all. Nor, in my judgment, is the bank's claim assisted by reference to *The Arantzazu Mendi* (5), for in that case not only did the master and crew assert that they were in possession of the ship on behalf of the Spanish nationalist government, but the owners of the ship assented to that view.

A It was argued by counsel for the bank that, as between the bank and the three governments, the bank was bound to admit the rights of the latter—not only, indeed, their right to call for possession of the bars, but also their title. But, assuming that this is so, the circumstance seems to me to be irrelevant in an action *in personam* by the plaintiffs against the bank. If the plaintiffs (claiming no title to them) had by some means acquired actual possession of the bars, and were sued in trespass by the bank, the terms and consequences B of the contract between the bank and the three governments would be wholly irrelevant to the plaintiffs' defence, and to any damages they might have to pay: see, *e.g.*, *The Winkfield* (6). Equally, in my view, where the plaintiffs sue the bank for delivery of the bars, the terms and consequences of the bank's contract with the three governments are irrelevant. In the absence of some title, the plaintiffs would fail. Proving a title, the plaintiffs (if they can litigate) C ought to succeed, unless the bank can prove a better *title* in itself or can set up a better *title* in those who deposited the bars with the bank.

It is in this respect that, as I think, the difference to which I have already alluded between an action *in rem* and an action *in personam* is important. In the former case, if a plaintiff establishes a right or title to the chattels in suit, the right or title is good against (and *pro tanto* defeats) the claims of all other D persons interested, whether parties joining in the proceedings or not. In the present case (if it was an action *in rem*) the establishment of the plaintiffs' title would be good against the three governments and defeat any claim they might have to the chattels both against the plaintiffs and against the bank. The present proceedings are, however, proceedings *in personam* only. If the plaintiffs succeed against the bank, the three governments might still be entitled E to recover the bars from the plaintiffs, if they could show a higher title, and might also have claims against the bank, the validity of which it is unnecessary now to consider. It is true that the three governments may, as a consequence, be compelled to resort to the courts to assert their rights and recover any property or money to which they may be entitled. But it is no part of the law of immunity, as applied in this country, that the courts will restrain all proceedings merely F on the ground that the result might be to compel a sovereign claimant to sue for his rights: see *per* LORD MAUGHAM ([1938] 1 All E.R. 738) in the *Cristina* case (1). A third party in the position of the bank in the present case, being advised in regard to deposited chattels that the title of the claiming owner was a good one, and obtaining his authority to rely on such title, might properly and legitimately elect to deny all rights of the depositor, and such third party G could not, I conceive, be prevented from so doing by the circumstance that the depositor was a foreign sovereign who was thereby compelled to litigate his claim. Even in the case of actions *in rem*, no instance has been found in which, the ship being in the actual possession of a third party (*e.g.*, a ship repairer), a claim by the owners has been stayed on the application of the third party and in the absence of the foreign sovereign, because the third party asserted H some right, proprietary, possessory, or other, in the sovereign. In *The Amazone* (7), the vessel was, in fact, in the physical custody of such a third party, Thornycrofts. The claim to immunity was set up by the defendant, the plaintiff's husband, who was a foreign diplomat, and claimed immunity as such. The ship was registered in his name, and it was asserted by him, and conceded by the plaintiff, that the possession of the vessel was, in law, his.

We were referred to *Long v. The Tampico* (8), an American case. That was a claim for salvage in respect of work done to the ship while in charge of a

captain to whom it had been delivered by one Obregon for navigation to Vera Cruz, there to be handed over to the Mexican government for public use. It was held by the District Court (New York) that (on the assumption that Obregon was the Mexican government's agent in handing over the ship to the captain) the captain, not being the servant of the Mexican State but a bailee, and the ship being in his possession as such, no doctrine of immunity applied to stay the proceedings. It is true, as JENKINS, J., observed, that the case is of no binding authority in our courts. But it appears to be still treated as good law in America: see *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar* (9). It seems, at least, to show that the claim to immunity made on behalf of the government of the United States in the present case cannot rest (as it should) on any reciprocity in the American courts. There is no evidence before the court of the view and practice of the French courts as regards the rule of immunity.

I have, therefore, been unable to satisfy myself that the bars in suit can be said to be in the "possession" of the three governments, as that word is used by LORD ATKIN in the *Cristina* case (1) or in any sense of that word that I am able to express or define. There remains the question: Were the bars in "the control" (within LORD ATKIN's formula) of the three governments? On this matter it is, I think, much more difficult to express a conclusion on an artificial and assumed basis of fact, for the answer to the question in any given case depends essentially on its exact and particular facts. But, assuming always that the bars remain segregated to the commission's contract and that by such contract the commission can at any time require the bank to deliver the same bars to such persons as it may direct, still, as a matter of principle and of ordinary English, I am disposed to think that the bars were not in the three governments' control. The learned judge below devoted the main part of his judgment to the matter of "possession" and he dealt briefly with "control." He was, however, of opinion that, since the three governments, or the Tripartite commission on their behalf, could at any time direct the bank to deliver the bars to them, it, therefore, followed that the bars were in their "control." But it seems to me that, until such a direction is given and has been complied with, the "control" of the bars was and is with the bank, for it rests entirely with the bank where the bars should from time to time be placed and who should be in charge of them on the bank's behalf. On such matters the commission have no knowledge and no concern. They are plainly not entitled to give to the bank any orders or in any way to dictate to the bank how the latter shall discharge its duties as bailee. To take a different view is, to my mind, to confuse "control" with "right to call for delivery"—which, on my understanding of the word, it certainly is not. I refer to the definition of "Delivery by way of bailment" in POLLOCK AND WRIGHT ON POSSESSION, p. 131:

"A delivery of a thing by a possessor (otherwise than in case of alienation) with intent to transfer separate undivided and exclusive control for the time being upon a condition or trust . . . is a bailment . . ."

In the *Cristina* case (1), LORD WRIGHT spoke ([1938] 1 All E.R. 732) of the rights on which the sovereign might rely to support the claim to immunity as comprehending rights "lesser" than proprietary or possessory. If his words could be said to mean and include merely contractual rights, as, *e.g.*, the right between a bailor and bailee to call for the return of goods deposited, it seems to me that they went far beyond the requirements of the decision in the *Cristina* case (1) and find no support in the opinions of the other noble Lords. But, in my view, the words were used in reference to the facts of that particular case and to the somewhat special "rights" which flow from such an act of State as the "requisitioning" of ships. It appears, I think, from LORD WRIGHT's later language (*ibid.*) that what he had in mind was the consequence of such a

requisitioning, which gives to the sovereign State the practical right to day-to-day direction of the movements and functions of the ship, whatever might be in law its (strictly) proprietary or possessory interests. I think that the same construction must be given to LORD ATKIN's formula, "possession or control" (*ibid.*, 721). And I further venture to think that, whatever were the "rights" of the commission *vis-a-vis* the bank, they are in no way comparable.

A I have expressed my opinion on the assumption that the bars were and are segregated to the commission's contract because of the importance of the questions raised and because of the possibility of their arising again, in one form or another, under modern conditions. Sharing LORD MAUGHAM's misgivings, I think that the extent of the rule of immunity should be jealously watched. But, as I have stated at the beginning of this judgment, on the facts  
B as they have emerged, I am satisfied that the bank has failed to make good a case for a stay of the plaintiffs' action. I think, therefore, that the appeal should be allowed and the bank's motion for a stay ought to be refused. I further think it to follow that the plaintiffs, on their motion, are entitled to an injunction, until judgment in the action or further order, as regards the fifty-one bars remaining unsold. In conclusion: (i) Had the plaintiffs failed to show  
C that they were entitled to pursue a claim for the return of any bars and, consequently, for an injunction in respect of them, then I agree with JENKINS, J., and SOMERVELL, L.J., and for their reasons, that they would also be disentitled to proceed with a claim for damages for detainee or conversion of the same bars. (ii) As regards the so-called "trust cases," I also entirely agree with the view taken in regard to them, as regards the present case, by the learned judge,  
D to which I only add that I feel some doubt whether *Gladstone v. Musurus Bey* (10) would to-day be decided in the same way as it was decided by PAGE Wood, V.-C., in 1862.

SOMERVELL, L.J. : The facts as admitted or proved before the learned judge are fully set out in his judgment, and it is unnecessary to recapitulate them in detail. In view of the line taken by the foreign governments that they  
E do not rely in these proceedings on any title proprietary or possessory, but only on their *de facto* possession and the terms of the deposit of the bars with the defendant bank, many of the documents, though matters of history, do not affect this decision. We are, for example, not concerned with the question whether these bars were, or were not, "monetary" or "non-monetary gold" within the Paris Agreement on Reparation, dated Jan. 14, 1946, nor with the  
F question whether the three governments [*viz.*, the governments of the United Kingdom, the United States of America and France] got rights proprietary or possessory by reason of the circumstances in which they obtained *de facto* possession. Counsel for the plaintiffs admits, as is clearly the fact, that the three governments had *de facto* possession of the bars prior to their deposit with the bank. The case before the learned judge proceeded on the basis that,  
G as stated in the affidavit of Mr. Rootham, an assistant chief cashier of the Bank of England, the sixty-four bars of gold referred to in the writ had been deposited with the bank for safe custody and were returnable in specie by the bank to the three governments on demand. The question was whether on this basis the foreign governments were within the principles of English law with regard to State immunity and could, through the bank, successfully apply to have the  
H proceedings stayed. Although I think that the appeal must be allowed on the further evidence before us, I will state briefly my reasons for agreeing with the learned judge's conclusions on the facts before him. The applicable principles of law are set out in *Compania Naviera Vascongado v. Cristina S.S.* (1). I need not read again the two propositions as stated by LORD ATKIN. The remainder of LORD ATKIN's speech and the other opinions make certain further points clear. It is plain that *de facto* possession is sufficient. LORD ATKIN said expressly ([1938] 1 All E.R. 722) that it was unnecessary to decide whether the ship was



rightly in the possession of the government. Three of their Lordships were of opinion that the writ *in rem* directly impleaded the Spanish government: see per LORD ATKIN ([1938] 1 All E.R. 721), per LORD THANKERTON (*ibid.*, 723), and per LORD WRIGHT (*ibid.*, 730). All their Lordships also decided that the arrest infringed the second principle, the ship being, it was held, in the actual possession of the foreign government. LORD ATKIN clearly regarded control as something beyond actual possession. He said (*ibid.*, 722):

"It is well established that the court will not arrest a ship which is under the control of a sovereign by reason of requisition: *The Broadmayne* (11), *The Messicano* (12), *The Crimdon* (13). The present case, however, is not one of control for public purposes, but of actual possession for public purposes."

LORD WRIGHT said (*ibid.*, 732) that the rule

"applies to cases where what the government has is a lesser interest, which may be not merely not proprietary but also not even possessory. Thus, it has been applied to vessels requisitioned by a government, where, in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign State, is subject to its direction, and employed under its orders."

I will consider first the claim for delivery up of the gold bars and the injunction. The first and main point is, as I see it, a very short one. Did these gold bars cease to be under the control of the three governments when deposited with the defendant bank? I am assuming, as I have said, that the bars were held by the defendant bank for the three governments so that through the agreed machinery of the Tripartite Commission the bank would on demand deliver the bars in accordance with any instructions it might so receive. I would have said that the three governments retained control. Some meaning must be given to the word "control." Some person other than the foreign government has *ex hypothesi* possession and that measure of control which goes with possession. Control would, therefore, as it seems to me, cover the right to tell the possessor what is to be done with the property. I can also see no logic in holding that the immunity is lost by a temporary bailment of property for, as here, safe custody, or possibly for some other temporary purpose. Suppose that the Cristina, having been in the *de facto* possession of the Spanish government, had been at the date of the arrest temporarily bailed to a ship repairer for minor repairs, it being clear that she was being repaired under the instructions of the Spanish government to enable them to use her for the public purposes for which they had taken possession. I think it would be wrong to say that in those circumstances the control required by the principle had been lost.

A good deal of the argument turned on whether "possession" was to be given its meaning in English law. This point does not, I think, arise, and I express no opinion on it. Perhaps, however, I ought to add this. The House of Lords were clearly not considering the problem which confronts us. If I am wrong in holding that "control," as used in the opinions in that case, covers the present case, I would still have been inclined to dismiss the appeal. I agree with the submission of counsel for the plaintiffs that the principle of immunity ought not to be extended in the absence of evidence that the extension has been generally accepted by civilised nations as a rule of international conduct. If I regarded the dismissal of the appeal as an extension of the rule, I would agree entirely. One is, however, in my opinion, not necessarily extending a rule in this sense if its application to circumstances, which were clearly not present to the minds of those whose formulation of the rule one is considering, involves the addition of a gloss. If, contrary to the view I have formed, such a gloss is necessary, I should regard it, not as an extension of the rule, but as its logical application to circumstances not then before the House.

We were referred to *Long v. The Tampico* (8) as showing that under this rule of international law, as applied in the United States, the immunity is lost if the property in question is in the hands of a bailee. In order to understand *Long v. The Tampico* (8), it is necessary to consider an earlier decision, *The Davis* (14), which concerned a lien for salvage of property of the United States government. MILLER, J., delivering the opinion of the Supreme Court of the United States, said (10 Wallace, 19):

A "... such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring a suit against the United States, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorising it to be done."

B He also said (*ibid.*):

"... no suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court."

C At the time of the salvage service, the goods in question were being carried in a ship and were arrested on arrival before they had been handed over to an agent of the government. The court held that the possession of the master of the ship was not the possession of the United States. The court negatived the view that no suit *in rem* could be instituted against property of the United States under any circumstances. As the marshal served his writ and obtained possession without interfering with that of any officer or agent of the government, the lien was held D to be enforceable against the property. In the *Tampico* case (8), the rule in regard to State immunity was based on a principle which, so far as I know, has never been its basis here and, if applied to-day, having regard to the Crown Proceedings Act, 1947, would abolish the rule altogether. It was stated by BROWN, J., in these words (16 Federal Reporter 495):

E "By international comity, and that tacit agreement which constitutes the law of nations, every government accords to every other friendly Power the same respect to its dignity and sovereignty, and the same consequent immunity from suit, both as respects the person of the sovereign as well as the national property devoted to the public service, which it enjoys itself within its own dominions."

F The case concerned claims for salvage services said to have been rendered on Aug. 8, 1880, to two vessels which had just been built and were admittedly designed for the Mexican government. Objection was taken on behalf of that government that the vessels were exempt from the jurisdiction of the court. The court was of opinion that on the evidence the vessels at the time of the salvage service neither formed part of the public service of Mexico nor were G as yet the property or in the possession of that government. This turned on the view that the possession of a Mr. Obregon, to whom the vessels had been delivered on Aug. 6 or 7, could not be treated as the possession of the Mexican government. The court, however, proceeded to consider the position if this was wrong, and the Mexican government had got possession on Aug. 6 or 7. Before the services were rendered on Aug. 8, the two vessels had been delivered by Obregon to H two captains respectively, as bailees, and they were to be delivered by the captains to the Mexican government at Vera Cruz. The court regarded the case, on this view of the law and the facts, as covered by *The Davis* (14), and held that the arrest, having been made without invading the possession of the Mexican government, must stand. In *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar* (9), which, like *The Davis* (14), was a decision of the Supreme Court of the United States, *Long v. The Tampico* (8) is cited with approval.

Although the rule in regard to immunity as applied in any one State is based on a similar rule being applied in other States, it would be impossible to expect absolute uniformity. If the United States had been the only government objecting to the present proceedings, I can imagine a formidable argument being addressed to us on the lines that a State was not in a position to claim an immunity which it did not itself grant, and that *Long v. The Tampico* (8) showed that the present proceedings would be regarded as falling outside the rule. We are, however, concerned with the objection of the French government. If I am right in my application of the rule as formulated by the House of Lords in the *Cristina* case (1), I think that it would be wrong to modify that rule as against the French government, even if I were satisfied that under the rule as applied in the United States the present proceedings would not be stayed. Although the point was not taken in these proceedings, there is something to be said for the view that, where a foreign government seeks to stay proceedings, the court should be satisfied by evidence that the law of that country grants immunity on the basis that is being sought here.

Before going on to consider the effect of the further information supplied by the bank, I will state my opinion on an alternative submission made by counsel for the plaintiffs. He offered to abandon his claim for delivery up of the bars and for the injunction, claiming only damages for conversion. On the basis that the bars were being held as bars for the foreign governments and the conversion relied on was the refusal to deliver them up, this argument did not commend itself to me. To say in effect: "We will not order your agent or bailee to deliver up your property, but will make him pay damages for not doing that which we are disclaiming any right to make him do," would appear to me to be an impossible proposal.

I agree with the learned judge that the cases dealing with the administration of trust property in which a foreign government may be included among the persons interested have no application to the facts of the present case. I agree also with the learned judge that the suggestion that the principle of immunity is limited to cases where either a foreign sovereign is impleaded or relief *in rem* is sought is inconsistent with authority and with the language used in the *Cristina* case (1) and in *Haile Selassie v. Cable and Wireless, Ltd.* (2). I thought at one time that the present procedure by which the objection was taken by the defendant, and not by an application made by the foreign government, was unsatisfactory. Provided, however, that there is, as here, clearly evidence from the foreign governments that the rights of immunity are claimed, and counsel for the defendant is instructed to argue the point, I think that there is no substance in the objection which I was inclined at one time to feel. It may be said that the above issues no longer arise, having regard to the conclusion to which I have come on the new evidence before us. I have, however, thought it right to express my opinion, because I am, at any rate, doubtful whether I should have come to the same conclusion as the learned judge on "possession."

I will now pass to the further developments that took place before us. Counsel for the plaintiffs put in some further correspondence as indicating that the bank did not hold specific bars as deposited for the governments, but credited them with so many fine ounces of gold, undertaking to deliver, not any specific bars, but so many ounces of gold. There was then filed an affidavit by Mr. L.J. Menzies, an acting deputy chief cashier of the bank. This affidavit set out the practice of the bank since 1940. From that date individual bars of gold had not been set aside and kept for individual customers. The various bars deposited in most cases, if not all, by other central banks, were kept separate from the bank's gold. Bars were examined on deposit, their gold content ascertained, and in certain cases, where necessary, they were made up to a standard. The customer was credited with the gold content, and thereafter the bars ceased to be held separately for that particular customer. There were further statements in the affidavit, and correspondence was put in to show that these sixty-four



bars in question had been set aside, and were held specifically for the three governments. At this stage of the proceedings this seemed an answer to the point raised by counsel for the plaintiffs on the further correspondence. If the bars had passed into what I will call the customers' pool of gold, the case would, in my opinion, have fallen outside the principles as laid down in the *Cristina* case (1). I do not see how it could be said that the three governments had in that case any control of the sixty-four bars. They had, what would in ordinary circumstances be just as valuable, a right to the delivery of an equivalent amount of gold.

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At the conclusion of the argument we were informed by counsel for the bank that further investigations had shown that one or more bars had, in fact, been inadvertently parted with, and the hearing was adjourned to enable the full facts to be placed before the court. A further affidavit was sworn by Mr. Menzies, and the following summarises the relevant facts. As I have stated, the ordinary practice of the bank was not to hold specific bars for individual customers. The bank, by letter dated Oct. 25, 1948, to the Tripartite Commission, stated that these bars had been temporarily segregated pending the receipt of instructions as to their disposal. There is no doubt that this had physically been done. There was a separate stack of these bars and a warning notice was placed on them. Particulars as to gold bars deposited are placed on cards, which constitute the records of the Bullion Office. I read Mr. Menzies' affidavit as meaning that, if segregation of particular bars to be held for a particular customer is to be effective, a warning note must be made on the cards which relate to the bars in question. This was not done, with the result that between Dec. 30, 1948, and Jan. 26, 1949, thirteen of these sixty-four bars were sold, have been utilised in manufacture, and no longer remain in their original state. The conclusion seems to me to be clear. The authorities of the bank responsible for the correspondence with the Tripartite Commission intended that these bars should be kept apart from the pool and held as individual bars for the three governments. Some steps were taken to this end, but, as the facts show, and as is admitted, one necessary step was not taken. The sixty-four bars for all relevant purposes at all material dates were in the pool. Thirteen of them were disposed of and the whole sixty-four might have been disposed of without instructions from or reference to the Tripartite Commission. In these circumstances it seems to me impossible to hold that the sixty-four bars were in the possession or under the control of the three governments. In any case of bailment where goods, say furniture, are being held for a particular customer, there is, of course, always the possibility of a mistake. A chair may inadvertently be delivered to the wrong person. That is a wholly different case. Here, admittedly under the ordinary practice of the bank, the bars passed in to the pool out of the possession and control of the bailor. The bank intended that they should be kept apart from the pool but failed to take the necessary steps to achieve this result. In my opinion, therefore, the whole basis of the argument for staying the proceedings goes in respect of all the sixty-four bars. If I am wrong about this, then it was, I think, conceded that the action must proceed in respect of the thirteen bars. An answer based on the fact that the bars were sold after the issue of the writ would not be an argument available, as I think, on the present issue, *viz.*, whether these proceedings should be stayed. The defendant bank, as one would expect, did not require the issue of a fresh writ to get over the possible argument based on this point. I agree that this appeal should be allowed on the terms stated by the Master of the Rolls.

COHEN, L.J.: The relevant facts, as disclosed by the evidence originally before us, can be stated shortly as follows. Prior to the outbreak of war, the plaintiffs were admittedly the owners of sixty-four identifiable gold bars which were deposited in a private vault at Limoges, the key of which was retained by the plaintiffs. When the Germans were driven out of France in 1944, they seized

these bars and took them to Germany, where in due course they were found by the American troops in 1945. On Jan. 14, 1946, an agreement was made in Paris between a number of the allied governments, which dealt with various matters in relation to German reparation. Part III of the agreement contained provisions in regard to "Restitution of Monetary Gold," paras. A, E and F being in the following terms:

"A. All the monetary gold found in Germany by the allied forces and that referred to in para. G below (including gold coins, except those of numismatic or historical value, which shall be restored directly if identifiable) shall be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany. E. The various countries participating in the pool shall supply to the governments of the United States of America, France and the United Kingdom, as the occupying Powers concerned, detailed and verifiable *data* regarding the gold losses suffered through looting by, or removal to, Germany. F. The governments of the United States of America, France and the United Kingdom shall take appropriate steps within the zones of Germany occupied by them respectively to implement distribution in accordance with the foregoing provisions."

In September, 1946, a Tripartite Commission was set up by the governments of the United Kingdom, United States of America and France to implement Part III of the Paris agreement. A notice of its constitution was published in the LONDON GAZETTE of Sept. 27, 1946, its functions including those of assisting in the distribution of the available monetary gold and performing such administrative acts as might be necessary, including the opening and maintaining of banking accounts. In July, 1948, a quantity of gold, including the sixty-four gold bars in dispute in this action, were sent to the Bank of England to be placed to the credit of a gold set-aside account in the name of His Majesty's Treasury on account of the governments of the United Kingdom, the United States of America and France. This account had been opened pursuant to a letter from the Treasury, dated Mar. 9, 1948, and was described in that letter as an account to be operated by the representatives of the three governments on the Tripartite Commission:

"for the deposit and eventual distribution of a portion of the gold looted by Germany from the occupied States of Europe and recovered by the allied occupation forces."

The nature of a "gold set-aside account" is explained in paras. 2, 3 and 4 of an affidavit of Mr. Menzies of the defendant bank, which have already been read or summarised by the Master of the Rolls.

By the time the sixty-four gold bars were despatched to England, the fact that the plaintiffs had, or might have, an interest in them was known, and on July 16, 1948, the Tripartite Commission wrote a letter to the governor of the Bank of England which contained the following paragraphs in relation to the gold bars:

"2. The commission has received a request from the representative of France on the commission that certain gold bars which are included in the second consignment from Frankfurt, now on its way to the Bank of England, should be set aside pending receipt by the commission of a communication from the French government . . . 6. The commission would be grateful, providing such action does not present insuperable technical or administrative difficulties, if you could see your way to having these bars set aside intact on arrival, if they can be identified, pending receipt of a further communication from the commission on the subject."

To this letter the bank replied on July 19 and in the course of its reply said:

A “The proposal which you make is acceptable to the Bank of England provided that at the time we receive the authority of the commission to hold the gold at the disposal of the Bank of France we also receive instructions from them to ship the gold from London. As you are aware, it is now contrary to the Bank of England’s practice to set aside specific bars in the name of the customer, but if the French act as indicated above it will not be necessary for the bank to do more than hold the gold at the disposal of the Bank of France.”

The conditions thus specified do not appear to have been fulfilled. The bank duly ascertained the gold content of the bars, and on Oct. 25, 1948, wrote to the Tripartite Commission a letter (not before the learned judge in the court below), which contained the paragraph which the Master of the Rolls has already read.

B On Sept. 14, 1948, the plaintiffs’ solicitors wrote to the bank giving formal notice of their interest in the bars and asking for an assurance within fourteen days that the bank would not dispose of the gold without the consent of the plaintiffs, or without an order of a competent court. This assurance not being forthcoming, the plaintiffs on Oct. 18, 1948, issued the writ in this action, claiming:

C “1. Delivery to the plaintiffs of sixty-four bars of gold, and for damages for their detention. 2. Alternatively damages for conversion of the said bars of gold. 3. An injunction to restrain the defendants their servants and agents from selling, charging, dealing with or parting with possession of the said bars of gold or any of them otherwise than as directed by the plaintiffs.”

D On Oct. 22, 1948, the plaintiffs moved for an injunction restraining the bank from dealing with the gold bars until judgment or on further order. On Nov. 5, 1948, the bank applied for an order setting aside the writ and staying all further proceedings on the grounds:

E “1. That the sixty-four bars of gold in the writ mentioned are in the possession or under the control of the governments of the United States of America, the Republic of France and the United Kingdom of Great Britain and Northern Ireland. 2. And that this action impleads two foreign sovereign States, namely, the governments of the United States of America and the Republic of France who decline to submit to the jurisdiction of this honourable court.”

F These are in substance the two propositions stated by LORD ATKIN in *Compania Naviera Vascongado v. Cristina S.S.* (1) in the passage of his speech which has already been read. Both motions came before JENKINS, J., in March, 1949, and on Apr. 6, 1949, he delivered a reserved judgment dismissing the plaintiffs’ motion and granting the bank’s application. The order, as drawn up, states that the application was granted on the ground that the action impleaded two foreign sovereign States, namely, the United States of America and the Republic of France, though I am inclined to think that the learned judge’s reasoning is directed more to the second proposition stated by LORD ATKIN. From this decision the plaintiffs appeal.

G Since the original hearing of the appeal further material facts have been brought to the attention of the court. It is now known that the bank has sold or disposed of thirteen out of the sixty-four bars, conduct which could only be justified if the gold bars had been merged in the general pool of customers’ gold and the right of the governments was limited to the receipt of the appropriate amount of fine gold. The effect of the evidence has been stated by my brethren, and I need not repeat what they said. As far as the thirteen bars so sold are concerned, I incline to agree with counsel for the plaintiffs that he would be entitled to proceed with his action as it stands so far as the claim for



conversion is concerned, since the cloak of immunity which might have been a bar to the prosecution of the action was destroyed when the thirteen bars ceased to be identifiable, but it is unnecessary to express a concluded opinion on this point, since counsel for the bank agreed that, if counsel for the plaintiffs founded his claim in conversion on the dealings by the bank with the thirteen bars in December, 1948, and January, 1949, the bank would not take the objection that the dealings were subsequent to the issue of the writ. As regards the remaining fifty-one bars, I agree with my brethren in their conclusion that the whole basis of the argument for staying the proceedings has gone, and with the reasons they give, based on the additional evidence, for reaching this conclusion. I do not desire to add anything further on this point.

In these circumstances, it is not strictly necessary to go into the issues that were decided in the court below, but, since the matter was fully argued, and the facts on which I have based my conclusion were not before the learned judge, I think it is right that I should state shortly my opinion on the main point with which he dealt. I must refer briefly to the *Cristina* case (1). The claim in that case related to a ship which the Spanish government claimed to be in their possession. It was held ([1938] A.C. 485):

"... that the courts of this country will not allow the arrest of a ship, including a trading ship, which is in the possession of, and which has been requisitioned for public purposes by, a foreign sovereign State, inasmuch as to do so would be an infraction of the rule well established in international law that a sovereign State cannot, directly or indirectly, be impleaded without its consent, and, therefore, that the writ and all subsequent proceedings must be set aside."

LORD ATKIN commenced his speech in that case by laying down two propositions of international law which, in his view, were engrafted into our domestic law, and were well established and beyond dispute. These propositions have already been read. They were, I think, accepted by all the other learned lords, with the reservation that LORD MAUGHAM was of opinion ([1938] 1 All E.R. 740) that the second principle should not be extended to property used only for the commercial purposes of the sovereign, and LORD THANKERTON and LORD MACMILLAN reserved this question for future consideration. It is also to be observed that both LORD ATKIN (*ibid.*, 722) and LORD WRIGHT (*ibid.*, 733) considered that *de facto* possession brought the principle into operation, notwithstanding that such possession was wrongfully obtained. LORD WRIGHT said (*ibid.*):

"This [the independent status in international law of a foreign sovereign] gives the sovereign, so far as concerns courts of law, an immunity even in respect of conduct in breach of the municipal law."

In calling attention to these passages, I am not, of course, suggesting that the possession of the governments in the present case was necessarily wrongful. That point was not argued before us, and it may well be that their possession, having been obtained in the way I have indicated, was not wrongful. Counsel for the plaintiffs accepted, as he was bound to do, the two propositions laid down by LORD ATKIN—indeed, he said they were exhaustive—but he contended that they did not touch the present case—the first because the action in the present case was *in personam* and not *in rem*, and the sovereign States were not necessary parties to the action—the second because, for the purposes of the present interlocutory appeal only, it was agreed that the sovereign States were to be treated as not being owners or claiming ownership of the gold bars and, as he said, they were neither in possession nor control of them.

Counsel for the bank did not press the point that the action impleaded the foreign States. Directly, they were certainly not impleaded; a judgment in the plaintiffs' favour would not bind them as would a judgment *in rem*. I think,

therefore, that it is not strictly true to say that the writ in this action impleads the sovereign States, but this would not help counsel for the plaintiffs unless he could satisfy us that, if we allow the action to proceed, we could do so without, by our process, seizing or detaining property which is in the possession or under the control of the sovereign States. On this point, the argument of counsel for the plaintiffs was divided into two parts: (a) he said that no such interference could be involved since the bars were not in the possession or under the control of the sovereign States; (b) he said that, even if they were in such possession or under such control, the award of damages would not involve interference with such possession or control.

As regards (a), he advanced the following propositions: (i) possession means possession in law, (ii) possession in law is one and indivisible; (iii) under a contract of bailment the possession is in the bailee, and the bailor, therefore, cannot have any possessory rights; (iv) the fact that a bailor who is the true owner of goods may be able to sue in conversion is immaterial, because his right so to do depends on his ownership, and on this application the sovereign States do not claim to be owners of the gold bars; (v) the sovereign States cannot be in control of the gold bars since a chattel differs from a ship and there cannot be control of a chattel apart from possession or custody. With the first, second and fourth propositions I find myself in agreement, but I cannot accept the fifth proposition. I can see no reason in principle why LORD ATKIN's second proposition should not extend to personal chattels. I think it is clear from the observations of LORD WRIGHT ([1938] 1 All E.R. 733), that, while he recognised that ships had certain peculiar qualities, the propositions laid down by LORD ATKIN were of general application. LORD MAUGHAM seems to have been of the same opinion, for he said (*ibid.*, p. 737) that the claim to immunity in that case might "extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right . . ." Indeed, the whole tenor of his speech is directed to chattels generally, and not merely to ships. The defendant bank would, therefore, be entitled to succeed if it could satisfy us that the gold bars in question were in the possession or under the control of the sovereign States. For the reasons given by my brother SOMERVELL I think it is plain that the bars were under the control of the three governments within the meaning of LORD ATKIN's second proposition, and I agree with my brother in thinking that, but for the new evidence to which I have referred, to allow this action to proceed, on the evidence originally before us, we should by our process be interfering with that control. Having reached this conclusion, I find it unnecessary to consider the third proposition of counsel for the plaintiffs, namely, whether the bars were or were not in the possession of the governments after they had been deposited with the Bank of England.

A number of other authorities were cited to us, but, in view of the conclusion to which we have been forced by the additional evidence, I do not propose to review them. I only desire to express my concurrence with the conclusions reached by my brother SOMERVELL on the American cases. I also agree with him that, had we refused to allow the case to proceed in detinue, it would, for the reasons he gives, have been wrong to allow it to proceed in conversion. Accordingly, had it not been for the additional evidence as to the dealings by the bank with the bars, I should have been of opinion that the appeal failed, but for the reasons I have given, based on the additional evidence, I agree that it must be allowed. Before parting with the case, I desire to express my concurrence with the tentative opinion expressed by my brother SOMERVELL that immunity could not be claimed by a sovereign State which did not itself accord immunity in similar circumstances to other sovereign States.

*Appeal allowed with costs.*

Solicitors: *Slaughter & May* (for the plaintiffs); *Freshfields* (for the bank); *Treasury Solicitor* (for the Crown).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

# CHANDRIS v. ISBRANDTSEN-MOLLER CO. INC.

[KING'S BENCH DIVISION (Devlin, J.), February 8, 9, 10, March 6, 1950.]

*Shipping—Charterparty—Dangerous cargo—Exclusion of "acids, explosives, arms, ammunition, or other dangerous cargo"—Turpentine—Ejusdem generis rule—Acceptance of cargo by master—Breach of charterparty by charterer—Liability to damages—Delay in unloading—Amount of damages—Limitation by terms of demurrage clause—U.S.A. Carriage of Goods Act, 1936, s. 4 (6) (Carriage of Goods by Sea Act, 1924 (c. 22), sched. art. IV, r. 6).* A

By cl. 26 of a charterparty: "Cargo to consist of lawful general merchandise, excluding acids, explosives, arms, ammunition or other dangerous cargo." Another clause incorporated the United States of America Carriage of Goods by Sea Act, 1936, under s. 4 (6) of which (being in identical terms with the Carriage of Goods by Sea Act, 1924, sched., art IV, r. 6), dangerous goods to the shipment whereof the master had not consented could be landed or destroyed without compensation, the shipper being liable for damages resulting from the shipment, and dangerous goods to the shipment whereof the master had consented, if they became a danger to ship or cargo, might be landed or destroyed, subject to the carrier's liability for general average, if any. By cl. 15 of the charterparty it was provided: "Should the cargo not be delivered to vessel at loading ports and/or discharged at port of destination within the specified time, for each and every day over and above the said lay-days, charterers are to pay, day by day, the sum of £100 British sterling per day demurrage." B

Under the charter the ship loaded at Jacksonville, U.S.A. a general cargo which included 1,546 tons of turpentine. The master consented to its shipment with knowledge of its nature and character, but he did not thereby waive any of the rights or remedies of the shipowner in respect of the shipment. On arrival at Liverpool, because of the dangerous nature of the turpentine, the ship was compelled to move out of the dock and to discharge in the river into craft with the result that the discharge took sixteen days longer than it would otherwise have done. The shipowner claimed damages for extra expenses and detention of the ship for the sixteen days. C

**HELD:** (i) on the principle that general words *prima facie* have their natural and larger meaning and are not to be restricted to things *ejusdem generis* with those previously enumerated, unless there is something to show an intention so to restrict them, "other dangerous cargo" was not restricted to cargo in the nature of "acids, explosives, arms, ammunition," but included turpentine, and, therefore, the charterers were in breach of the charterparty. D

*Anderson v. Anderson* ([1895] 1 Q.B. 753), *applied*.

(ii) although the terms of s. 4 (6) of the United States Act of 1936 relating to the shipment of dangerous goods without the consent of the master provided that the shipper should be liable for damages resulting from the shipment, while the terms of the sub-section relating to such shipment with the consent of the master contained no such provision, there was not to be implied into the latter part of the sub-section a provision that the shipper could not be liable for damages. E

(iii) the shipowner having affirmed the contract, the demurrage clause was not inapplicable, either on the ground that a dangerous cargo was outside the cargo covered by the charterparty, or on the ground that the breach by the charterers was of a fundamental obligation of the charterparty, and, therefore, the amount of the damages for which the charterers were liable was limited by the provisions of the demurrage clause. F

*Inverkip S.S. Co., Ltd. v. Bunge & Co.* ([1917] 2 K.B. 193), *applied*.

*Akt. Reidar v. Arcos, Ltd.* ([1927] 1 K.B. 352), *explained*. G



[AS TO DESCRIPTION OF CARGO AND LIABILITY FOR DEMURRAGE AND DAMAGES FOR DETENTION IN CHARTERPARTIES, see HALSBURY, Hailsham Edn., Vol. 30, pp. 300-307, paras. 494-498 and pp. 344-352, paras. 524-531; and FOR CASES, see DIGEST, Vol. 41, p. 336, Nos. 1891-1898 and pp. 559-565, Nos. 3851-3900 and pp. 577-580, Nos. 4016-4038.]

Cases referred to:

- A (1) *Podar Trading Co., Ltd., Bombay v. Francois Tagher, Barcelona*, [1949] 2 All E.R. 62; [1949] 2 K.B. 277; [1949] L.J.R. 1470.
- (2) *Magnhild (Owners) v. McIntyre Brothers & Co.*, [1920] 3 K.B. 321; 89 L.J.K.B. 1110; 124 L.T. 160; *on appeal*, [1921] 2 K.B. 97; 90 L.J.K.B. 527; 124 L.T. 771; 17 Digest 275, 896.
- B (3) *Akt. Frank v. Namaqua Copper Co., Ltd.*, (1920), 90 L.J.K.B. 36; 123 L.T. 523; 41 Digest 307, 1690.
- (4) *Anderson v. Anderson*, [1895] 1 Q.B. 749; 64 L.J.Q.B. 457; 72 L.T. 313; 17 Digest 274, 893.
- (5) *Tillmanns & Co. v. S.S. Knutsford, Ltd.*, [1908] 2 K.B. 385; 77 L.J.K.B. 778; 99 L.T. 399; *on appeal, sub nom. S.S. Knutsford, Ltd. v. Tillmanns & Co.*, [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 41 Digest 522, 3504.
- C (6) *Thorman v. Dowgate S.S. Co., Ltd.*, [1910] 1 K.B. 410; 79 L.J.K.B. 287; 102 L.T. 242; 41 Digest 307, 1685.
- (7) *Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.*, (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; *revsg. S.C. sub nom. Hamilton v. Thames and Mersey Marine Insurance Co.*, (1886), 17 Q.B.D. 195; 55 L.J.Q.B. 390; 17 Digest 257, 697.
- D (8) *Glynn v. Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; *affg. S.C. sub nom. Margetson v. Glynn*, [1892] 1 Q.B. 337; 41 Digest 311, 1715.
- (9) *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; *affg.*, [1917] 2 K.B. 1; 86 L.J.K.B. 675; 116 L.T. 201; 81 J.P. 181; 12 Digest 399, 3233.
- E (10) *Sir Lindsay Parkinson & Co., Ltd. v. Commissioners of Works and Public Buildings*, [1950] 1 All E.R. 208; [1949] 2 K.B. 632.
- (11) *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; 118 L.T. 442; *affd.*, [1918] 2 K.B. 486; 87 L.J.K.B. 1066; 118 L.T. 783; 12 Digest 242, 1975.
- F (12) *Larsen v. Sylvester & Co.*, [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 41 Digest 306, 1682.
- (13) *Burrell & Sons v. Green (F.) & Co.*, [1914] 1 K.B. 293; 83 L.J.K.B. 499; 109 L.T. 970; *on appeal, sub nom. Burrell & Sons v. Hind, Rolph & Co.*, [1915] 1 K.B. 391; 84 L.J.K.B. 192; 112 L.T. 105; 41 Digest 361, 2094.
- G (14) *Schloss Brothers v. Stevens*, [1906] 2 K.B. 665; 75 L.J.K.B. 927; 96 L.T. 205; 29 Digest 226, 1832.
- (15) *Beaumont-Thomas v. Blue Star Line, Ltd.*, [1939] 3 All E.R. 127; Digest Supp.
- (16) *Hain Steamship Co., Ltd. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; 155 L.T. 177; Digest Supp.
- H (17) *Steven v. Bromley & Son*, [1919] 2 K.B. 722; 88 L.J.K.B. 1147; 121 L.T. 354; 41 Digest 654, 4870.
- (18) *Jackson v. Union Marine Insurance Co.*, (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 41 Digest 330, 1859.
- (19) *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 39 Digest 477, 996.
- (20) *Grant & Co. v. Coverdale, Todd & Co.*, (1884), 9 App. Cas. 470; 53 L.J.Q.B. 462; 51 L.T. 472; 41 Digest 436, 2735.

- (21) *Ardan S.S. Co. v. Weir (Andrew) & Co.*, [1905] A.C. 501; 74 L.J.P.C. 143; 93 L.T. 559; 41 Digest 453, 2848.
- (22) *Inverkip S.S. Co., Ltd. v. Bunge & Co.*, [1917] 2 K.B. 193; 86 L.J.K.B. 1042; 117 L.T. 102; 41 Digest 580, 4037.
- (23) *Akt. Reidar v. Arcos, Ltd.*, [1927] 1 K.B. 352; 96 L.J.K.B. 33; 136 L.T. 1; 41 Digest 341, 1922.

SPECIAL CASE stated by an arbitrator.

The shipowner claimed damages and interest under a charterparty in respect of extra expenses incurred and of the detention of the ship for sixteen additional days by reason of the cargo being unloaded in a river instead of in dock. The cargo included 1,546 tons of turpentine which, it was alleged, was a breach of a term of the charterparty. The charterers contended that turpentine was not "other dangerous cargo" within the meaning of the charterparty; that by virtue of the incorporation in the charterparty of the United States of America Carriage of Goods by Sea Act, 1936, s. 4 (6), the charterparty did not prohibit the shipment of dangerous cargo to which the master had consented; that no damages, but only demurrage, were recoverable in respect of the detention of the ship; and that there was no power in the arbitrator to award interest on damages or demurrage. The arbitrator found against the charterers on all points and awarded the shipowner £7,529 15s. In the alternative, on the assumption that demurrage only was recoverable, he assessed the figure at £2,216 15s.

*Mocatta and Michael Holman* for the shipowner.

*A. J. Hodgson and Boyes* for the charterers.

*Cur. adv. vult.*

Mar. 6. **DEVLIN, J.**, read the following judgment. The matter before me is an award stated in the form of a Special Case, and the facts found by the arbitrator, so far as they are material to the questions that I have to answer, are these. In March, 1941, the *Evgenia Chandris* under a voyage charter loaded at Jacksonville, U.S.A., a general cargo which included 1,546 tons of turpentine. Turpentine is a dangerous cargo. The master consented to its shipment with knowledge of its nature and character, but did not thereby waive any of the rights or remedies of the owner in respect of the shipment, nor had he any authority from the owner so to do. The vessel arrived at Liverpool, which was the port of discharge, on May 25, 1941, and began discharging on May 27 in dock. On May 29, because of the dangerous nature of the turpentine, she was ordered to move out of the dock and to discharge in the river into craft, with the result that the discharge took sixteen days longer than it would otherwise have done.

The first question which I have to consider is whether turpentine is a dangerous cargo within the meaning of cl. 26 of the charterparty. The second is whether, having regard to the fact that the charterparty incorporates the United States of America Carriage of Goods by Sea Act, 1936, the shipment of the turpentine with the knowledge and consent of the master was a breach of the charterparty. If these questions are answered affirmatively, as the arbitrator has answered them, the owner is entitled to the sum of £79 5s. 0d. as extra expenses incurred by reason of the discharge having to be made in the river, and is entitled to a further sum in respect of the sixteen additional days. Is the further sum to be demurrage at the rate fixed by cl. 15 of the charterparty or is it to be damages for detention? This is the third question. The arbitrator has decided that it is to be damages which he has assessed at £7,529 15s. 0d., a much larger figure than the corresponding figure for demurrage. The fourth question is whether the arbitrator has jurisdiction to award interest. He held that he had and has awarded the sum of £170. I can get rid of this last question at once. In *Podar Trading Co., Ltd. v. Tagher* (1) the Divisional Court answered the same question in the negative. Whether or not I am technically bound by

a decision of the Divisional Court, I propose to follow this one as a recent and authoritative pronouncement on the law, and I have not, therefore, invited argument on it.

The first question depends on the construction of cl. 26 of the charterparty, which provides:

A "Cargo to consist of lawful general merchandise, excluding acids, explosives, arms, ammunition or other dangerous cargo."

The question is whether "other dangerous cargo" is to be construed *ejusdem generis* with what goes before. Counsel for the charterers, who says that it is, argues that the question turns on whether or not the rule is correctly stated in the following passage in SCRUTTON ON CHARTERPARTIES, 15th ed., p. 239:

B "It must be remembered that the question is whether a particular thing is within the *genus* that comprises the specified things. It is not a question (though the point is often so put in argument), whether the particular thing is like one or other of the specified things."

C This paragraph was quoted with approval by McCARDIE, J., in *Magnhild v. McIntyre* (2) ([1920] 3 K.B. 332). The alternative view, which the paragraph condemns, is the one for which counsel for the charterers contends and he can cite in support of it the *dictum* of GREER, J. (90 L.J.K.B. 40) in *Akt. Frank v. Namaqua Copper Co., Ltd.* (3). If the former view is right, counsel for the charterers cannot suggest a *genus* which would not include turpentine, and so he would fail. If the latter view is right, it is not suggested that turpentine is like any of the specified things, and so the charterers would succeed. Initially, counsel for the charterers presented his argument as if the choice lay between these two interpretations of the rule and there was no question but that the rule in one or other form applied. I think that this is the first question I have to determine, and, indeed, without examining the nature and scope of the rule, I should not be able to find a satisfactory answer on the point propounded.

E *Anderson v. Anderson* (4) was a decision of the Court of Appeal in relation to a post-nuptial settlement in which all three members of the court clearly laid it down that general words were *prima facie* to be considered as having their natural and larger meaning and not to be restricted to things *ejusdem generis* with those previously enumerated unless there was something in the deed to show an intention so to restrict them. In *Tillmanns & Co. v. S.S. Knutsford, Ltd.* (5),

F VAUGHAN WILLIAMS, L.J., without impeaching the authority of *Anderson v. Anderson* (4) sets out other authorities to the opposite effect designed to show that it is the restricted meaning that primarily attaches to the general words. It is, perhaps, important that this case concerns a charterparty. In *Thorman v. Dowgate S.S. Co., Ltd.* (6) HAMILTON, J., also dealing with a charterparty, thought it unnecessary to embark on this discussion. *Anderson v. Anderson* (4)

G is a decision which, unless distinguishable on the ground that I am dealing with a commercial document rather than a settlement, is binding on me. Apart from its authority, if I may respectfully say so, I entirely agree with it. A rule of construction cannot be more than a guide to enable the court to arrive at the true meaning of the parties. The *ejusdem generis* rule means that there is implied into the language which the parties have used words of restriction that are not there. It cannot be right to approach a document with the presumption that there should be such an implication. To apply the rule automatically in that way would be to make it the master and not the servant of the purpose for which it was designed, namely, to ascertain the meaning of the parties from the words they have used. Of course, the first approach will often show quite plainly that the words are used far more widely than the parties could have intended, as, for example, "all other perils" in the Lloyds policy which formed the subject of the well known decision in *Thames*



and *Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (7). The so-called rule is, in short, really only a recognition of the fact that parties with their minds concerned with the particular objects about which they are contracting are apt to use words, phrases or clauses which, taken literally, are wider than they intend. Under the description of *ejusdem generis* the principle is applied to words only, but it is not different from the principle which restricts the meaning of clauses if literally they are inconsistent with the main object of the contract, as in *Glynn v. Margetson & Co.* (8). The same principle is put to work when it is sought to apply such clauses to events not contemplated by the contract, as in *Metropolitan Water Board v. Dick Kerr & Co.* (9) and other similar cases in which frustrating events, though literally covered by the wide language of suspension clauses, have been held not to be within them. The latter principle has been recently applied in *Sir Lindsay Parkinson & Co., Ltd. v. Commissioners of Works* (10) in which ASQUITH, L.J., referred ([1950] 1 All E.R. 228) to the process as

“ . . . a restriction imposed on the literal scope of the language actually used by the parties, by implication from what they must have contemplated.”

COHEN, L.J. (*ibid.*, 223) applied the principle enunciated by McCARDIE, J. ([1918] 1 K.B. 335) in *Naylor v. Krainische* (11) that:

“ . . . words, even though general, must be limited to circumstances within the contemplation of the parties.”

I do not think that the presence of a *genus*, or of a series of items, alters the nature of the principle or gives it any special significance.

I cannot think that LORD MACNAGHTEN, in his rather cryptic observation ([1908] A.C. 409) in *Knutsford v. Tillmanns* (5), or HAMILTON, J., in *Thorman v. Dowgate* (6), were intending to say that the rule should be applied more stringently in the case of commercial documents than in the case of settlements. If that is what these two great lawyers had in mind, it would be impossible for me to differ from them, but I find that hard to credit. Legal draftsmen are all familiar with the existence of the rule, and familiar, too, with the proper signals to hoist if they do not want it to apply. Phrases such as “whether or not similar to the foregoing” and “without prejudice to the generality of the foregoing” are often employed in legal draftsmanship, and, if the draftsman has read the report of *Larsen v. Sylvester & Co.* (12), he will know that the addition of “whatsoever” generally serves the same purpose. Commercial draftsmen are not usually taught these rules. Moreover, the main argument of construction that justifies the application of the rule does not apply in commercial documents. It is that if the general words have an unrestricted meaning the enumerated items are surplusage. The presumption against surplusage is of little value in ascertaining the intention of the parties to commercial documents, as many great commercial judges have recognised. In *Burrell v. Green* (13) BAILHACHE, J., said ([1914] 1 K.B. 303) he was unimpressed by the argument of redundancy “because charterparties often contain many redundant words.” In *Schloss Brothers v. Stevens* (14) WALTON, J., said ([1906] 2 K.B. 673):

“It was said for the defendant that, if all risks were covered, why refer specially to risks of robbery with or without violence, negligence, etc.? On the other hand, it is very common to find in such contracts, although perfectly general words are made use of, including practically all risks, special reference to particular perils to which it is desired to draw special attention.”

In *Beaumont-Thomas v. Blue Star Line, Ltd.* (15) SCOTT, L.J., referred to the same habit, but less kindly ([1939] 3 All E.R. 133) as

" . . . the common and pernicious practice of cramming a contract with particular illustrations of some general stipulation, which in a legal sense are wholly unnecessary, and which, just because they are unnecessary, often afford a pretext for limiting general words in a way which was never intended."

A Draftsmen of charterparties—whether of the printed form or of the type-written clause, but, perhaps, especially of the latter—are probably not consciously familiar even with the idea of *ejusdem generis*. This charterparty refers, for example, to "a full and complete cargo of wheat and/or maize and/or other lawful merchandise." Nobody has ever, I think, suggested that the merchandise has to be similar to wheat or maize, although the first question which would occur to a lawyer would be to ask himself why the parties bothered to refer to wheat or maize, if they meant that the cargo might be anything B to chalk to cheese, including turpentine. I apply the principle laid down in *Anderson v. Anderson* (4), and so inquire whether there is anything in the text of this charterparty or in the circumstances in which it was made which would lead me to suppose that the parties intended "other dangerous cargo" C to have some limited meaning. I can find no such indication. It seems to me that the only reason why the owner is objecting to acids, explosives, arms, or ammunition is because they are dangerous, and, that being so, he may be presumed to have the same objection to all other dangerous cargo. On this ground, therefore, I think that the contention of counsel for the charterers fails.

This makes it unnecessary for me to deal with the other point, but since it was fully argued and is a point much in dispute, I may permit myself to express D shortly my view of it. If the *ejusdem generis* principle is a rule of automatic application, it becomes of the first importance to determine exactly what the rule is. If it is merely, as I think, an aid to ascertaining the intention of the parties, no point of controversy need arise. If there is something to show that the literal meaning of the words is too wide, then they will be given such other meaning as seems best to consort with the intention of the parties. In some E cases it may be that they will seem to indicate a *genus*; in others that they perform the simpler office of expanding the meaning of each enumerated item. If a *genus* cannot be found, doubtless that is one factor indicating that the parties did not intend to restrict the meaning of the words, but I do not take it to be universally true that, whenever a *genus* cannot be found, the words must have been intended to have their literal meaning, whatever other indica- F tions there may be to the contrary. I see no reason why, if it accords with the apparent intention of the parties, the words should not be treated, as suggested by LORD MACNAGHTEN (12 App. Cas. 501) in *Thames and Mersey Marine Insurance Co. v. Hamilton* (7), as being:

G " . . . inserted in order to prevent disputes founded on nice distinctions . . . [and] to cover in terms whatever may be within the spirit of the cases previously enumerated . . . "

The next question is the effect of s. 4 (6) of the United States Carriage of Goods by Sea Act, 1936. This sub-section, which is in identical terms with the corresponding rule (art. IV, r. 6), made under the Carriage of Goods by Sea Act, 1924, is in two parts. The first part deals with dangerous goods to the H shipment whereof the master has not consented, and the second part deals with such goods to the shipment whereof he has consented. With regard to the first class, the rule provides that the goods may be landed or destroyed without compensation and that the shipper shall be liable for damages resulting from the shipment. With regard to the second class, the rule provides only that the goods, if they become a danger to ship or cargo, may be landed or destroyed, and this is subject to the carrier's liability for general average, if any. This second part says nothing at all about liability for damage. Counsel

for the charterers argues that, since the first part expressly makes the shipper liable for damages and the second part is silent, there must be implied into the second part a provision in contrast to the first that the shipper is not liable for damages. If this reading of the rule is right, counsel next contends that the charterparty, construed as a whole, does not prohibit absolutely the shipment of all dangerous cargo, but only of dangerous cargo to the shipment whereof the master has not consented. I need not explore the merits of this further contention, for I can see no ground for making the implication in the rule which counsel requires. If it was clear that the Act was intended to provide a complete code in relation to the matters with which it deals, it might be argued that it could not have deliberately remained silent in respect of cargo of the second class, and, therefore, that some implication must be made, but the Act is not intended as a code. It is not meant altogether to supplant the contract of carriage, but only to control on certain topics the freedom of contract which the parties would otherwise have. I see no reason why it should not be silent on such topics as the consequences of shipping cargo with the consent of the master, leaving the matter to be regulated by the parties themselves. On the contrary, I see good reason why silence might be thought desirable, for the consequences might well depend on the terms in which the consent was given or the circumstances in which it was given.

Accordingly, I decide the first two questions against the charterers, and I agree with the arbitrator's conclusion that there has been a breach of the charterparty. I have next to determine whether the damages for the detention are at large or are governed by the demurrage clause, cl. 15. This clause provides:

"Should the cargo not be delivered to vessel at loading ports and/or discharged at port of destination within the specified time, for each and every day over and above the said lay-days, charterers are to pay, day by day, the sum of £100 British sterling per day demurrage."

The discharge took twenty-two and a half days over and above the lay-days. The owner has claimed and has been awarded demurrage in respect of six and a half of those days. The fact that the nature of the cargo was responsible for increasing the discharging time from an extra six and a half days to an extra twenty-two and a half days at first sight appears to be irrelevant, since the clause seems wide enough to apply to delay in discharging, however caused. In holding that the clause does not apply, the arbitrator expressed his view in para. 13 of the award in the following terms:

"I hold that demurrage clauses, like freight and exceptions clauses, are designed to apply only where cargo of the kind (if any) specified in the contract of affreightment is shipped; and that in cl. 15 of the charterparty in question the words 'the cargo' refer to contract cargo and not to cargo shipment of which is prohibited by the contract. If the charterparty had permitted or provided for carriage of dangerous cargo, the number of lay-days and the demurrage rate agreed upon might have been quite different. The basis of all the contractual provisions was that dangerous cargo should not be loaded."

Coming as it does from an arbitrator of great learning and experience, this view is entitled to deep respect.

It was at one time thought that, if the owner or charterer committed a breach of some fundamental or basic condition of the contract, such as is involved, for example, in a deviation from the contract voyage, the exceptions clauses in the contract were displaced and the contract could be enforced by the aggrieved party without granting to the other the benefit of any of the exceptions which might otherwise have protected him. The law on this matter was settled by the House of Lords in *Hain Steamship Co., Ltd. v. Tate & Lyle, Ltd.* (16), where it was held that it was governed by the ordinary law of contract.



The deviation is a fundamental breach going to the root of the contract, and the aggrieved party is entitled either to rescind or to affirm. If he affirms, he retains his right to damages for the breach, but the contract with all its terms and conditions remains alive for the benefit of the wrongdoer as well as of himself. In the case of the shipment of cargo outside the contract, the owner has in effect a similar right of election, as is instanced by *Steven v. Bromley & Son* (17). He can treat the shipment as a request to carry the cargo at a reasonable remuneration, and, if he accepts it, the freight clause in the contract will not apply to the non-contractual cargo. Here, again, no principle is involved peculiar to contracts of carriage and freight clauses, but only the ordinary law. In *Sir Lindsay Parkinson & Co., Ltd. v. Commissioners of Works* (10) the Court of Appeal held that the payment clause in a building contract was not applicable to work which was not contemplated by the contract, and that the contractor was entitled to recover for it on an implied contract to pay a reasonable remuneration.

In all these cases the old contract is not displaced unless there is either a rescission of it or evidence from which a new contract can be implied. Counsel for the shipowner does not contend that either event has taken place in this case, and neither is alleged in the pleadings in the arbitration which are attached to the award. The owners had previously taken freight in respect of the dangerous cargo at the charterparty rate, and they claimed in the arbitration, as I have said, under the demurrage clause in respect of six and a half days. What counsel for the shipowner contends is that the demurrage clause, while it remains generally effective, is not of its nature applicable to the consequences of the shipment of dangerous cargo. If I understood his argument rightly, it can be considered in two aspects—the clause is inapplicable, first, because the cargo was outside the contractual description, and, secondly, because there was a breach of a fundamental or basic provision of the contract. A demurrage clause is merely a clause providing for liquidated damages for a certain type of breach. It is, presumably, the parties' estimate of the loss of prospective freight which the owner is likely to suffer if his ship is detained beyond the lay-days. The demurrage rate in this case appears to have been a good deal lower than the freight market rate, and I suppose I need not shut my eyes to the fact that a sum produced by demurrage is generally less than damages for detention, which are, presumably, assessed by reference to the market rate of freight at the time of the breach. To this extent a demurrage clause may be in practice a concession to the charterer, but I am not, and I do not think I could be, invited to consider it as different in its nature from an ordinary liquidated damages clause.

At first sight it would appear that a demurrage rate should be as applicable to dangerous cargo as to any other sort of cargo. If the discharge of the dangerous cargo takes longer, the demurrage will be larger. Counsel for the shipowner has argued, however, that the shipment of dangerous cargo often results in the necessity for paying danger money or some other sort of bonus to officers and crew, and so, if the contract had covered dangerous cargo, a higher rate of freight and of demurrage might well have been demanded. The arbitrator thought so too, so let it be accepted. It seems to me that it is just because it may well be that neither the demurrage clause nor any other clause of the contract was originally intended to apply to the new situation created by a wrongdoer that the aggrieved party is given his choice whether he desires them to apply or not. If he thinks that the freight and demurrage rates provided by the contract are insufficient to compensate him, he can rescind and sue on an implied contract for an adequate remuneration. A further consideration reinforces this view. It is not contended by counsel for the shipowner that the owner has any option in the matter of applying the demurrage clause. His argument is that it does not apply at all, whether the owner wants it or not. The result is that, if the demurrage rate were higher than the market rate of

freight at the time of the detention—and, even though the former may be designed to be lower, there is always the possibility of a slump in freight rates—the owner would be bound to take the lower rate, and the wrongdoer would thus profit from his own wrong. A similar consideration assisted LORD ATKIN ([1936] 2 All E.R. 601) and LORD WRIGHT, M.R. (*ibid.*, 608), in *Hain's case* (16) to reject the argument that deviation automatically cancelled the contract, and to prefer the view that it gave the aggrieved party the option of rescinding or affirming. It is plain, however, that after an election to affirm the whole there cannot be a further option to rescind in part. So counsel for the shipowner is driven to argue that the impact of the new situation *ipso facto* robs the clause of applicability. That might be so if it had been due to no wrongdoing. The principle laid down in *Jackson v. Union Marine Insurance Co., Ltd.* (18) and applied in *Sir Lindsay Parkinson v. Commissioners of Works* (10) requires that the contract should become inapplicable without any default of either party. Where there is default, the offended party has the advantage of making his choice. It does not appear to me that the argument, the general nature of which I have considered, is rendered any more attractive by being put as a matter of construction of the demurrage clause and reading “the cargo” in that clause as referring to contract cargo. If this is true of the demurrage clause, it must be true of every other clause. It must follow, therefore, that, notwithstanding that the contract as a whole is affirmed, no clause in it which refers expressly to “the cargo” can be applicable to the dangerous cargo. A glance at cl. 7, 9, 10 and 17 of the charterparty shows the devastating effect that this would have, but, of course, all the clauses expressly or impliedly refer to “the cargo,” and whether the words are expressly used or not is often a mere accident of draftsmanship. The argument seems to me to lead logically to the conclusion that no part of the affirmed contract can apply. I think the true view is that the party who affirms the contract in circumstances such as this treats the dangerous cargo, subject to his right to damages, as coming within the contract description, and that the term “the cargo” is to be construed accordingly.

I turn now to consider the second aspect of this argument whereunder counsel for the shipowner distinguishes between the breach of a fundamental obligation and the breach of an ordinary term, contending that the demurrage clause does not apply to the former. There is an express obligation on the charterers under this charterparty to furnish a full and complete cargo of lawful merchandise. They have broken that obligation, and it is not disputed that thereby they broke a fundamental obligation, by which I understand to be meant a condition going to the root of the contract the breach of which entitled the owner to rescind. No doubt in the circumstances of this case, as they were explored in the arbitration, that was a proper view to take. The turpentine consisted of 1,546 tons, though what proportion of the cargo it formed I do not know. Counsel for the shipowner says that, unless it was *de minimis*, there is a breach entitling the owner to rescind, just as he would be able to reject in a contract for the sale of goods. If this is so, the question of the master's implied authority to consent to shipment may require some consideration. If it be the law that an owner who at the end of a voyage discovers that a small portion of cargo (enough to be above *de minimis*) outside the contract description has been shipped, albeit with the knowledge of the master, can tear up the whole contract, it may result in some practical inconvenience. No such question arises for my consideration here, since the owners themselves chose to affirm. The result of the affirmation is that the breach of condition is to be treated as if it were a breach of warranty. In *Wallis, Son & Wells v. Pratt* (19) LORD LOREBURN, L.C., puts the position in this way ([1911] A.C. 395):

“ . . . he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a

breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty."

A In the same case in the Court of Appeal FLETCHER MOULTON, L.J. ([1910] 2 K.B. 1013) treats the remedy of damages as being common to all terms of the contract. In the case of a breach of condition, the injured party has the option of another and higher remedy, but if he does not avail himself of it, he will have to be content with his right to damages. I can see nothing in principle to suggest that the damages for the breach of a warranty *ex post facto*, as it is sometimes called, should be any different from those for the breach of a warranty *ab initio*, nor can I see any reason in principle why a liquidated damages clause should not apply with equal efficacy to both.

B Counsel for the shipowner does not argue that, if the obligation not to load a dangerous cargo had not been, in its original form, a fundamental obligation, the demurrage clause would not have applied. He would be precluded from doing so by authority. It is useful to review the state of the authorities on this point, because I think that by so doing I can be led to the right conclusion on the merits of counsel's distinction. It is well settled that, in relation to the cargo, a charterer has two distinct obligations. The first is to furnish a full and complete cargo which complies with the charterparty. The second is to load and discharge it within the lay-days. This distinction first became of practical importance when a charterer, who had failed to get his cargo down to the loading place, contended that he was excused by virtue of an exceptions clause applying to events which prevented loading. In *Grant & Co. v. Coverdale, Todd & Co.* (20) the House of Lords held that he was not. LORD SELBORNE, L.C., said (9 App. Cas. 475):

E "It would appear to me to be unreasonable to suppose, unless the words make it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation of loading, which are no part whatever of it, but which belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, he has to convey the cargo to the place of loading and have it ready there to be put on board; and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises."

F A similar point was discussed in *Ardan S.S. Co. v. Weir (Andrew) & Co.* (21). The Lord Ordinary (LORD PEARSON) held ([1905] A.C. 502) that:

G "... the delay was caused, not by the exceptional congestion of shipping, but by the failure of the defenders to perform their primary duty of providing a cargo, and that the principle upon which a reasonable time is allowed to the charterers for loading does not apply to such a case."

H The reference to "primary duty" was adopted by LORD HALSBURY, L.C., in the House of Lords (*ibid.*, 510). This appears to be the first place in which the term, which recurs in later cases, was used. Unless it has a special significance in Scots law, I think that the Lord Ordinary was using it merely as a convenient term to describe the nature of the charterer's duty as laid down by LORD SELBORNE, L.C. The discharge of the duty is preliminary to the obligation to load. In that sense it is primary.

The owner obtained damages for detention in both these cases, but no question of demurrage arose. The point was, therefore, unsettled whether a demurrage



clause would apply not only to a failure to load within the lay-days, but also to a breach of the primary obligation. This question was answered in the negative in *Inverkip S.S. Co., Ltd. v. Bunge & Co.* (22). This was a decision of the Court of Appeal in which WARRINGTON and SCRUTTON, L.J.J., delivered judgments with which LORD COZENS-HARDY, M.R., concurred. It will suffice to quote two passages. WARRINGTON, L.J., said ([1917] 2 K.B. 198):

"It was contended that on the true construction of the charterparty the clause I have read [the demurrage clause] is confined to mere delays in loading and does not extend to cover detention occasioned by failure to provide a cargo. Reliance was placed on the case of *Ardan S.S. Co., Ltd. v. Weir (Andrew) & Co.* (21) as establishing that the obligation to load in accordance with the charterparty and the obligation to provide a cargo are separate and distinct obligations, and I accept that view. But I cannot hold that in the present case the provision for demurrage is confined to delay in loading."

SCRUTTON, L.J., said (*ibid.*, 203):

"If there was a breach in not having cargo ready on Aug. 25 the only consequence is detention of the ship, and the damages for that, which is the same detention, however it arises, are agreed in the charter and have been paid."

The authority of this case concludes the point I have to determine unless it can be distinguished, as counsel for the shipowner seeks to distinguish it, on the ground that in it the delay in providing the cargo was not a breach of a fundamental obligation. It is argued that the furnishing of a cargo contrary to the charterparty is a breach of contract which by itself and forthwith goes to the root of the matter, whereas delay in providing a cargo depends on the length of the delay. It was not considered necessary in *Inverkip S.S. Co. v. Bunge & Co.* (22) to decide whether the delay was sufficiently long to entitle the owner to rescind if he had so desired. SANKEY, J., in the court below ([1917] 1 K.B. 31) thought that it was. WARRINGTON, L.J. ([1917] 2 K.B. 198) expressed no opinion, and SCRUTTON, L.J. (*ibid.*, 201) thought that it was not, inasmuch as the circumstances showed that the charterer was not repudiating. The case does, however, show that nobody thought it important to determine whether the breach was fundamental or not. To that extent it accords with the view that I have already expressed, and it remains, therefore, to consider the authority on which counsel for the shipowner relies as showing that the point is decisive.

This is the judgment of SARGANT, L.J., in *Akt. Reidar v. Arcos, Ltd.* (23). That case decided a point up to then left undetermined. *Inverkip S.S. Co. v. Bunge, Ltd.* (21) had decided that damages for detention for breach of the obligation to provide a cargo were covered by the demurrage clause. Supposing, however, that the breach of such an obligation gave rise to damages of a different character, not for detention at all. The demurrage clause could not then provide the measure. Ought the clause to be construed as exhaustive, so that no damages which could not be measured by it could be recovered at all, or ought it to be construed merely as applying to damages for detention, leaving damages of any other character to be assessed at large? The Court of Appeal decided the latter. The facts were that the vessel was chartered to carry a cargo of timber from a White Sea port to an English port. If she reached the English port before Oct. 31 she could discharge there a cargo of 850 standards, but if she reached there after that date, she could not, by reason of the Merchant Shipping Act, 1906, enter the port with more than 544 standards. That meant that to carry a full and complete cargo her loading must be completed by Oct. 20. In breach of the charterparty it was not completed by that date with the result that she did not load more than 544 standards, and the owners sued the charterers for

dead-freight. This is a problem which might be dealt with in one of two ways. One way is to say that there has been a breach of contract causing dead-freight as damage and that dead-freight is not excluded by the demurrage clause, which is not exhaustive. On that way of looking at it, the question whether the breach was of a primary or fundamental duty is irrelevant. The alternative way is to say that there has been a breach of the primary or fundamental obligation to load a full and complete cargo and therefore that the demurrage clause does not apply. On that way of putting it the nature of the damage, whether it was dead-freight or detention, would be irrelevant. It seems to me plain that the Court of Appeal chose the former way of dealing with it. BANKES, L.J., thought it unnecessary to decide whether there was a breach of the obligation to load a full and complete cargo, and said ([1927] 1 K.B. 362) that the loss was recoverable simply as damages for the breach of contract to load at the agreed rate. ATKIN, L.J., said (*ibid.*, 363):

"If the lay-days expire without a full cargo having been loaded the charterer has broken his contract. The provisions as to demurrage quantify the damages, not for the complete breach, but only such damages as arise from the detention of the vessel."

Neither of these lords justices refer in terms to any primary or fundamental obligation. GREER, J., in the court below ([1926] 2 K.B. 88), and SARGANT, L.J. ([1927] 1 K.B. 366), did refer to the breach of a primary obligation; and it is on the latter judgment particularly that counsel for the shipowner relies. SARGANT, L.J., said:

"The loss inflicted on the owners and claimed by them is loss of another character—namely, loss of freight caused by the breach by the charterers of their contract to load a full and complete cargo, as prescribed by cl. 1 of the charterparty. The obligation of cl. 1 is, in my judgment, rightly described by the learned judge as the primary obligation. The object of the second sentence of cl. 3 is to provide compensation for a detention of the vessel in the course of fulfilling this primary obligation, not to give compensation for the breach of the primary obligation itself."

Neither GREER, J., nor SARGANT, L.J., in the passage I have quoted, disregard the fact that the loss caused was dead-freight; SARGANT, L.J., particularly refers to it. If they had been intending to decide the case on the ground that the demurrage clause did not apply to the breach of a primary obligation, it

would clearly be necessary to distinguish *Inverkip S.S. Co. v. Bunge* (22) and explain the difference in the character of the obligations in the two cases. In my judgment, the *ratio decidendi* in *Akt. Reidar v. Arcos* (23) is to be found in the judgments of BANKES and ATKIN, L.J.J., and the reference by SARGANT, L.J., to a primary obligation is, strictly speaking, irrelevant. I think that the point I have to consider is in principle determined by *Inverkip S.S. Co., Ltd. v. Bunge* (22) and is not touched by the reasoning in *Akt. Reidar v. Arcos* (23).

In the result, I think that the damages are limited by the demurrage clause. Accordingly, I answer the first question set out in para. 15 in the affirmative, and the second question in the negative. The third question does not arise because counsel for the shipowner agrees that it should be answered negatively as the arbitrator has done. The effect of this is that the alternative award for £2,216 15s. is upheld; and as I have answered in the negative the question of interest, no sum will be added to that by way of interest.

*Judgment for the shipowner, for £2,216 15s. Shipowner to pay half charterers' costs of the hearing and costs of setting down.*

Solicitors: *Holman, Fenwick & Willan* (for the shipowner); *Lightbounds, Jones & Co.* (for the charterers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NORTH CENTRAL WAGON AND FINANCE CO., LTD.  
v. GRAHAM.

[COURT OF APPEAL (Cohen, Asquith and Singleton, L.J.J.), March 13, 1950.]

*Hire Purchase—Conversion—“ Owners may terminate hiring ” on default of hirer—Right to immediate possession of chattel hired—Need of notice.*

On May 8, 1947, the plaintiffs let a motor-car on hire purchase to C. The hire purchase agreement provided, *inter alia*, that during its continuance the hirer should not loan nor part with possession of the vehicle nor attempt to sell, pledge, charge, assign, sub-let or otherwise dispose of it. The agreement further provided by cl. 7: “ (i) If the hirer shall fail to pay any sum due hereunder or to observe or perform any stipulation on his part herein contained, the owners may terminate the hiring; and thereupon the hirer shall pay to the owners the whole of the sums specified under the heading ‘ Terms of Hire ’ in the schedule hereto . . . (ii) If this hiring be terminated for any reason appearing at the beginning of this clause the owners may by written notice to the hirer and subject to similar stipulations put an end to the hiring under any other agreements subsisting between them and the hirer.” In June, 1947, C. instructed the defendant, an auctioneer, to sell the car for him; on July 2, 1947, the defendant sold the car; and the plaintiff now sought damages for its conversion.

HELD: on the true construction of the hire purchase agreement the plaintiffs acquired a right to immediate possession as soon as any breach of cl. 7 (i) occurred, without giving any notice to terminate the agreement, and, therefore, they were entitled to sue in conversion.

*Jelks v. Hayward* ([1905] 2 K.B. 460), *applied*.

[AS TO TERMINATION OF HIRE PURCHASE AGREEMENT, see HALSBURY, Hailsham Edn., Vol. 16, pp. 513, 514, para. 756; and FOR CASES, see DIGEST, Vol. 3, pp. 95-98, Nos. 256-266.]

Cases referred to:

- (1) *Manders v. Williams*, (1849), 4 Exch. 339; 18 L.J.Ex. 437; 13 L.T.O.S. 325; 3 Digest 111, 350.
- (2) *Jelks v. Hayward*, [1905] 2 K.B. 460; 74 L.J.K.B. 717; 92 L.T. 692; 3 Digest 96, 259.
- (3) *Bradley v. Copley*, (1845), 1 C.B. 685; 14 L.J.C.P. 222; 5 L.T.O.S. 198; 43 Digest 497, 361.
- (4) *Fenn v. Bittleston*, (1851), 7 Exch. 152; 21 L.J.Ex. 41; 18 L.T.O.S. 197; 3 Digest 106, 317.

APPEAL by the plaintiffs from an order of LEWIS, J., sitting without a jury at Nottingham, dated Dec. 19, 1949. LEWIS, J., held that under the terms of a hire purchase agreement the plaintiffs were not entitled to possession of a motor car at the date of the sale thereof by the defendant, and that, therefore, they could not maintain conversion against him. The facts appear in the judgment of ASQUITH, L.J.

*Pocock* for the plaintiffs.

*Elwes* for the defendant.

COHEN, L.J.: I will ask ASQUITH, L.J., to give the first judgment in this case.

ASQUITH, L.J.: In May, 1947, the plaintiffs bought a motor car, and, on May 8, they let it on hire purchase to a man called Cole. Cole took delivery and used the car and began to pay instalments, but, in June or July, 1947, he appears to have got into money difficulties, and, without the knowledge of the plaintiffs and in breach of his contractual obligations, he instructed the defendant, an auctioneer, to sell the car for him. On July 2, 1947, the defendant sold the



car to a man called Selby for £202 10s. and Selby sold it to a man called Sibley. It was not until January, 1948, that the plaintiffs discovered that their car was registered in the name of Sibley. Correspondence followed, to which I need not refer, and on Nov. 4, 1948, a writ was issued demanding damages against the auctioneer (the defendant) for conversion of the car by him.

A The hire purchase agreement is expressed to be made between the plaintiffs and Cole, and in cl. 4 a number of obligations are set out. The only one of these which is directly relevant is cl. 4 (e), where the hire purchaser covenants not to

“do or allow to be done anything which will tend prejudicially to affect the ownership or financial position of the owners in relation to the vehicle.”

By cl. 5, which is directly in point, it is provided:

B “During the continuance of this agreement the hirer shall not sell, pledge, charge or assign the benefit of this agreement, nor loan nor part with the possession of the vehicle nor attempt to sell, pledge, charge, assign, sub-let or otherwise dispose of the vehicle . . .”

Clause 7 provides:

C “(i) If the hirer shall fail to pay any sum due hereunder or to observe or perform any stipulation on his part herein contained, the owners may terminate the hiring; and thereupon the hirer shall pay to the owners the whole of the sums specified under the heading ‘Terms of Hire’ in the schedule hereto . . . (ii) If this hiring be terminated for any reason appearing at the beginning of this clause the owners may by written notice to the  
D hirer and subject to similar stipulations put an end to the hiring under any other agreements subsisting between them and the hirer.”

Clause 10 provides:

“This agreement is only a contract of bailment for hire.”

E In his judgment, Lewis, J., was admittedly much influenced by the fact that this is not one of those hire purchase agreements in which the effect of a breach by the hire purchaser is expressed *ipso facto* to put an end to the agreement. It is, on the other hand, plainly a hire purchase agreement of the type which, on specified breaches occurring, vests in the lessor on hire purchase the option to terminate the hiring or not as he chooses. Lewis, J., said:

F “In my view, the question that I have to decide in this case is whether, on the true construction of the terms of this contract, when there has been no action taken by the owner to terminate the contract, the fact (to give an example) that the hirer was late one month in paying his hire purchase instalment *ipso facto* terminates the hire purchase agreement. Directly the hire purchase agreement is terminated, of course possession of the goods vests once more in the owner, and, therefore, in that event, he is  
G the person who is entitled to possession of the goods. As I have said, the whole point here is whether, in the events which happened in this case, the right to possession was in the owners.”

At the end of his judgment he stated his decision in these terms:

H “In my view, the position here is that the argument of counsel for the defendant, namely, that the plaintiffs were not entitled to possession at the time of the sale, prevails; and the defendant, therefore, is entitled to succeed on the ground that the plaintiffs have not satisfied me on the terms of the hire purchase agreement that they were entitled to possession in view of the events which happened in this case.”

The point which falls for decision may be very shortly stated and it is this. When a bailor and lessor on hire purchase sues in conversion by reason of the wrongful sale of the article bailed by the bailee, it is essential for him to show

that he is entitled at the time of the sale to immediate possession of the goods, and the question is whether, under the terms of this hire purchase agreement, the plaintiffs were in that position at the time of the sale.

Counsel for the plaintiffs raises another point, which is independent of the precise terms of the hire purchase agreement. He says that a bailee who comports himself in a manner utterly repugnant to the terms of the bailment terminates the bailment, and thereupon the right to possession re-vests in the bailor. A bailee who sells the thing bailed without the knowledge or consent of the bailor is clearly guilty of such conduct. That, as a general principle of law, is not really in dispute. It applies in cases in which the contract is either a very simple one or one which does not make specific provision as to the rights of the parties in the event of particular breaches, but, of course, where there is a contract which makes such special provision (and that is this case) what has to be taken into account is, not the general law, but the position which arises having regard to those express stipulations.

The question, therefore, is whether, having regard to the terms of cl. 7, and, particularly, cl. 7 (i), the effect of the breach was, not merely to give the plaintiffs a right to terminate the hiring, but also to entitle them to say that at the time of the sale they had a right to immediate possession of the goods. Several cases were cited to us: *Manders v. Williams* (1), *Jelks v. Hayward* (2), and *Bradley v. Copley* (3) being the principal ones. *Jelks v. Hayward* (2) is by far the closest on its facts to the present case. It appears from the headnote that in that case

"Furniture was let for hire with an option of purchase under a hire purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring and re-take possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county court, and, no claim having been made to it, was appraised and sold under the execution and the proceeds paid into court, and the furniture delivered to the purchaser. On the day after the sale the owners heard for the first time of the seizure and sale of the furniture, and gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, and in the course of the interpleader proceedings the execution creditor admitted the title of the claimants, who gave a notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling it:—*Held*, that, as under the hiring agreement the claimants had a right to re-take possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them."

KENNEDY, J., said ([1905] 2 K.B. 467):

"Whatever interest the apparent possessor, the execution debtor, had in the goods seized, he had by the terms of the hire purchase agreement between him and the respondents; it was an interest terminable *ipso facto* on the occurrence of such a seizure as actually took place; in other words, the respondents became entitled to the possession of the goods without notice or demand immediately upon that act of seizure by the bailiff. In order to maintain an action of conversion for the subsequent sale by the bailiff, there must be a right in the plaintiff to immediate possession of, as well as a property in, the goods. In the present case there is no question that the goods sold were the property of the respondents: had they also a right to their possession at the time of the sale? In my opinion, they had, because the act of the bailiff in seizing entitled them to take possession of the goods immediately upon the seizure."

If in that case there had not been the words "without previous notice" it seems to me that it would have been precisely on all fours with the present

case, and one of the problems that we have to consider is whether that makes the whole difference. There are two possibilities. One is that you can terminate the hiring on a breach by simply re-taking possession. Supposing that that is the proper construction of this clause, then clearly a person who has a right to re-take possession must necessarily have had a right to immediate possession in the events that happened. Therefore, to avoid that conclusion, it is necessary for the defendant to establish that some other act, additional to or other than re-taking possession, was necessary to terminate the hiring. The easiest one to imagine is some form of notice, and the question, to my mind, reduces itself to this: On the true construction of this contract, was any notice needed to terminate the agreement?

In answering that question, it is to be noted that, if notice is needed, it can only be by virtue of an implied term, and I can see no necessity for such an implication. Moreover, it is fair to look at sub-cl. (ii) of cl. 7, because it is apparent that the learned judge who tried the case below was influenced by the language of that clause in his construction of sub-cl. (i). Sub-clause (ii) deals with contracts of hiring other than that of the car in respect of which a breach has occurred, and it provides that, if the lessor wishes to terminate those agreements, he is to give written notice. Surely (though the learned judge drew a different inference from sub-cl. (ii)) some significance attaches to the omission of any similar words in sub-cl. (i), which lies cheek by jowl with it. There is, apparently, no direct authority on the construction of the words "may terminate the hiring," and it is a little startling that there should not be because it is the commonest form of expression in hire purchase agreements and one would have expected that there would be cases which decided whether those words implied the necessity of notice as a condition precedent to the termination of the hiring or whether a mere re-taking would in itself constitute such a termination.

That being the case, I think that on the *expressio unius exclusio alterius* principle of construction we ought to hold that it is possible to terminate the hire in cl. 1 without any notice and that the moment a breach of the kind covered by cl. 7 (i) occurs the owner has a right to immediate possession. I think that the law, on the authorities generally as cited to us, is correctly summarised in POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW, p. 166, where the learned authors say:

"The remedies of the bailee are not always exclusive, for the bailor by reason of his right to possession may retain concurrently with him a sufficient right to maintain trespass and theft against strangers. This seems to be the case wherever the bailment is revocable by the bailor at his pleasure either unconditionally or upon a condition which he may satisfy at will. But if the bailment is for a term certain (as in the case of goods let to the tenant of furnished lodgings) or determinable only after notice or after a default by the bailee or upon any other occurrence which does not depend on the will of the bailor, then until the term has expired or been determined or become determinable at will it seems that the bailor is excluded and cannot maintain either trespass or theft or trover even against a stranger."

If the bailor in this case had a right to terminate this hiring at will the moment after a breach such as has occurred in this case, then it seems to me that within that language it becomes a case in which the bailor has an immediate right to possession, and can sue a third party in conversion. For those reasons, I think that this appeal ought to be allowed.

COHEN, L.J.: I am of the same opinion and for the same reasons, but, as we are differing from the learned judge in the court below, I will add a few words of my own. The case is not altogether an easy one. It turns, as the learned judge said, on the question whether, on the true construction of the



contract and in the events which have happened, the plaintiffs became entitled to possession. As a matter of construction, I agree with ASQUITH, L.J., that cl. 7 (i) of the agreement does not require notice as a condition precedent to the exercise by the plaintiffs of their right to terminate the hire. They can, I think, terminate the hire in any appropriate way, including the most obvious way of taking possession of the car. That being so, I think that *Jelks v. Hayward* (2) is clear authority for the view that the plaintiffs were in a position to maintain an action for trover. A

I must further point out that Mr. Cole, in instructing the defendant to sell, and in selling, the car, committed a breach of the contract which goes to the root of it. In those circumstances, a passage in HALSBURY, Hailsham ed., vol. 1, p. 736, para. 1211, seems in point. It says:

"The act of the bailee in doing something inconsistent with the terms of the contract terminates the bailment, causing the possessory title to revert to the bailor, and entitling him to maintain an action of trover." B

That view is stated in somewhat similar language in POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW, p. 132, where it is said:

"Any act or disposition which is wholly repugnant to or as it were an absolute disclaimer of the holding as bailee re-vests the bailor's right to possession, and therefore also his immediate right to maintain trover or detain even where the bailment is for a term or is otherwise not revocable at will, and so *a fortiori* in a bailment determinable at will." C

The authority cited for both those passages is *Fenn v. Bittleston* (4), the relevant passage occurring in the judgment of PARKE, B. (7 Exch. 159). D

Those passages, which seem to me, if I may respectfully say so, to be a correct statement of the law, definitely support the view which my brother has expressed, namely, that the plaintiffs are in a position to maintain an action in trover. Counsel for the defendant says that they only apply where the contract is silent on the subject, and that here the contract provides what is to happen in the event of a breach of any stipulation and merely gives the right to terminate the contract. That, he says, is something distinct from a right to enter into possession, and the latter right is only exercisable after notice has been given to terminate the contract. As I have said, I do not so construe the contract, and I am glad to find that the construction which I place on it accords with the view of what the law would be in the absence of express provision, and, if I may say so respectfully, with what is a very reasonable position in the circumstances of the case. For these reasons, I agree that the appeal should be allowed. E F

SINGLETON, L.J.: I agree.

*Appeal allowed. Judgment for the plaintiffs for £202 10s., with costs in both courts.* G

Solicitors: *Jaques & Co.*, agents for *Oxley & Coward*, Rotherham (for the plaintiffs); *Jackson & Jackson*, agents for *A. S. & A. E. Furniss*, Worksop (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## HUNTINGFORD v. HUNTINGFORD.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Roxburgh, J.), March 13, 1950.]

*Divorce—Costs—Poor person—Discretion to order poor person to pay opponent's costs unfettered—Order for payment of profit costs in "special circumstances"—R.S.C., Ord. 16, r. 28 (1) and r. 31B (1) (2).*

A A husband and wife, both suing as poor persons, brought petitions for the dissolution of their marriage. The commissioner found for the wife on both petitions, but he refused an application by the wife for an order for the payment by the husband of her out-of-pocket costs on the ground that under R.S.C., Ord. 16, rr. 28 (1) and 31B (1), in the absence of special circumstances a successful poor person was not entitled to receive costs from the other party to the proceedings.

B HELD: under R.S.C., Ord. 16, r. 28 (1), the discretion of the court to order the husband to pay the out-of-pocket expenses of the wife is unfettered; *Olds v. Olds* ([1948] 2 All E.R. 61), *followed*. The provisions of Ord. 16, r. 31 (B) (1), relate only to the making, on special circumstances being shown, of an order for the payment to the poor person in respect of profit costs.

C [AS TO ORDERS FOR COSTS IN POOR PERSONS' CASES, see HALSBURY, Hailsham Edn., Vol. 10, p. 704, para. 1053, and pp. 758, 759, para. 1198; and FOR CASES, see DIGEST, Vol. 27, p. 477, Nos. 5050-5052 and Digest Supp.]

Cases referred to:

- D (1) *Olds v. Olds*, [1948] 2 All E.R. 61; [1948] P. 283; [1948] L.J.R. 1385; 2nd Digest Supp.  
(2) *Collins v. Collins and Dove*, [1947] 1 All E.R. 793; 177 L.T. 183; 2nd Digest Supp.

E APPEAL from a decision of Mr. Commissioner BLANCO WHITE, K.C., dated Jan. 11, 1950, refusing to make an order for the payment in divorce proceedings by an unsuccessful poor person husband of the out-of-pocket costs of the successful poor person wife. The facts appear in the judgment of BUCKNILL, L.J.

*Tyndale, K.C., and Stuckey for the wife.*

*Middleton, K.C., and Arnold-Baker for the husband.*

F BUCKNILL, L.J.: This is an appeal from an order of Mr. Commissioner BLANCO WHITE, K.C., made on Jan. 11, 1950, whereby he refused to order the husband to pay the wife's poor persons' out-of-pocket costs. At the material time both husband and wife were poor persons. The wife brought a petition on the ground of cruelty and succeeded. The husband denied cruelty and asked for a decree to be pronounced in his favour because of his wife's desertion, but that was refused.

G The case was heard by the commissioner on June 15, 1949. On that day, when the commissioner was asked to award to the wife out-of-pocket costs, he said:

H "With regard to the costs of these two petitions, both the husband and wife are poor persons. The wife has succeeded on both petitions, but, though I have found the husband guilty of cruelty, it is not the type of case which casts any reflection against him as a man. It is simply these two individuals do not fit. The husband is a person of much greater sexual vigour than the wife, and, although his behaviour does, in fact, amount to cruelty towards the wife, it is a pure misfortune. It is not a case in which I should feel it proper to make any special order, and, therefore, the question what is the proper order to make as to costs reduces itself to a question of what is the proper interpretation of the poor persons' rules in the absence of any

special circumstances. If it were not a poor persons' case, on those facts I should almost automatically exercise my discretion by saying that the husband should pay his wife's costs unless there were good reasons shown to the contrary. Here the difficulty is because of the apparent conflict of R.S.C., Ord. 16, r. 28 (1) and r. 31B (1). As at present advised, I think the proper interpretation of those two rules together is that in the absence of any special circumstance a poor person pays no costs whether to a poor person or to an ordinary litigant. However, it is argued on behalf of the wife that apart from any special circumstances the ordinary rule would be that he would pay poor persons' costs to the successful party. As it is desirable this matter should be more fully argued I express no further opinion."

The question was then adjourned for further argument.

As regards the normal practice about poor persons' costs counsel for the wife (who has had great experience in poor persons' cases) informed the court that the usual rule is to give the poor person wife her out-of-pocket costs if she is successful against her poor person husband. So far as my experience goes, as judge of first instance in the Divorce Division for some years, I frequently made such an order and do not remember refusing to make such an order if asked to do so. I think the commissioner has not taken the usual practice sufficiently into consideration, and was in error in this preliminary judgment when he said that unless there are special circumstances "a poor person pays no costs whether to a poor person or an ordinary litigant." I read those words of the commissioner as meaning that the poor persons' rules which deal with costs prohibit the judge from granting to the successful wife any costs unless there are special circumstances.

I must refer to the two rules which are most relevant to the point. They are part of R.S.C., Ord. 16. Rule 28 (1) provides:

"No court fee shall be payable in respect of the filing of the certificate nor in respect of the memorandum to be issued under r. 27 of this Order and after such filing the poor person named in the certificate shall not be liable for any court fees and unless the court or a judge shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges."

It is clear from the decision of the Court of Appeal in *Olds v. Olds* (1) that this rule gives the judge who tries the case an absolute discretion to give the poor person his or her costs against another person who is a poor person. Rule 31B (2) says:

"Where it appears to the court or a judge that any other party has acted unreasonably in bringing or defending the proceedings or in his conduct of them, or that the special circumstances of the case require it, the court or judge may order the other party to pay the costs of the poor person, including profit costs, or a proportion of profit costs, or a sum of money in respect thereof, in addition to out-of-pocket expenses properly incurred in the course of the proceedings but not fees to counsel . . ."

The other party therein referred to clearly also includes some one who is not a poor person. I think that the commissioner read into r. 28 (1) a limitation as regards the special circumstances referred to in r. 31B (2) which he ought not to have done, because by so doing he fettered the absolute discretion given to the judge under r. 28 to make an order as to costs if he was so minded.

That having taken place on June 15, 1949, in January, 1950, the matter was further argued and leading counsel were brought in because the case appeared to raise a question of general importance. The commissioner then gave a more elaborate judgment and in its course he said:

"The wife succeeded. On the facts of the case I was of opinion that there was no ground on which I ought to make any special order. Counsel for the



wife who had succeeded said that in those circumstances on a proper interpretation of the poor persons rules, that is to say, R.S.C., Ord. 16, r. 22, onwards, the wife should receive what are usually called poor persons' costs, namely, her out-of-pocket expenses. On the other hand, on behalf of the husband, it was argued that he, being a poor person should not, in the absence of a special order, pay costs . . . For convenience I will use the phrase 'special order' (used by TUCKER, L.J., in *Olds v. Olds* (1)) to mean an order ordering otherwise than under r. 28 (1). Using that phrase, r. 28 (1) provides (i) unless there is a special order 'no poor person shall be liable to pay costs to any other party'; and (ii) unless there is a special order 'no poor person shall be entitled to receive from any other party any profit costs or charges.' One is a limitation on the liability of a poor person to pay costs; the other is a limitation upon the right of the poor person to receive costs, and, apart from any special order, first he is not liable to pay any costs at all, and, secondly, he is not entitled to receive any profit costs or charges."

Later, he said:

"If there is no special order then it appears to me that r. 28 (1) covers the matter. A poor person is not liable to pay any costs and is not entitled to receive from any other party any profit costs or charges . . . If there is no reason for a special order, what happens then? Does the poor person wife get her out-of-pocket expenses or does the poor person husband pay nothing?

Then he cited from the judgment of TUCKER, L.J., in *Olds v. Olds* (1), and eventually summarised the position this way:

"If the husband is a poor person, the wife does not get her costs, apart from a special order. I see no reason why, if she is also a poor person, she should get out-of-pocket expenses because she is a wife, apart from a special order. On the true interpretation of these sections I think there has to be an affirmative exercise of the court's discretion under r. 28 (1), what, in this judgment, I have called a special order, to entitle a successful poor person to receive costs from an unsuccessful poor person."

With great respect to the commissioner, I think, that he erroneously tried to read r. 28 in the light of r. 31B. His constant use of the phrase "special order," which is not in the rules, seems to indicate that. I cannot see why an order giving poor persons' costs to a successful wife against her unsuccessful husband should be regarded as a special order. All that r. 28 requires is that there should be an order by the court to that effect, and an order to pay costs is required in every case. I think that the commissioner has misdirected himself in this respect and that it would be unfortunate if his judgment were to stand because it seems to me to indicate that, unless there are circumstances which justify a special order, a poor person wife is not entitled to get her out-of-pocket costs from her poor person husband. There is no point in using the word "special" unless there are special circumstances calling for it. That being so, I think that this is a case in which it is proper for us to reverse the decision of the commissioner. I think the appeal should be allowed.

**DENNING, L.J.:** In *Olds v. Olds* (1) this court held that the power under r. 28 to order a poor person to pay costs was in the unfettered discretion of the court. The commissioner seems to have felt himself fettered by considering that there ought to be "special circumstances." That, I think, was wrong. When a poor person wife brings a suit against a poor person husband, the court has an unfettered discretion to order the husband to pay the out-of-pocket expenses of the wife and has repeatedly done so for many years. So long as the court realises that it is making an order against a poor person, the order for

costs is perfectly good, even though it does not say on its face that it is a discretionary order. If *Collins v. Collins and Dove* (2) decides the contrary, I cannot agree with it. Accordingly, I agree that the appeal should be allowed.

**ROXBURGH, J.:** I agree. The wife was a poor person, and, therefore, under r. 31B she could not recover more than her out-of-pocket expenses unless there were special circumstances, but there the relevance of r. 31B in this case ceases as no more than out-of-pocket expenses were claimed. I can see here no possibility of any conflict between r. 28 and r. 31B. It seems to me that the commissioner had to consider whether under r. 28 he should "otherwise order," because it is plain that, if he did not "otherwise order," the respondent husband, as a poor person, would not be liable to pay any costs. In considering whether he would "otherwise order," he had an unfettered discretion. It seems to me that he did not fully appreciate that he was thus placed, but that he felt that there was some limitation on his discretion. It would also seem that he did not take account of what I understand to be the prevailing practice in regard to poor persons in divorce matters. I, accordingly, agree that this appeal should be allowed.

*Appeal allowed.*

Solicitors: *Miss P. B. Topham*, Law Society Services Divorce Dept. (for the wife); *F. N. W. Lockyer*, Law Society Services Divorce Dept. (for the husband).

[Reported by C. ST.J. NICHOLSON, Esq., *Barrister-at-Law*.]

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## NOTE

### HYDE v. HYDE.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Hodson, J.), March 22, 1950.]

*County Court—Appeal—Claim exceeding £200—Issue tried in county court by consent—Decision on question of fact—Right of appeal—County Courts Act, 1934 (c. 53), s. 105.*

APPEAL by the defendant from an order of His Honour JUDGE PUGH, made at Bow County Court on Dec. 14, 1949.

*Elson Rees* for the defendant.

*Lester* for the plaintiff.

Case referred to:

(1) *Braddock v. Tillotsons Newspapers, Ltd.*, [1949] 2 All E.R. 306; [1950] 1 K.B. 47.

The parties to the action agreed to the issue being tried in the county court, although the amount claimed by the plaintiff exceeded £200. The county court judge gave judgment for the plaintiff on the facts of the case, and the defendant thereupon appealed to the Court of Appeal for leave to adduce further evidence.

HELD: in a case which had been tried by consent in the county court the right of appeal was the same as in all other cases tried in the county court, and, as there was no point of law in the case, but merely a question of fact, under the County Courts Act, 1934, s. 105, no appeal lay.

Solicitors: *S. Myers & Son* (for the defendant); *T. V. Edwards* (for the plaintiff).

C.St.J.N.

**Re MILL'S DECLARATION OF TRUST. MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD. v. MILL AND OTHERS.**

[CHANCERY DIVISION (Romer, J.), February 22, 23, March 8, 1950.]

*Perpetuities—Settlement—Limitation dependent on void limitation—Accord with previous valid limitations—“Issue.”*

A By a deed of declaration of trust a settlor settled certain investments (called “the trust fund”) on trust to pay one half of the annual income thereof to his wife during her life and the other half thereof to his daughter during her life, and to pay the whole of the said income to the survivor of his wife and his said daughter. On the death of the survivor the trustees were directed to stand possessed of the trust fund in trust in equal shares for all or any the children of his said daughter then living who attained the age of twenty-one years or being female married under that age, and to hold each such child's share on trust to pay the income thereof to such child for his or her life. The settlor further provided: “6. After the death of each of such children the capital and income of the share of such child shall be held in trust for all or any one or more exclusively of the others or other of the issue of such child (whether children or remoter descendants) at such time and if more than one in such shares with such provisions for maintenance education advancement and otherwise at the discretion of any persons and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as such child shall by deed revocable or irrevocable or by will or codicil appoint but so that under any appointment a child of the appointor shall not (otherwise than by way of advancement) take a vested interest except upon attaining the age of twenty-one years or upon marriage And in default of and until and subject to any such appointment in trust for all or any the children or child of such child who attains the age of twenty-one years or being female marry under that age and if more than one in equal shares. . . . 8. Upon the death of the survivor of the wife and the said daughter and in the event of the said daughter dying without leaving issue who attains a vested interest the trustees shall sell and convert into money such part of the trust fund as does not consist of money and shall distribute the proceeds in manner following . . .” and the settlor gave certain sums of money to various charities and directed that the balance of the trust fund be distributed amongst certain named persons. On May 11, 1939, the settlor died. On Nov. 10, 1948, the settlor's daughter died, having married, but without there having been issue of her marriage. The settlor's widow survived the daughter.

G HELD: (i) on the construction of the deed, the word “issue” in cl. 8 was referable exclusively to cl. 6 and was not intended to include children of the daughter; as cl. 6 was admittedly void for perpetuity, cl. 8 was limited to operate on the failure of a class which, had it come into being, would have been precluded from taking; and, therefore, cl. 8, which did not accord with previous valid limitations, was also void.

*Monypenny v. Dering* (1852) (22 L.J.Ch. 313) and *Re Thatcher's Trusts* (1859) (26 Beav. 365), applied.

H (ii) although the gift of income to the survivor of the widow and the daughter was not expressly limited to endure only for her life, having regard to the other provisions of the deed such a limitation should be implied, and, in the circumstances, the corpus of the trust fund would, on the widow's death, result to settlor's estate.

[AS TO APPLICATION OF RULE AGAINST PERPETUITIES TO ALTERNATIVE LIMITATIONS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 143-145, paras. 240-243; and FOR CASES, see DIGEST, Vol. 37, pp. 102-106, Nos. 374-398.]



Cases referred to:

- (1) *Re Bence*, [1891] 3 Ch. 242 60 L.J.Ch. 636; 65 L.T. 530; 37 Digest 105, 396.
- (2) *Monypenny v. Dering*, (1852), 2 De G., M. & G. 145; 22 L.J.Ch. 313; 19 L.T.O.S. 320; 37 Digest 123, 548.
- (3) *Re Davey*, [1915] 1 Ch. 837; 84 L.J.Ch. 505; 113 L.T. 60; 37 Digest 105, 392.
- (4) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 37 Digest 99, 346. A
- (5) *Re Thatcher's Trusts*, (1859), 26 Beav. 365; 37 Digest 103, 385.
- (6) *Longhead v. Phelps*, (1770), 2 Wm. Bl. 704; 37 Digest 102, 376.
- (7) *Beard v. Westcott*, (1813), 5 Taunt. 393; *subsequent proceedings* (1822), Turn. & R. 25; 44 Digest 1271, 10992.
- (8) *Somerville v. Lethbridge*, (1795), 6 Term Rep. 213; 37 Digest 126, 581. B

ADJOURNED SUMMONS to determine the construction of certain clauses in a deed of declaration of trust executed by H. Mill. The facts and the relevant clauses of the deed are set out in the judgment, and are summarised in the headnote.

*Wilfrid Hunt* for the plaintiff, one of the trustees of the deed.

*Raymond Jennings, K.C.*, and *B. S. Tatham* for the first defendant, the settlor's widow. C

*R. S. Lazarus* for the second defendant, the Jewish Board of Guardians, interested under cl. 8 of the deed.

*F. B. Alcock* for the third defendant, one of the administrators of the estate of the settlor's daughter.

*Cur. adv. vult.* D

Mar. 8. **ROMER, J.**, read the following judgment. By the above-mentioned deed of declaration of trust the settlor, Mr. Henry Mill, settled certain investments for the benefit of his widow and his daughter and any children or remoter issue that his daughter might have. In the event of his daughter, who was then a spinster, leaving no issue who should attain a vested interest, the settlor introduced certain beneficial dispositions in favour of charities (including the defendants, the Jewish Board of Guardians) and others under a gift over, and it is the terms in which the gift over is expressed that has in part given rise to the present application. E

So far as material the deed is in the following terms:

"2. The trustees shall stand possessed of the investments aforesaid and the varied investments for the time being representing the same (all of which are hereinafter referred to as 'the trust fund') and of the annual income of the trust fund upon the trusts and with and subject to the powers hereafter declared concerning the same. 3. The trustees shall pay one half of the annual income of the trust fund to the wife of the settlor during her life and the other half thereof to his daughter Agnes Martha Mill (hereinafter called 'his said daughter') during her life and from and after the death of either his wife or his said daughter the trustees shall pay the whole of the said annual income to the survivor of them. 4. From and after the death of the survivor the trustees shall stand possessed of the trust fund in trust in equal shares for all or any the children of his said daughter living at the death of the survivor of his wife and his said daughter who attains the age of twenty-one years or being female marry under that age. 5. The trustees shall stand possessed of the share of each of such children or the investments representing the same and the accumulations (if any) of income made during his or her life and while unmarried which investments and accumulations are hereinafter included in the description of such child's share (subject to any advancement which may be made for his or her benefit under the power for that purpose hereinafter mentioned) upon trust to pay the income thereof to such child for his or her life. 6. After the death of each of F G H

such children the capital and income of the share of such child shall be held in trust for all or any one or more exclusively of the others or other of the issue of such child (whether children or remoter descendants) at such time and if more than one in such shares with such provisions for maintenance education advancement and otherwise at the discretion of any persons and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as such child shall by deed revocable or irrevocable or by will or codicil appoint but so that under any appointment a child of the appointor shall not (otherwise than by way of advancement) take a vested interest except upon attaining the age of twenty-one years or upon marriage And in default of and until and subject to any such appointment in trust for all or any the children or child of such child who attains the age of twenty-one years or being female marry under that age and if more than one in equal shares. 7. Any child of such child who or whose issue takes any part of the share of such child under any appointment by such child shall not in the absence of any direction by such child to the contrary take any share in the unappointed part without bringing the share or shares appointed to him or her or his or her issue into hotchpot and accounting for the same accordingly. 8. Upon the death of the survivor of the wife and the said daughter and in the event of the said daughter dying without leaving issue who attains a vested interest the trustees shall sell and convert into money such part of the trust fund as does not consist of money and shall distribute the proceeds in manner following that is to say. . . ”

and the settlor then gave certain sums of money to various bodies including one of £100 to the Jewish Board of Guardians, and then directed the distribution of the balance of the trust fund among certain named persons. Clause 9 provides: “The statutory power of advancement shall apply for the benefit of any child or other issue of the said daughter.”

The settlor died on May 11, 1939. He was sole trustee of the trust fund during his lifetime, and the plaintiffs and the first defendant (the settlor's widow) are now the trustees of the deed, they being the settlor's legal personal representatives. The trust fund is of an approximate value of £23,000. The settlor's daughter, described in the settlement as Agnes Martha Mill, married the defendant, Israel Levine, but there was no issue of the marriage. She died on Nov. 10, 1948, intestate, and letters of administration issued on Dec. 17, 1948, out of the Exeter District Registry to her husband and her mother.

Accordingly, as matters now stand, the whole income of the trust fund is payable to the settlor's widow, but the parties are anxious to know now what are the trusts, in the events which have happened, that affect the corpus of the fund. It is argued on behalf of the settlor's widow and the daughter's estate that the gift over of the fund by cl. 8 of the settlement is void. On the other hand, the defendants, the Jewish Board of Guardians, as representing the beneficiaries under that clause, are concerned to maintain its validity. Now, although, had cl. 4 of the settlement stood alone, children of the settlor's daughter would (subject to surviving the widow and fulfilling the requisite age or marriage qualification) have taken the corpus of the fund, the effective gifts of capital are to be found in cl. 6, and these gifts, which are in favour of grandchildren and remoter issue, were, accordingly, intended to qualify or cut down the earlier interests conferred on the children by cl. 4. The gifts in cl. 6, however, are manifestly void in that they infringe the rule against perpetuity. The event on which the gift over in cl. 8 is to take effect is the event of the daughter dying without leaving issue who attains a vested interest. Counsel for the settlor's family contend that this is one compound event and that, as the settlor did not himself “split” the event into two alternatives, cases such as *Re Bence* (1) show that the court will not divide up the event itself. They,

accordingly, contend that, inasmuch as cl. 6 is admittedly invalid, cl. 8 is equally so as being dependent on it. They further contend that the gift over must necessarily fail in that it does not "dovetail in" with the earlier valid trusts, namely, those declared by cl. 4 and cl. 5, and as to this I was referred to *Monypenny v. Dering* (2).

Counsel for the charities concedes that the event on which the gift over is expressed to take effect cannot be split into alternative events, but he claims that the gift is valid on the following grounds. He argues that the gift over does not offend against the perpetuity rule because the words in cl. 8 "dying without leaving issue" mean "dying without leaving issue living at the death of the daughter"; and in this connection reliance was placed on *Re Davey* (3). Such issue, it is said, could consist of children of the daughter (taking under cl. 4) or more remote issue (taking under cl. 6) and that as a child or grandchild, living at the daughter's death, would attain a vested interest (if at all) not later than twenty-one years from such death no question of remoteness can arise. As to this, it is true that if the daughter had had children they might well have taken by virtue of the rule in *Lassence v. Tierney* (4) on failure of the trusts grafted on their original shares. As a question of construction, however, I am of opinion that the word "issue" in cl. 8 is referable exclusively to cl. 6 and was not intended to include children of the daughter. There is a clear distinction drawn in the settlement between children of the daughter and more remote issue. It is to the latter alone that the enjoyment of the capital was intended to pass, and it is with reference to them alone that the words "vested interest" had previously been used. Accordingly, in my judgment, the event referred to in cl. 8 is the event of the daughter dying without leaving grand-children or remoter issue who attain a vested interest under cl. 6. Is, then, this gift over good? It appears to me that it is not. On the footing that "leaving" postulates living at the death, one may assume the case of the daughter outliving her mother and dying survived by a daughter and such daughter's infant son. Had cl. 6 been valid that grandchild of the settlor's daughter would attain a vested interest at twenty-one and, in that event, the gift over to the charities under cl. 8 would never have taken effect. On the other hand, as cl. 6 is wholly invalid, the grandchild could never attain a vested interest even if it did attain twenty-one. The settlor only intended the charities to take if the grandchild died before twenty-one, and, in my opinion, the charities could not claim to take on an event in which they were never intended to take and in the place of a person, namely, the grandchild, who was intended to take.

The principle applicable is, in my judgment, that propounded by LORD ST. LEONARDS, L.C., in *Monypenny v. Dering* (2) and commented on by SIR JOHN ROMILLY, M.R., in *Re Thatcher's Trusts* (5). So far as material the headnote in *Monypenny v. Dering* (2) is:

"J.M. by his will devised the Maytham Hall estate, being of gavelkind tenure, to trustees upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P.M. for life, and after his decease for the first son of P.M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue, for every other son of P.M. successively for the like interests and limitations, and in default of issue of the body of P.M., or in case of his not leaving any at his decease, for T.M. for life, and after his decease for T.G.M. the eldest son of T.M. for life, and after his decease for the first son of T.G.M. and the heirs male of his body, and in default of issue of the body of the said T.G.M., for every other son of T.M. successively for the like estates and interests, and on failure of all such issue of the body of T.M., upon trust for him, his heirs and assigns for ever; P.M. never had any children:—*Held*, that P.M. took an estate for life with remainder to his first unborn son, if such son had been born, and that all the remainders over were void:—*Held*, also, that effect



was to be given to the gift over to T.M. and his sons in default of issue of the body of P.M. etc., as an independent clause, and that it was consequently valid . . . Where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuity, effect cannot be given to such clause unless it will accord with previous valid limitations."

A It is with reference to that proposition alone that I wish to refer to LORD ST. LEONARDS' judgment. He deals with it as follows (2 De G.M. & G. 180):

"This brings me to the clause containing the gift over, and a very important question is certainly raised on that clause. After having provided for the unborn children and issue of unborn children of Phillips Monypenny, the testator says, 'And in default of issue of the body of my said brother, Phillips Monypenny, or in case of his not leaving any at his decease, upon trust for my said brother, Thomas Monypenny, for and during the term of his natural life,' etc. If this was a regular remainder, depending upon the previous limitations, it would, of course, be open to the same objections as those limitations, and, those limitations being void, it could not take effect. The law, as to this part of the case, stands in a peculiar position. The case of *Longhead v. Phelps* (6) shews that where there are two clauses containing a gift over, the first being a good gift over on a particular event, and the second being one which would be too remote, and therefore void, advantage may be taken of the former without any notice being taken of the latter clause. The point did not arise in the case just mentioned on a gift over following any disposition illegal on account of perpetuity; but it did so arise in a very important case which was not cited, and which was very much agitated both in this court and the courts of Common Law, I mean *Beard v. Westcott* (7). There were in that case successive life estates for terms of years to the testator's grandson and his unborn issue (as in *Somerville v. Lethbridge* (8)), which were clearly void beyond the first son, and then followed a disposition to this effect: 'And in case there shall be no issue male of the same John James Beard (the testator's grandson), nor issue of such issue male at the time of his death, or in case there shall be such issue male at that time, and they shall all die before they shall respectively attain their respective ages of twenty-one years without lawful issue male,' then the estate was to go over. The case was sent to the Court of Common Pleas, and they were of opinion (that part of the case is cited in a note to GILBERT ON USES, p. 270) that the several gifts, after the gift to the unborn son of the grandson, were void, but they were also of opinion that, if the event mentioned arose, the gift over would take effect, the event in question being within the legal limits of perpetuity. With this decision I could not agree, and for this reason, that the testator never meant that the gift over should take effect unless the parties interested under the previous limitation, if they had lived, were capable themselves of taking, and that, consequently, the gift over must be void. Having had great difficulty in prevailing on SIR WILLIAM GRANT to send the case to the Court of Common Pleas originally, and that court having decided that the consideration I have just stated did not affect the validity of the gift over, I applied to and prevailed on LORD ELDON to send a case to the Court of King's Bench. That court held that the gift over was void, not because it was not within the line of perpetuity, but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take; and LORD ELDON affirmed that decision.

This shews that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid. This reasoning will apply to the case before me in this manner; if the gift in question can be read as a gift in the alternative, that, in case there is no issue living at the death of the brother, the estate is to go over, then effect may be given to it consistently with *Beard v. Westcott* (7) and every other authority, because the estate over would not be carried under the limitation at the expense of any person whom the testator intended to take, and no objection on this ground could consequently be raised."

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In *Re Thatcher's Trusts* (5) the headnote is:

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"The testator by his will, dated in 1835, gave one-fifteenth of the produce of his real and personal estate to his grand-daughter Elizabeth Hobbs for life, and after her decease in trust for the child, if only one, and if more than one, for the children of her, the said Elizabeth Hobbs, the grand-daughter, to be equally divided between or among the same children, if more than one, share and share alike, and to be vested in such of the same children as should be a son or sons when he or they should attain the age or respective ages of twenty-five years, or die under that age leaving issue, at his or their death or respective deaths, and on such of the same children as should be a daughter or daughters, when she or they respectively should attain the age or respective ages of twenty-five years, or be married (with consent), which as to each of them should first happen, and to be payable as soon after the respective ages or days should be attained, and also after the death of the said Elizabeth Hobbs, his grand-daughter, as conveniently might be. And in case any child of Elizabeth Hobbs 'should depart this life, being a son or sons, under the age of twenty-five years, without leaving any issue living at the time of his or their death or respective deaths, or being a daughter or daughters should die under that age and without having been married' with consent, then her share was to be divided between the other children. 'And in case there should be no child of Elizabeth Hobbs, who being a son should attain the age of twenty-five years, or die under that age leaving issue, or being a daughter should attain that age or be married with consent,' the fund was to be held in trust, as to one moiety, for William Hobbs, and as to the other moiety upon the same trusts as were thereinbefore declared respecting another one-fifteenth, which the testator had previously bequeathed to Ann Tuckwell for her life, and afterwards to her children in a similar manner. But in case the said William Hobbs and Ann Tuckwell should both have departed this life without leaving any child or children, or the issue of any deceased child, then the fund was to be held in trust for the testator's next of kin."

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The Master of the Rolls, after holding that the gift to the children of Elizabeth Hobbs, was void for remoteness, said (26 Beav. 369):

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"Then arises the question, whether the gift over to Mrs. Tuckwell for life is good, this being a limitation to a person in existence at the date of the will. The distinctions on this subject are well defined, although they may not be in every case susceptible of a ready application to the particular words of a will. On the one hand, it is clearly settled that if there be two alternative limitations, one branch of which is too remote, and the other of which is capable of taking effect, the court will disregard the invalid limitation and give effect to that which is legal. *Longhead v. Phelps* (6) is an instance of this distinction, which rests on sound and settled rules of construction. On the other hand, if the limitations are ulterior to or expectant upon limitations which are too remote, they are void also,

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although made to a person in existence at the date of the will. The case of *Beard v. Westcott* (7) and *Monypenny v. Dering* (2) are instances of the second class of cases. Nothing can be more distinct than the mode in which this is explained by LORD ST. LEONARDS, both in his argument and also in his judgment in *Monypenny v. Dering* (2)."

I might point out there that when SIR JOHN ROMILLY refers to LORD ST. LEONARDS' argument he is referring to his argument in *Beard v. Westcott* (7). At first sight it looks as though he argued and delivered judgment in *Monypenny v. Dering* (2). Then the judgment goes on (*ibid.*, 370): "He says that the Court of King's Bench held the gift over in *Beard v. Westcott* (7) void." He cites from a judgment of LORD ST. LEONARDS which I have already read, and goes on to say (*ibid.*):

"This is strictly applicable to the present case; it is impossible here to say that the limitation to Mrs. Tuckwell is an alternative limitation; it is clearly one expectant upon the failure of the previous limitation to the children. It does not, to use the words of LORD ST. LEONARDS, 'dovetail in and accord with previous limitations which are valid' but it is intended not to take effect unless the children, whom he intended to take effect under the previous limitation, would have been capable of taking. The testator never intended Mrs. Tuckwell to take if there were children in existence but who were prevented by law from taking. I am of opinion, therefore, that the whole limitation fails, and that an order must be made in accordance with the prayer of the petition."

Applying the principles stated in these judgments to the present case, it seems to me impossible to say that the gift to the charities "dovetails in and accords with previous limitations which are valid." Such previous limitations are those to the daughter's children in cl. 4 and cl. 5, and the gift over in cl. 8 in no sense fits in with them. Indeed, unless it is read in relation to cl. 6, it is not intelligible at all. In my judgment, the gift over is expectant on the failure of a class (or certain members of a class) which the settlor intended to benefit, but which, had it come into being, would have been precluded by law from taking and is avoided by the principles recognised in the two decisions to which I have referred.

The next question that arises is whether, in these circumstances, the fund subject to the trusts of the deed (a) is held in trust for the defendant, Annie Mill, absolutely as to both income and capital, or (b) subject to a life interest for the said defendant, devolves by way of resulting trust on the estate of the settlor. The suggestion that the first defendant is entitled to the fund absolutely is founded on the fact that, whereas, by cl. 3, the income of the fund is originally divided between the widow and daughter expressly for their respective lives, the trust which is to take effect on the death of either of them is "to pay the whole of the said annual income to the survivor of them," no reference to the life of the survivor being expressed. Although an indefinite gift of income may in some cases be tantamount to a gift of the corpus which produces the income, it is, I think, reasonably clear in the case of this settlement that the survivor of the settlor's widow and daughter were only intended to take the income for life, having regard to the other provisions of the deed, and I have no difficulty in implying such a limitation in cl. 3. The result is that, subject to Mrs. Mill's life interest, the trust fund devolves on the settlor's estate by way of resulting trust.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the settled fund.

Solicitors: *W. R. Bennett & Co.* (for the plaintiff and the first defendant); *Stephenson, Harwood & Tatham* (for the second defendant); *Field, Roscoe & Co.*, agents for *Ford, Simey & Ford*, Exeter (for the third defendant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]



# WALTER *v.* ETON RURAL DISTRICT COUNCIL AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), March 13, 1950.]

*Local Government—Superannuation—Decision of claim by “ authority concerned ”  
—Scheme administered by county council—Employees of rural district council  
entitled to participate—Claim to annual superannuation allowance by former  
employee of rural district council—Claim admitted by rural district council,  
but rejected by county council—Local Government Superannuation Act,  
1937 (c. 68), s. 35.*

The plaintiff, who was employed by a rural district council, was entitled, under the Local Government Superannuation Act, 1937, s. 4 (1), to participate in the benefits of a superannuation fund maintained by the county council. Under s. 1 (3) of the Act, the county council were the “ administering authority ” of the fund. On giving notice that he was unable, owing to ill-health, to continue to discharge his duties efficiently, the plaintiff claimed to be entitled, under s. 8 of the Act, to an annual superannuation allowance. His claim was admitted by the rural district council, but rejected by the county council, and his appeal from the decision of the county council was dismissed by the Minister of Health. In an action by the plaintiff against the two councils, claiming a declaration that he was entitled to a superannuation allowance, the county council contended that, under s. 35 of the Act, the Minister's determination of the question was final. The plaintiff contended that the question was not one for the determination of the Minister under s. 35, because the rural district council were “ the authority concerned ” within the meaning of the section, and, as they had accepted his claim, the county council, as the “ administering authority,” were merely under a duty to pay him.

HELD: it was the right and duty of the “ administering authority ” to see that an employee, who claimed to be paid out of the fund, was entitled to be paid; therefore, the county council, being the “ administering authority ” of the fund, were “ the authority concerned,” within the meaning of s. 35; and, accordingly, the determination of the Minister on the appeal from their decision was final, and the plaintiff was not entitled to the declaration asked for.

[FOR THE LOCAL GOVERNMENT SUPERANNUATION ACT, 1937, see HALSBURY'S STATUTES, Second Edn., p. 569.]

ACTION against the Eton Rural District Council and the Buckinghamshire County Council claiming a declaration that the plaintiff, a former employee of the rural district council, was entitled, under the Local Government Superannuation Act, 1937, s. 8, to an annual superannuation allowance out of the superannuation fund which was maintained and administered by the county council and in which the employees of the rural district council were entitled to participate. The plaintiff's claim to an allowance was admitted by the rural district council, but rejected by the county council who contended that he was not entitled to the declaration as the Minister had dismissed his appeal from the decision of the county council, and, under s. 35 of the Act, the determination of the Minister was final. The facts appear in the judgment.

*H. B. Williams, K.C., and Maurice Lyell* for the plaintiff.

*Heathcote-Williams, K.C., and Ronald Bernstein* for the first defendants, Eton Rural District Council.

*Simes, K.C., and Roots* for the second defendants, Buckinghamshire County Council.

**LORD GODDARD, C.J.:** The plaintiff, a former employee of the Eton Rural District Council, has brought this action against that authority and the

A county council of Buckinghamshire claiming a declaration that he is entitled to be paid an annual superannuation allowance under the Local Government Superannuation Act, 1937, at the appropriate rate. The rural district council have put in a defence to the effect that, in their view, which they have stated, the plaintiff is entitled to be paid and he should not have brought the action against them. The second defendants, the county council, say, in effect, that the question whether he is entitled to a superannuation allowance has to be decided by them and not by the rural district council, and that, as they have decided against him and his appeal from their decision has been dismissed by the Minister under s. 35 of the Act, he is not entitled to the declaration.

B Under the Local Government Superannuation Act, 1937, s. 1 (1), a superannuation fund has to be established by certain local authorities. The Buckinghamshire County Council already had such a fund, and, under s. 4 (1) of the Act, the fund maintained by them is the appropriate superannuation fund in relation to the plaintiff, as, by an admission agreement made in 1925, the employees of the rural district council are entitled to participate in the benefit of the fund maintained by the county council. By s. 1 (3) of the Act, the county council are the "administering authority" of the fund. By s. 35:

C "Any question concerning the rights or liabilities of an employee of a local authority, or of a person claiming to be treated as such an employee, under any of the provisions of Part I or this Part of this Act, or any regulations made under this Act, shall be decided in the first instance by the authority concerned, and if the employee is dissatisfied with any such decision or with the authority's failure to come to a decision, shall be determined by the Minister, and the Minister's determination shall be final."

D The plaintiff gave notice to the rural district council that, by reason of permanent ill-health and infirmity of body, he was unable to discharge his duties efficiently. The rural district council accepted his notice, agreed that he was in the state of health described, and forwarded the notice to the county council. The plaintiff then claimed that, as a contributory employee to the superannuation fund, he was entitled, under s. 8 of the Act, to receive an annual superannuation allowance.

E It is contended by the county council that I cannot decide the question whether the plaintiff is entitled to the allowance, as, under s. 35 of the Act, it is one for the Minister, with whom the final decision rests. Counsel for the plaintiff contends that this is not a question for the Minister because the authority concerned in this case is the rural district council, and, as they have decided that the plaintiff is entitled to the superannuation allowance, the county council, as the "administering authority," are merely under a duty to pay him. I should like to be able to accept that argument, but I do not think I can.

F The words used in s. 35 are: "Any question concerning the rights ... of an employee of a local authority, or of a person claiming to be treated as such an employee ... shall be decided in the first instance by the authority concerned ..." and the question is: Who are "the authority concerned"? G Counsel for the county council contends that "the authority concerned" is the authority who have to administer the fund. He points out that s. 8 of the Act merely gives an employee the right to receive a superannuation allowance if certain conditions are fulfilled, and does not confer a right or duty on any authority to make a decision, and, therefore, it is the authority who have to pay, i.e., the "administering authority," who must satisfy themselves that the employee has brought himself within the provisions of s. 8, and, if he has not done so, the "administering authority" cannot pay, and have the right and the duty to refuse to pay. I think that the argument of counsel for the county council is right. "The administering authority" have to see to the proper application of the fund and, if an employee claims to be paid out of it, it seems to me that the body who have the duty of paying must satisfy themselves that he has the right to be paid. If they decide that he is not entitled to be paid, and

the employee is dissatisfied with their decision, then, under s. 35 of the Act, the question concerning the rights of the employee is to be determined by the Minister, whose determination is to be final. For these reasons I come to the conclusion that this action fails.

*Action dismissed with costs.*

Solicitors: *Timothy Hales* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *G. L. Bridger*, Slough (for Eton Rural District Council); *Pyke, Franklin & Gould*, agents for *Guy R. Crouch*, Aylesbury (for Buckinghamshire County Council).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

## BORTHWICK-NORTON AND OTHERS v. ROMNEY WARWICK ESTATES, LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Cohen and Singleton, L.J.J.), March 15, 1950.]

*Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Suffering premises to be used as a brothel—User by sub-tenant—Knowledge of tenant—Imputation of knowledge—Relief—Exercise of discretion of court—Law of Property Act, 1925 (c. 20), s. 146 (2).*

The lease of certain premises contained a covenant by the tenants not to do, or suffer to be done, on the premises any act which might be an annoyance, damage or disturbance to the landlords or their tenants, and to use them as a private dwelling-house only, and there was a proviso for re-entry in the event of a breach of covenant. The premises had been divided into a number of flats, and in 1947 the tenants sub-let the top flat to Mrs. Y. Complaints regarding Mrs. Y.'s conduct and the manner in which she was using her flat were made to the tenants by their sub-tenants in other flats on the premises, but the tenants took no steps to ascertain whether or not the allegations were true. On Aug. 30, 1948, Mrs. Y. was convicted of keeping the flat as a brothel. On Sept. 14 the tenants gave her notice to quit, and she thereupon vacated the flat. Pursuant to the Law of Property Act, 1925, s. 146 (1), the landlords served a notice on the tenants complaining that they had committed a breach of covenant by suffering the premises to be used as a brothel. In an action by the landlords for forfeiture and possession, the tenants contended that they had not suffered the premises to be used as a brothel because they had no knowledge that they were being used in that manner. The judge held that the law would impute knowledge to them as they had received sufficient warning of what was going on on the premises, but had wilfully shut their eyes to the true state of affairs. Accordingly, he found them guilty of a breach of covenant, and, having regard to their conduct, he held that they were not entitled to relief under s. 146 (2) of the Act of 1925. The tenants appealed.

HELD: (i) there was ample evidence to support the conclusion of the judge that the tenants had deliberately shut their eyes to the true state of affairs, and, therefore, they were guilty of a breach of covenant.

(ii) the discretion given to the court by s. 146 (2) of the Act of 1925, to grant relief against forfeiture was not to be exercised in favour of persons who suffered premises to be used as a brothel, and, therefore, as the tenants were found guilty of a breach of covenant by suffering the



premises to be used as a brothel, they were not entitled to relief under the section.

*Decision of HILBERY, J. (ante, p. 362), affirmed.*

[AS TO RELIEF AGAINST FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 260, 261, para. 293; and FOR CASES, see DIGEST, Vol. 31, pp. 487, 488, Nos. 6354-6356.]

A APPEAL by the defendant company from an order of HILBERY, J., dated Jan. 23, 1950, and reported *ante*, p. 362, in an action for possession of premises on the ground of breach of covenant.

B The plaintiffs were the present trustees of the Paddington Estate. In 1869 the premises, 81, Warwick Avenue, Paddington, were demised by the then trustees of the estate to John Kellond for a term of ninety-seven and a quarter years from June 24, 1869, and the lease contained a covenant by John Kellond for himself, his executors, administrators and assigns that he would not do, or suffer to be done, on the premises any act which might be, or grow to be, an annoyance, damage, or disturbance to the Ecclesiastical Commissioners (who were parties to the deed), or the trustees for the time being or their tenants, and would keep and use the premises as and for a private dwelling-house only. The lease contained a proviso for re-entry by the trustees in the event of any breach of covenant. In 1938 the lease became vested in Mrs. Ada Purnell, and on June 21, 1947, the defendant company became the assignees of the residue of the term created by the lease. The defendant company was a family concern, and was managed by John Edward Purnell, the chief shareholder, and his mother, Mrs. C Ada Purnell, and the rents of the properties owned by the defendant company were collected weekly by Mr. or Mrs. Purnell. The premises, 81, Warwick Avenue, had been divided up into a number of flats or tenements, and the top flat was let by Mrs. Purnell, on behalf of the company, to a Mrs. Young. When collecting the rent from Mrs. Young, Mrs. Purnell used to go into the living room of the flat, but, according to her evidence, she "saw nothing to make her feel uncomfortable." On Aug. 30, 1948, as a result of observations kept on the premises by police officers on Aug. 18 and 19, Mrs. Young was charged with keeping the top flat as a brothel. She admitted the offence and was convicted. On Sept. 14, the defendant company served on her a notice to quit the premises, and she quitted them on Sept. 25, 1948. On Oct. 19, 1948, the solicitors for the plaintiffs wrote to Mrs. Purnell stating that they had been instructed by the plaintiffs to take the necessary steps for the forfeiture of the lease, on account of Mrs. Young's conviction, and, pursuant to the Law of Property Act, 1925, F s. 146 (1), they served a notice on the defendant company complaining that the defendants had "done or suffered to be done on the . . . premises an act which is an annoyance, damage or disturbance to the . . . trustees and that you have not used the said messuage or tenement as and for a private dwelling-house only, in that you have used or suffered to be used the same or part thereof during 1948 as a brothel contrary to the Criminal Law Amendment Act, 1885, s. 13 (2)." G On Oct. 25, the defendant company's solicitors wrote stating that Mrs. Purnell had no knowledge of the use to which the top floor of the premises was being put until Sept. 13, 1948, when she learnt of Mrs. Young's conviction, and that she had thereupon served Mrs. Young with a notice to quit, and they suggested that, in the circumstances, the notice under the Law of Property Act, 1925, H s. 146, should be withdrawn. The plaintiffs, however, refused to withdraw the notice, and brought the action for possession. HILBERY, J., found that the defendant company had received ample warning of what was going on on the premises, and he held that it was guilty of a breach of covenant and was not entitled to relief under s. 146 (2) of the Act of 1925.

*Rabagliati, K.C., and Armstrong Cowan* for the defendant company.

*Melford Stevenson, K.C., and Sir Shirley Worthington-Evans* for the plaintiffs.

**LORD GODDARD, C.J.:** This is an appeal from a decision of **HILBERY, J.**, in an action brought by the superior landlords for the forfeiture of the lease of a house in Warwick Avenue, Maida Vale. The ground on which forfeiture was sought was breach of a covenant against suffering the premises to be used in any way as an annoyance or a nuisance. The annoyance and nuisance that was alleged was that the defendant company had suffered the premises to be used as a brothel. The learned judge gave judgment for the plaintiffs and awarded them possession of the premises.

[**HIS LORDSHIP** set out the facts, and continued:] It is said that the learned judge was wrong in holding that Mr. Purnell and his mother, Mrs. Purnell, the two directors of the defendant company, had any knowledge that the top floor of the premises was being used by their tenant, Mrs. Young, as a brothel. The learned judge found that they ought to have known what was going on, but that they would not know. The evidence in the case shows that there had been constant complaints by other tenants in the house with regard to the conduct on the premises, *i.e.*, noise, and riotous and disgusting behaviour. There is also no doubt (because Mr. Purnell admits it) that one of the tenants, Mr. Daltrey, complained to him that the place was being used as a brothel. Whether Daltrey used the word "bawdy-house" or the words "funny business" does not in the least matter. Purnell admits that, whatever form of words was used, he knew that Daltrey was complaining that the premises were being used as a brothel. What impressed the learned judge so strongly was that, notwithstanding these complaints, Mr. Purnell did absolutely nothing. He could have watched the premises, or caused them to be watched, or he could have spoken to the police, but he did, in fact, nothing. This was not a case of some surreptitious use being made of the premises by a prostitute, as the evidence of the police was that Mrs. Young and another woman were going, quite openly, in and out of the premises, with different men, at all hours of the afternoon and night. There is no evidence when Mrs. Young began to act as a prostitute, but she had been one long enough to be well-known to the police in that district. Mrs. Purnell and, more frequently, Mr. Purnell used to go to collect the rent at these premises, and it is certainly a remarkable state of affairs that they could have had this common prostitute living on the premises for a considerable length of time and could have gone to her flat, week in and week out, to collect the rent, and yet they did not know her character. It suggests a degree of innocence and ignorance on the part of a landlord that one can only say would be surprising. When, in addition, one finds that serious complaints were made by other tenants, and that no attempt was made to find out what was going on, it is not astonishing that the learned judge came to the conclusion that he did. In the opinion of this court, there was ample evidence to support the conclusion to which he came, *viz.*, that Mr. and Mrs. Purnell deliberately shut their eyes to the true state of affairs. If the learned judge had found on these facts that the two directors of the company knew the use to which the premises were being put, I think that he would have been justified in doing so.

There is one matter which has been a good deal pressed on the court, although we have not heard counsel for the plaintiffs. The learned judge, having come to the conclusion that he did, said that he was supported in his conclusion by a further fact which emerged in the course of the case, and he went on to say (*ante*, p. 365):

"At 66, Warwick Avenue, which was also owned by the defendant company, and the rents of which were collected by Mr. or Mrs. Purnell, Mrs. Purnell retained one room, which she used as an office and in which she spent a good deal of time at all hours of the day. By September, 1948, [which is after Mrs. Young's conviction] a flat in that house was being used as a brothel, and, after the police had kept it under observation for four nights, they reported that two women were seen to take twenty-six different

men to the premises. In that case also, Mrs. Purnell said that she had observed nothing irregular happening at the house."

There had been cross-examination on that point, but there was no evidence that No. 66, Warwick Avenue was being used as a brothel, and the cross-examination was, strictly, only going to credit. There was evidence of some statements made by the police in a letter, but the statements in the letter are not evidence, and the police were not called. I am not saying that they should have been called on that point, although they might have been called if their evidence had become material on the question whether the judge should exercise his discretion under the Law of Property Act, 1925, s. 146 (2), to grant relief against forfeiture. Be that as it may, it was, perhaps, unfortunate that so much stress was laid on this letter, and that counsel for the plaintiff returned more than once to the letter, because, as I have said, the statements in the letter were not evidence. The learned judge, however, had already shown, before referring to that fact, that his mind was not in any doubt on the matter. Before dealing with that point, he said (*ante*, p. 365):

"I have formed the view that, in all the circumstances, neither Mrs. Purnell nor her son wanted to know any more about what was going on."

It is only fair to the son to say that cross-examination of him with regard to that letter was not persisted in. Another matter on which there was cross-examination, and to which the learned judge evidently did not pay any attention, was whether there had not been a conviction of a man for living on the immoral earnings of the woman who was living at No. 66. There, again, I do not think that the evidence would have been material on the main issue, although it was a matter on which Mrs. Purnell could be cross-examined, but, after she had said that she did not know of this conviction, the matter ought to have been allowed to drop, because that again could only go to her credit, and it was not evidence that was material in the case, except, possibly, on the question of discretion.

In this case the question of discretion to grant relief against forfeiture, under s. 146 (2) of the Act of 1925, and the question of breach of covenant stand or fall together, as, had there been no knowledge on the part of the directors of the defendant company, the action would have failed, because, when the direct notice of Mrs. Young's conviction was received, they served a notice on her to quit the premises. If until that time they had had no knowledge that the premises were being used as a brothel, they would have been entitled to succeed in the action, and no question of the exercise of discretion would have come into the matter. If, on the other hand, they knew what was going on on their premises, or, as the learned judge found, they could have known if they had not deliberately refrained from taking notice, so that knowledge must be attributed to them, no one can suggest that this was a case in which discretion ought to have been exercised in their favour. The discretion which is given by s. 146 (2) of the Act of 1925 is not to be exercised in favour of people who suffer premises to be used as a brothel, and the learned judge, having found that the defendant company was suffering these premises to be used as a brothel, was justified in refusing to exercise discretion in their favour. The consequence is that this appeal fails and must be dismissed.

COHEN, L.J.: I agree.

SINGLETON, L.J.: I also agree.

*Appeal dismissed with costs.*

Solicitors: *Ingledeu, Brown, Bennison & Garrett* (for the defendants); *Trower, Still & Keeling* (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]



*Re* BEAUMONT'S WILL TRUSTS. WALKER AND ANOTHER  
v. LAWSON AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), March 16, 1950.]

*Executor—Fund for payment of legacies and legacy duty—Whether payable out of residue or primarily out of lapsed share of residue.*

By her will, dated Apr. 3, 1947, a testatrix, who died on Aug. 26, 1948, gave certain specific and pecuniary legacies free of duty, and further provided: "I give devise and bequeath all my real estate and all my personal estate not hereby otherwise disposed of . . . unto my trustees upon trust that my trustees shall sell call in and convert into money the same . . . and after payment of all my funeral and testamentary expenses and debts shall stand possessed of the residue thereof in trust to pay and transfer the same equally between [A., B., C., and D.] absolutely." A. predeceased the testatrix and her share therefore lapsed, but B., C. and D. survived her.

**HELD:** as the Administration of Estates Act, 1925, s. 34 (3) and sched. I, pt. II, did not provide for the incidence of legacies and the duty payable in respect of legacies given free of duty, the law in that respect which was applicable before 1926 had not been altered, and the legacies and the duty in respect thereof were payable out of the residuary estate before its division into four shares, and not primarily out of the lapsed share.

*Re Thompson* ([1936] 2 All E.R. 141), considered.

[AS TO ORDER OF APPLICATION OF ASSETS OF SOLVENT ESTATES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 375-380, paras. 704-708; and FOR CASES, see DIGEST, Vol. 23, pp. 473-486, Nos. 5425-5534.]

Cases referred to:

- (1) *Re Thompson*, [1936] 2 All E.R. 141; [1936] Ch. 676; 105 L.J.Ch. 289; 155 L.T. 474; Digest Supp.
- (2) *Re Boards*, [1895] 1 Ch. 499; 64 L.J.Ch. 305; 72 L.T. 220; 23 Digest 510, 5758.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix and by virtue of the Administration of Estates Act, 1925, s. 34 (3), sched. I, pt. II, the share of the testatrix's residuary estate purported to be given by her will to Bertha Lawson (who predeceased the testatrix) was primarily applicable towards the discharge of the legacies bequeathed by the said will and the duty in respect thereof, or whether the said legacies and duty were payable out of the whole residue.

*J. A. Armstrong* for the plaintiffs, the executors of the will.

*Arthur Bagnall* for the first defendant, one of the persons beneficially interested under the will in the residuary estate, who was also the personal representative of another of such persons.

The second defendant (whose interest was similar to the beneficial interest of the first defendant) was not represented at the hearing.

*Winterbotham* for the third defendant, interested on the testatrix's intestacy.

**DANCKWERTS, J.:** The testatrix made her will on Apr. 3, 1947, and died on Aug. 26, 1948, and the question which arises is in regard to the incidence of legacies given by the will and the duty payable on those legacies.

By her will, the testatrix, after appointing executors, gave certain specific articles free of duty. She then gave a number of pecuniary legacies, free of duty, and proceeded as follows:

"I give devise and bequeath all my real estate and all my personal estate not hereby otherwise disposed of (including all property over which I shall have power to appoint) unto my trustees upon trust that my trustees shall sell call in and convert into money the same or such part thereof so far as shall be necessary and after payment of all my funeral and testamentary

expenses and debts shall stand possessed of the residue thereof in trust to pay and transfer the same equally between the said Minnie Lawson Isabel Lawson Bertha Lawson and Joanna Millin absolutely."

Bertha Lawson predeceased the testatrix, and the only residuary legatee living at the present time is Minnie Augusta Lawson, the first defendant. Both Isabel Lawson and Joanna Millin survived the testatrix but have since died. Minnie Augusta Lawson is the personal representative of Isabel Lawson, so that two out of the three surviving shares are represented before me.

The question is whether these various burdens are to be borne wholly by the quarter share given to Bertha Lawson, which has lapsed, or are to be paid out of the whole of the residuary estate before any question of division arises so that each person takes a share of the whole, diminished accordingly, and the only lapse is of such a diminished share. The relevant provisions of the Administration of Estates Act, 1925, are in s. 34 which provides:

"(3) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in pt. II of sched. I to this Act."

There is no question that the quarter share is property undisposed of by the will. Turning to pt. II of sched. I to the Act, there is a number of different classes of property. The schedule provides:

"ORDER OF APPLICATION OF ASSETS WHERE THE ESTATE IS SOLVENT. 1.

Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies . . . 5. The fund, if any, retained to meet pecuniary legacies."

It seems to me, as argued by counsel for the third defendant that, in effect, no provision has been made in the Administration of Estates Act, 1925, s. 34 (3), with regard to such things as legacies. There is no doubt, on the authorities, that the funeral, testamentary and administration expenses, debts and liabilities come out of the whole residuary estate before division, because that is what the will says. There is no question about that, but it seems to me that the position of the legacies depends on the old law. Under the old law, before the Administration of Estates Act, 1925, legacies would plainly come out of the residuary estate, and, although in this will there is not in terms a gift of residue, there is a gift of "all my real estate and all my personal estate not hereby otherwise disposed of," and it seems to me that the old law applies unless something can be indicated in the Administration of Estates Act which eliminates, or modifies, the old law as to the extent of such burdens. On this point I am assisted by a decision of CLAUSON, J., in *Re Thompson* (1), in which he held that the old law laid down in *Re Boards* (2) still remained operative after the Administration of Estates Act came into force so as to cast the primary burden of legacies on the personal estate.

It seems to me, therefore, in the present case that the pecuniary legacies and the specific legacies and the duty on these legacies (which is in the form of an additional legacy, or has the effect of an additional legacy) are all payable out of the whole estate before the division into four equal parts, so that the lapsed share is simply a lapsed share of the estate after those burdens have been cleared.

*Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate in due course of administration.*

Solicitors: *Peacock & Goddard*, agents for *Johnstone, Williams & Walker*, Nottingham (for the plaintiffs); *Collyer, Bristow & Co.*, agents for *Wilkins & Thompson*, Uttoxeter (for the first defendant); *Sharpe, Pritchard & Co.*, agents for *Rendall, Litchfield & Co.*, Bournemouth (for the third defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

GOWER v. GOWER.

[COURT OF APPEAL (Bucknill and Denning, L.JJ.), March 6, 7, 1950.]  
*Divorce—Adultery—Standard of proof.*

In 1942 the wife divorced the husband, and the husband was ordered to pay her a certain sum for the maintenance of herself and their child. In August, 1945, the wife and child began living at the same address as C., a married man living apart from his wife, and thereafter the wife and C. moved together to various addresses, taking the child with them, until December, 1949, when C. went to live away from the wife. Evidence was given that at one address the landlord knew the wife as Mrs. C., and that at another the wife and C. occupied one bedroom. The husband sought to have the amount which he had been ordered to pay the wife reduced, and on the issue as to the wife's misconduct,

HELD: it had been proved beyond any reasonable doubt that the wife and C. had committed adultery.

*Per* DENNING, L.J.: I do not think that this court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge, to be proved beyond all reasonable doubt. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (2), as substituted by the Matrimonial Causes Act, 1937, s. 4, which simply requires the court on a petition for divorce to be "satisfied on the evidence that the case for the petition has been proved" lays down a standard and puts adultery on the same footing as cruelty, desertion or unsoundness of mind. So far as the Act of 1925 is concerned, no valid distinction can be drawn between the standard of proof of cruelty and adultery, nor does public policy require any such distinction.

*Ginesi v. Ginesi* ([1948] 1 All E.R. 373), criticised and doubted.

[AS TO ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-665, paras. 972-978; and FOR CASES, see DIGEST, Vol. 27, pp. 293-304, Nos. 2695-2813.]

Cases referred to:

- (1) *Ginesi v. Ginesi*, [1948] 1 All E.R. 373; [1948] P. 179; [1948] L.J.R. 892; 112 J.P. 194; 2nd Digest Supp.
- (2) *Mordaunt v. Moncreiffe*, (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 27 Digest 384, 3770.
- (3) *Wright v. Wright*, (1948), 77 C.L.R. (2) 191.
- (4) *Davis v. Davis*, [1950] 1 All E.R. 40; 114 J.P. 56.
- (5) *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 2nd Digest Supp.

APPEAL by the husband from an order of BARNARD, J., dated Jan. 25, 1950.

In 1942 the husband, Leonard Maurice Gower, was divorced by the wife on the ground of his adultery, and an order was made that he should pay to the wife £130 per annum less tax. In August, 1945, the wife wrote to the husband saying that she was staying with friends at a certain address in London, and it appeared that she was living in a flat with the child of the marriage (who was aged eleven) where also was living the tenant of the flat, a Mr. Cockburn, a married man living apart from his wife. The flat consisted of a bed-sitting room, a kitchen, and a bathroom. The landlord of the flat gave evidence that she knew the wife as Mrs. Cockburn. In November, 1945, the wife, the child, and Mr. Cockburn moved to Wolverhampton where they remained until April, 1946. Evidence was given that at the house to which they then moved the wife and Mr. Cockburn occupied one bedroom. Later, they went to London together, and then to Richmond where they remained until December, 1949, when Mr. Cockburn left and went to another address. The husband applied to the court for a reduction of the amount which he had been ordered to pay the wife as



maintenance, and PILCHER, J., directed an issue to be tried whether the wife had committed misconduct with Mr. Cockburn. BARNARD, J., tried the issue, and found that misconduct had not been committed, and refused leave to appeal. The Court of Appeal granted leave to appeal.

*Crispin* for the husband.

*P. M. O'Connor* for the wife.

A **BUCKNILL, L.J.** (having considered the facts): The learned judge came to the conclusion that adultery was not made out, mainly on the ground that there was not a scrap of evidence of any inclination. I venture to think that the learned judge has misdirected himself there. The vital question is: Where were these people sleeping during the time that they were together? If the evidence points almost irresistibly to the fact that they were sleeping in the same room, one does not want any further evidence than that. There is no need for evidence of kissing and that sort of thing. I ask myself this question: If Mr. Cockburn and the wife had not been called as witnesses, would there have been the slightest doubt on the evidence that adultery had been committed? Would not the evidence have been abundantly sufficient to establish adultery? I should have thought that there could be no doubt about that. Did these two witnesses remove that presumption? So far as the wife is concerned, I think that the letter which she wrote shows that she was lying then. The judge himself says that she was a very unsatisfactory witness, and I think that Mr. Cockburn is tarred with the same brush. This is not a case of demeanour. Where a judge has seen the witnesses and says that he believes one in preference to another, it is obvious that an appellate tribunal, which has not that advantage, has not the same means for deciding which is speaking the truth, but here it is solely a question of an inference to be drawn from the proved facts. In my view, the inference to be drawn from the proved facts is irresistible that these two persons committed adultery.

E Counsel for the wife laid great emphasis on the fact that this is a charge of adultery. He said that adultery is a *quasi*-criminal offence and must be proved as such. I have never quite understood what that meant. The standard of proof required in a criminal case is higher than the standard of proof in a civil action because in a civil action a matter may be proved on a balance of probabilities and the court may decide one way or the other on a very small margin of preference, while, on the other hand, in a criminal case the matter must be proved beyond any reasonable doubt. To put it in another way, if the case for the prosecution is based on circumstantial evidence, the evidence must be such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused. If the accused gives any reasonable explanation which is consistent with innocence, the matter is not proved beyond any reasonable doubt. I apply that test here. Is the evidence in this case consistent with innocence on the part of these people? I think that it is not. I think it is proved beyond any reasonable doubt that they committed adultery, and, therefore, this appeal should be allowed.

H **DENNING, L.J.:** I agree. In my view, it would have been much better if the whole application for a reduction of maintenance had been referred to one judge both to try the allegation of adultery and also to fix the amount to be awarded. That, however, has not been done, and all we have to deal with is the issue whether or not adultery has been committed. I agree with all that my Lord has said on this issue. I think the only reasonable inference is that this pair were living together as man and wife. I think the real reason why the judge fell into error may have been that he required an excessively high standard of proof. I would issue a caveat about the standard of proof. I do not think that this court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge, to be proved beyond all reasonable doubt. I can well understand the

judge applying that standard because of what was said in *Ginesi v. Ginesi* (1), but I would like to point out several things in regard to that case. First, it was not fully argued, because counsel conceded that the standard of proof of adultery was the same as in a criminal case. Secondly, the decision of the House of Lords in *Mordaunt v. Moncreiffe* (2) was not cited. It was there decided that a suit for divorce for adultery is a civil and not a criminal matter, and that the analogies and precedents of criminal law have no authority in the divorce courts. This strikes at the root of *Ginesi v. Ginesi* (1), which appears to have proceeded on the supposed criminal or quasi-criminal character of adultery. Thirdly, no reference was made to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (2), as substituted by the Matrimonial Causes Act, 1937, s. 4, which simply requires the court on a petition for divorce to be "satisfied on the evidence that the case for the petition has been proved." This itself lays down a standard and puts adultery on the same footing as cruelty, desertion or unsoundness of mind. Fourthly, the High Court of Australia in *Wright v. Wright* (3), after full consideration, declined to follow *Ginesi v. Ginesi* (1) and held that, on a charge of adultery, the criminal standard of proof was not appropriate. Fifthly, this court, in *Davis v. Davis* (4), held that the "criminal" standard of proof did not apply to cruelty. So far as the Act of 1925 is concerned, no valid distinction can be drawn between the standard of proof of cruelty and adultery, nor does public policy require any such distinction: see a valuable note in the *LAW QUARTERLY REVIEW*, vol. 66, pp. 35-38. These matters may well be sufficient to entitle this court to re-consider *Ginesi v. Ginesi* (1) if and when the occasion arises: see *Young v. Bristol Aeroplane Co.* (5) ([1944] 2 All E.R. 300). In the present case, I say simply that I am satisfied on the evidence that adultery has been proved. I agree, therefore, that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Pengelly & Co.* (for the husband); *Arthur Robson & Co.* (for the wife).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

## R. v. KELLY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Birkett, JJ.),  
March 6, 10, 15, 1950.]

*Criminal Law—Trial—Juror—Disqualification—"Attainted of felony"—Conviction of receiving—"Free pardon"—Liability of jurymen to serve if name in jurors book, although entitled to exemption—When court will order venire de novo—Juries Act, 1870 (c. 77), s. 10—Juries Act, 1922 (c. 11), s. 2 (1).*

By the Juries Act, 1870, s. 10: "... no man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries . . . in any court or on any occasion whatsoever."

After the appellant had been found guilty of murder it was discovered that a member of the jury had been convicted, some five years before the trial, of receiving and sentenced to a month's imprisonment. It was contended on behalf of the appellant that the jurymen, having been "attainted" of felony, was disqualified by virtue of the Juries Act, 1870, s. 10, and that, in consequence, there had been a mis-trial and the court should order a *venire de novo*.

**HELD:** (i) after the Forfeiture Act, 1870, came into operation on July 4, 1870, attainer was abolished, except in regard to persons outlawed or already attainted when that Act was passed, and when the Juries Act, 1870, s. 10, which came into operation on Aug. 9, 1870, imposed a disqualification on a person who "has been or shall be attainted" of felony the words "shall be" referred only to a person who might in future be convicted of an infamous crime.

(ii) attainer having been deliberately abolished, the words "a person attainted of felony" could not be read as meaning a person "convicted of felony," capital or non-capital; the jurymen had not been convicted of an infamous crime as defined in the Larceny Act, 1861, s. 46; and, accordingly, the objection against him could not be sustained.

(iii) a person whose name appears in the jurors book prepared under the Juries Act, 1922, s. 1, is liable to serve on a jury under s. 2 (2) of the Act whether or not he claims any exemption to which he is entitled.

*Per curiam:* (i) the court will not order a *venire de novo* on the ground of the lack of qualification of a juror except in cases of either the impersonation of a juror or a mistake as to his identity.

*R. v. Wakefield* ([1918] 1 K.B. 216), *referred to*.

*Ras Behari Lal v. Regem* (1933) (102 L.J. (P.C.) 144), *distinguished*.

(ii) the free pardon contemplated in the Juries Act, 1870, s. 10, as removing disqualification for jury service means an actual free pardon and not a free pardon gained by serving a sentence under the Civil Rights of Convicts Act, 1828, s. 3.

[AS TO QUALIFICATION AND DISQUALIFICATION OF JURORS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 283-286, paras. 583-585; and AS TO CHALLENGING, see *ibid.*, pp. 303-309, paras. 630-645; and FOR CASES, see DIGEST, Vol. 30, pp. 220-228, Nos. 88-217, and Digest Supp.]

Cases referred to:

(1) *R. v. Tremearne*, (1826), 5 B. & C. 254; 4 L.J. (O.S.) K.B. 157; 30 Digest 233, 287.

(2) *R. v. Sutton*, (1828), 8 B. & C. 417; *sub nom.*, *R. v. Despard*, 6 L.J. (O.S.) M.C. 102; 14 Digest 221, 104.

(3) *R. v. Mellor*, (1858), Dears & B. 468; 27 L.J. (M.C.) 121; 30 L.T. (O.S.) 309; 22 J.P. 191; 30 Digest 232, 280.

(4) *R. v. Wakefield*, [1918] 1 K.B. 216; 87 L.J.K.B. 319; 118 L.T. 576; 82 J.P. 136; 14 Digest 539, 6100.

(5) *Ras Behari Lal v. Regem*, (1933), 102 L.J. (P.C.) 144; 150 L.T. 3; Digest Supp.

(6) *Brown v. Crawshaw*, (1614), 2 Bulstr. 154; 30 Digest 228, 208.

(7) *Hay v. London Tower Division Justices*, (1890), 24 Q.B.D. 561; 59 L.J. (M.C.) 79; 62 L.T. 290; 54 J.P. 500; 14 Digest 495, 5457.

(8) *R. v. Olivo*, [1942] 2 All E.R. 494; 168 L.T. 112; 106 J.P. 284; 2nd Digest Supp.

**APPEAL** against conviction at Liverpool Assizes of murder.

The ground of appeal was that a jurymen had been previously convicted of felony and was thereby disqualified from sitting on the jury. The facts appear in the judgment of the court.

*Rose Heilbron, K.C.*, and *R. S. Trotter* for the appellant.

*Gorman, K.C.*, and *Blackledge* for the Crown.

*Cur. adv. vult.*

Mar. 15. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was convicted before CASSELS, J., at the last Liverpool assizes of murder. He appealed to this court alleging various grounds of misdirection, but when the case was first in the paper for hearing on Mar. 6, counsel



for the appellant asked leave to take a further point which had not been covered by the original notice, and she submitted that there had been a mis-trial in that one of the jurors was disqualified from sitting on a jury. The ground of disqualification alleged was that the jurymen in question had been convicted of felony. It was said that under s. 10 of the Juries Act, 1870, the conviction constituted such a disqualification that the trial must be considered to have taken place, not before twelve, but only before eleven jurymen, that this would constitute a mis-trial, and the court would be obliged to award a *venire de novo*. This, indeed, would have been the result if this court had been obliged to give effect to the objection, and a further trial would have had to take place. It is necessary to state that the name of the jurymen in question, which for obvious reasons I do not mention, appeared in the jurors book as a person qualified and liable to serve as a juror, that he was duly summoned, that his name appeared on the panel of jurors, and that he was duly called, was unchallenged, and was sworn. It also appears that some five years previously he had been convicted of the felony of receiving stolen goods and sentenced to one month's imprisonment.

The first statute to which it is necessary to refer is the Juries Act, 1870, s. 10, which provides:

" . . . no man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever."

That Act, in effect, re-enacts the provisions of s. 3 of the Juries Act, 1825. I pause here to say that counsel for the appellant contended that at common law a convicted felon was disqualified from serving on a jury, citing in support passages from *HALE'S PLEAS OF THE CROWN* and other works of authority. The court, however, is of opinion that since 1825 the qualifications and exemptions of jurors are governed by statute law and that we have to consider, not what the law may have been, and, no doubt, was, in the time of *HALE*, but what provisions Parliament has made on the subject by the various Acts dealing with juries that have been passed from 1825 onwards. We are satisfied that the whole law now is statutory. The importance of this case is manifest as there are conflicting views disclosed in textbooks which deal with the matter, and the exact point never seems to have been the subject of an express decision, although, as I shall explain before the end of this judgment, a point which is, in our opinion, indistinguishable was the subject of a decision by a court of high authority in the year 1828 very soon after the first Juries Act had been passed.

It will be observed that s. 10 of the Juries Act, 1870, deals with three classes of persons—those attainted of treason or felony; those convicted of any crime that is infamous (in either case unless they shall obtain a free pardon); and those who were under outlawry. Outlawry has been abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, and need no longer be considered. An infamous crime is shown by s. 46 of the Larceny Act, 1861, to mean buggery, assaults with intent to commit buggery, both of which are felonies, and an attempt to commit buggery which is a misdemeanour, and, as the jurymen in question had not, therefore, been convicted of a crime which was infamous, the remaining point to be decided was whether he was a person attainted of felony.

No doubt, the distinction between "convicted" and "attainted" has often been regarded as distinguishing between the verdict of the jury and the sentence of the court, but the true meaning is the result of a judgment following on conviction or judgment of outlawry in cases of treason or capital felony. If a person were convicted, but no judgment was passed, attainder would not follow.

The attaint was the result of the judgment in a capital case because thereby corruption of blood with all its consequences under the old law followed: see, on this point, the article on attaint in the *ENCYCLOPAEDIA OF THE LAWS OF ENGLAND*, 2nd ed., vol. 1, p. 615, the author of which was Sir William Anson. The Juries Act, 1870, received the Royal Assent on Aug. 9, 1870, and a month previously, namely, on July 4 of that year, the Forfeiture Act, 1870, which abolishes forfeitures for treason and felony was passed. The preamble states:

"Whereas it is expedient to abolish the forfeiture of lands and goods for treason and felony . . ."

which (be it observed), as regards land, was a consequence of an attaint. The Act goes on to provide in s. 1:

"From and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry."

It is to be observed that the Act makes no distinction between verdict, conviction, or judgment as the cause of the attainder, but it seems clear that after July 4, 1870, there was no such thing left in the law as attainder except in regard to persons who were outlawed or already under that disability at the time of the passing of the Act. It is true that in the Juries Act, 1870, the words are "who has been or shall be attainted of any treason," but, in our opinion, the words "shall be" must be taken as referring to a person who may in the future be convicted of any crime that is infamous. It is impossible to suppose that attainder could have remained for any purpose once it had been deliberately abolished by s. 1 of the Forfeiture Act, 1870, except in the case of outlawry. We cannot read for this purpose "a person attainted of felony" as meaning "a person convicted of felony" capital or non-capital, and the juryman in this case, although he had been convicted of the non-capital felony of receiving, was not attainted, and, therefore, the objection cannot be sustained.

It is right that we should refer to one other matter which at one time rather impressed the court. By s. 12 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, outlawry proceedings were abolished, and by s. 20 (3) it was provided that:

"The Acts mentioned in the first and second columns of sched. IV to this Act are hereby repealed to the extent specified in the third column of that schedule."

Among the repeals are the proviso to s. 1 of the Forfeiture Act, 1870, which provided that "nothing in this Act shall affect the law of forfeiture consequent upon outlawry," and the words in the Juries Act, 1870, s. 10, "nor any man who is under outlawry."

At first it seemed as though the fact that Parliament had expressly repealed only the words dealing with outlawry might be used as an argument that they intended to leave the rest of the section effective, but as, in the view of this court, a person convicted after the coming into force of the Forfeiture Act, 1870, was not attainted, whether the section is expressly repealed or not, it can have no effect. In view of the conclusion at which we have arrived on this point, it is, perhaps, unnecessary to consider the argument that was addressed to us that a person who has served his sentence is to be regarded as having obtained a free pardon. By the Civil Rights of Convicts Act, 1828, s. 3, it was provided that every punishment for felony, after it has been endured, should have the effect of a pardon under the Great Seal. We feel great doubt whether that section could be prayed in aid in interpreting an Act passed forty-two years later. It seems a more reasonable interpretation that the obtaining of a free pardon contemplated in s. 10 of the Juries Act,

1870, refers to the obtaining of an actual free pardon and not one implied by virtue of the Civil Rights of Convicts Act, 1828.

While this is really enough to dispose of the objection, in view of the argument addressed to us, we think it right to refer to two more matters. The first is as to the effect of the Juries Act, 1922. Section 1 of that Act contains elaborate provisions for the preparation of the jurors book and s. 2 provides :

"Every person whose name is included in the jurors book as a juror or special juror shall be liable to serve as such, notwithstanding that he may have been entitled by reason of some disqualification or exemption to claim that he ought not to be marked in the electors list as a juror or special juror . . ."

It is provided by s. 8 (2) (b) that :

"A person whose name is not included in the register of electors shall not be qualified or liable so to serve . . .",

and there is a provision that a woman who is an avowed member of a religious order or community, although included in the jurors book, shall not be liable to serve. Although one would not expect a person disqualified, for instance, because he had been convicted of an infamous crime, to disclose that fact by claiming that he was disqualified, it seems to us that, as the Juries Act, 1870, imposed a disqualification, whether the person concerned claimed or did not claim exemption does not matter. If his name is included in the jurors book, he is liable to serve. It is true that his name might have been taken out if he had objected. It is true that his name might not have been included if the registration officer had been aware of his conviction, but it seems to us that the Act provides in terms that a person whose name appears in the jurors book is liable to serve as a juror and that that again is an answer to the present objection.

There remains always the right of the accused person to challenge either peremptorily or, if he has exhausted his peremptory challenges, for cause. This right remains unaffected, but it is said: How could he challenge if he did not know? It is also contended that the cases show that where information has come to the knowledge of the accused after conviction with regard to the qualification of a juror, effect has been given to it by the court and the trial treated as a nullity. It is perfectly true that there are such cases, but, so far as this court can ascertain, they have all been cases where there has been either impersonation of a juror or a mistake as to the identity of a juror. For instance, in *R. v. Tremearne* (1), on J. Williams being called to serve, his son, who was not on the panel and was under age and had no qualification, answered for his father and served on the jury. The court, consisting of ABBOTT, C.J., afterwards LORD TENTERDEN, BAYLEY, J., HOLROYD, J., and LITLEDALE, J., held that this was a fatal objection and that there was a mis-trial and made the rule absolute for a new trial. In *R. v. Sutton* (2) it was sought to obtain a new trial on the ground that an unqualified alien had sat on the jury, which fact was not known to the defendant until after the trial. The only two judges mentioned in the report were LORD TENTERDEN and BAYLEY, J., both of whom had been parties to the earlier case, but we think there can be no doubt that the other two judges, HOLROYD, J., and LITLEDALE, J., would also have been sitting. Whether they were or not, it appears that LORD TENTERDEN said (8 B. & C. 419):

"... I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge. In the case cited [*R. v. Tremearne* (1)] no such opportunity had been afforded. We ought to be very careful in giving way to such an application, for if we must grant a new trial at the instance of a



defendant after conviction, we must, also, do it at the instance of a prosecutor, when there has been an acquittal; and it seems to me that, without a precedent, we ought not to interfere in this late stage of the proceedings."

We can see no difference between a case where the disqualification arose from the juryman being an alien and one in which it arises by reason of his being convicted. The ground of the decision seems to be that there was no doubt as to the identity of the person called and the prisoner was given his challenges.

In *R. v. Mellor* (3) there had again been personation, or rather a mistake, for on a man of the name of Thorne being called, one Thorniley by mistake took his place and it was held to be a mis-trial. As late as 1918 there was before this court *R. v. Wakefield* (4) which was again a case of personation, and on the authority, among other cases, of *R. v. Tremearne* (1) and *R. v. Mellor* (3) the court set aside the verdict and ordered a *venire de novo*. So far as this court has been able to ascertain, this result has only been achieved where there has been personation in one form or another. We can find no case in which, where there has been no doubt as to the identity of the person called, the court has ever set aside the verdict. Our attention was called to *Ras Behari Lal v. Regem* (5), a

case before the Judicial Committee, where LORD ATKIN certainly indicated that, if the objection to a juror was not known at the time of the trial, but arose afterwards, the court would interfere. It is not, however, necessary for us to go further into that case, which is not technically binding on us, though, of course, we should treat the decision with great respect, for not only are the facts very different from what they are here, but, for the reasons that we have already given on other grounds, we are satisfied that this objection cannot prevail.

It is not without a sense of satisfaction that the court has been able to come to the conclusion that it has in this case. While, no doubt, it is desirable that persons who have real criminal records should not serve on juries, if we had to give effect to this objection it would mean that any juvenile who had been convicted of a petty theft would for the rest of his life be disqualified from serving on a jury, and whatever may have been the position in the time of HALE, C.J., it would, indeed, be disastrous if we now were obliged to hold that a conviction for a petty crime, technically a felony, conferred disqualification for life on the offender who might have escaped with no more than a nominal penalty. It is worth remembering that when the Juries Act, 1825, was passed all but the

most petty felonies were capital, so that on conviction and judgment attainder automatically followed. Though in that year the Judgment of Death Act, 1823, empowered the court to abstain from imposing the death penalty on persons convicted of any crime except murder if the offender seemed to the court a fit subject for the exercise of the royal prerogative of mercy, it was not till 1826 that, at the instance of Sir Robert Peel, Parliament began to pass the series of

Acts whereby the capital sentence was abolished for nearly all felonies, so that by 1870 it was only treason, murder, piracy by violence, and setting fire to His Majesty's ships and dockyards that remained capital and in which attainder would follow. The appeal is dismissed.

*Appeal dismissed.*

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Director of Public Prosecutions (for the Crown).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

## BARKER v. BARKER.

[COURT OF APPEAL (Bucknill and Somervell, L.J.J., and Vaisey, J.), March 3, 13, 1950.]

*Divorce—Costs—Order against respondent wife—Discretion and duty of judge—Effect of Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 1.*

A husband, who petitioned for divorce on the ground of his wife's desertion, was granted a decree *nisi* without costs against her in an undefended suit. It was proved in evidence that she left the matrimonial home, telling the husband that she was going to another man, but after two months she implored him to take her back and promised to undo the wrong she had done. The husband refused to take her back and told her to "stop pestering him." There was evidence that she was possessed of some means and was working for a weekly wage. On an appeal by the husband against the order as to costs,

HELD: (i) although the discretionary power of the court to make an order for costs against a wife was unfettered, it was not the practice to make such an order unless the wife had separate means sufficient to pay the costs. In a case where the wife had so acted as to increase the husband's costs unnecessarily the discretion of the court might properly be exercised by the making of an order. The judge who hears a petition for divorce must inquire into the whole matter and consider any question of condonation, connivance, conduct conducing, unreasonable delay in presenting the petition, or whether the husband, while innocent of any matrimonial offence, was partly responsible for the break-up of the marriage. The judge is not bound to state all or any of the reasons for the exercise of his discretion. If he has acted on facts connected with or leading up to the litigation, which have been proved before him or observed during the progress of the case, the Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, ought not to interfere with the exercise by him of his discretion.

*Milne v. Milne & Fowler* (1871) (L.R. 2 P. & D. 202) and *Millward v. Millward and Andrews* (1887) (57 L.T. 569), referred to.

(ii) the effect of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, was not to make the wife's means irrelevant to the question whether she should pay her husband's costs in a divorce suit.

*Tickle v. Tickle* (1945) (114 L.J.P. 29) and *Jestice v. Jestice* (1945) (114 L.J.P. 29 (n)), criticised.

*Per* BUCKNILL, L.J. : Where there is no doubt that a spouse has committed adultery, but proof of it cannot be obtained, it seems from the decision in *Everitt v. Everitt* ([1949] 1 All E.R. 908) that the innocent spouse may refuse to cohabit with the guilty spouse and may, at the end of three years, petition for a divorce on the ground of desertion. In such a case there is no room for the argument, which was successful in *Pratt v. Pratt* ([1939] 3 All E.R. 437), that repentance and a genuine wish to return home communicated to the deserted spouse brings the desertion to an end. If this is the law, surely the court should require the deserted spouse to take all reasonable steps to obtain proof of the adultery, and, if possible, bring a petition on that ground, because adultery is the solid basis of the decree. Constructive desertion in such a case is, in my view, somewhat of a legal fiction.

*Per* SOMERVELL, L.J. : The fact that leave to appeal is given on a matter of costs does not bring about a substitution of the discretion of the Court of Appeal for that of the judge.

[AS TO COSTS IN DIVORCE PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 758-767, paras. 1197-1209; and FOR CASES, see DIGEST, Vol. 27, pp. 463-470, Nos. 4826-4937, and Digest Supp. and 2nd Digest Supp.]

Cases referred to:

- (1) *Milne v. Milne and Fowler*, (1871), L.R. 2 P. & D. 202; 40 L.J.P. & M. 13; 23 L.T. 877; 27 Digest 470, 4926.
- (2) *Millward v. Millward and Andrews*, (1887), 57 L.T. 569; 51 J.P. 616; 27 Digest 470, 4924.
- (3) *Tickle v. Tickle*, (1945), 114 L.J.P. 29; 2nd Digest Supp.
- (4) *Jestice v. Jestice*, (1945), 114 L.J.P. 29 (n); 2nd Digest Supp.
- (5) *Ritter v. Godfrey*, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; Digest, Practice, 871, 4129.
- (6) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; Digest, Practice, 855, 4004.
- (7) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279.
- (8) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; Digest Supp.
- (9) *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers Ltd.*, [1933] 2 K.B. 616; 102 L.J.K.B. 775; 149 L.T. 545; Digest Supp.
- (10) *Lever Bros., Ltd. v. Masbro' Equitable Pioneers Society, Ltd.*, (1912), 106 L.T. 472; Digest, Practice, 925, 4677.
- (11) *Miller v. Miller*, (1869), L.R. 2 P. & D. 13; 39 L.J.P. & M. 4; 21 L.T. 471; *subsequent proceedings*, (1870), L.R. 2 P. & D. 54; 39 L.J.P. & M. 38; 22 L.T. 47; 27 Digest 470, 4925.

APPEAL from an order of Mr. Commissioner LONGLAND, K.C., dated Dec. 15, 1949, refusing to award a successful husband petitioner in divorce proceedings costs against the respondent wife. The facts appear in the judgment of BUCKNILL, L.J.

*Hyamson* for the husband.

The wife did not appear and was not represented.

*Curr. adv. vult.*

March 13. The following judgments were read.

**BUCKNILL, L.J.:** This is an appeal by a husband from that part of a decree made by Mr. Commissioner LONGLAND, K.C., whereby he ordered that the wife should not be condemned in the costs incurred in divorce proceedings taken by the husband. The commissioner gave leave to the husband to appeal from this order as to costs. On June 2, 1949, the husband filed a petition for divorce, on the ground of desertion and asked that the wife be condemned in the costs of the proceedings. The wife did not enter an appearance, nor did she appear at the trial on the question of costs.

[HIS LORDSHIP stated the facts and continued:] The commissioner said that counsel for the husband was right when he submitted that the husband had good grounds for believing that the wife had committed adultery, and he was, therefore, quite entitled to refuse to take her back and that she then remained in desertion. On the question of costs the commissioner said this of the husband:

"If that is your belief that your wife had committed adultery you were entitled not to forgive her and you were entitled not to take her back, and if you ask me for a decree I shall have to give it to you, but I am not going to give you costs against her."

On the appeal counsel for the husband made three submissions: (i) A successful husband usually gets his costs against the wife who has separate estate; (ii) the commissioner misdirected himself by exercising his discretion for an irrelevant reason, namely, the refusal of the husband to have his wife back; (iii) the Court of Appeal will review the exercise of discretion on a matter of costs when the judge has misdirected himself.

As regards the first point, I do not think that one should regard a divorcee



petition as being in the same category as a writ of summons in a civil action. Neither do I think that the rule of practice which requires an unsuccessful defendant to pay the successful plaintiff's costs in obtaining his judgment necessarily or usually applies in the case where a husband petitions for a divorce from his wife and obtains a decree. True, the court has an absolute discretion to grant costs against a respondent wife, whether she has separate estate or not, but I do not think that it is the practice to do so unless the wife has separate means sufficient to pay his and her own costs. Where the wife has put forward charges against her husband which are quite unfounded, or has denied matrimonial offences of which she is found guilty and in which she had no reasonable prospects of success, or where the wife has separate means which are sufficient to pay her own costs, as well as the husband's costs, the position is different. Until the decree is made absolute the woman remains the wife of the husband, and he is *prima facie* responsible for her maintenance (except, perhaps, in the case where she has been found guilty of adultery). I do not know of many reported cases in which the question has been considered whether the respondent wife, in an undefended divorce petition by the husband, should pay his costs of obtaining the decree. In *Milne v. Milne & Fowler* (1) the husband petitioned for a decree of divorce on the ground of the wife's adultery. The wife, in her answer, denied the adultery and pleaded condonation, connivance, cruelty, and wilful neglect, but she withdrew her plea at the trial. The husband had a moderate income and had five children dependent on him. The co-respondent was a man of small means. The wife was a rich woman, having separate estate producing an income of £4,100 per annum. The husband obtained his decree and then asked the court to condemn the wife in the costs of the proceedings. In that case LORD PENZANCE, in giving judgment, said (L.R. 2 P. & D. 204):

"As regards the respondent, the only reason why a wife as respondent is relieved from the payment of costs is, that in the majority of cases the wife has no property. The law assumes that on her marriage all her property passes to her husband, and in a very large number of cases the wife not only does not pay costs, but litigates at the expense of her husband. But this all depends upon the assumption that she has not got any property. Here it is exactly the other way. The wife has a large separate income, and the husband but moderate means, and there can be no reason why a wife with large property should not be made to pay the costs like any other suitor. It is improper to apply a rule to a case, in which the reason of such rule entirely fails. As a general principle, therefore, a wife who has property should be liable for costs. I say liable, for I do not mean that in every case I should condemn her in the costs, because that would be to affirm the proposition that she would be liable in cases in which blame might attach to her husband for her misconduct. It is therefore in the discretion of the court to exercise this power, and it becomes a question whether I should do so in this case. I am at a loss to discover any cause of blame in the conduct of the husband. She ran off with the co-respondent, her husband forgave her and took her back. Shortly afterwards she again left her home with the co-respondent, and has continued to live with him ever since. The husband is entirely free from blame, the wife is without excuse. I shall therefore condemn her in the costs, and it will answer all purposes for today if I condemn her in such costs as arise out of her pleas and the issues found against her."

In *Millward v. Millward and Andrews* (2) the husband petitioned for a divorce on the ground of his wife's adultery. The case was undefended and the husband obtained a decree and asked that the wife should pay his costs. The wife appeared at the hearing to argue the question of costs. She had about £3,500 in her possession. The husband was a veterinary surgeon and received a good

deal of financial help from his wife. SIR JAMES HANNEN, P., in his judgment said (57 L.T. 570):

"It is a source of daily pain to me, that I am obliged to inflict on unfortunate husbands the costs arising out of the misconduct of their wives. I am always extremely glad when it turns out that the guilty wife has separate means to answer costs. In cases where there has been a settlement the aggrieved husband is entitled to have it varied in his favour. Should the guilty wife remain, then, in cases such as this, where there is no settlement, in full possession of her property? I am very happy to learn, by the evidence in the present case, that, though upwards of £2,000 has been expended by the wife upon the common home, there still remains £3,500 in her possession. Like every other unsuccessful litigant, she must pay the costs. I wish that all guilty wives who come before this court had means of their own to answer costs."

Here, again, the order was based on the fact that the wife had ample separate means.

In *Tickle v. Tickle* (3) the husband petitioned for the dissolution of his marriage on the ground of his wife's desertion and obtained a decree. The suit was undefended. The husband in his petition asked for costs against his wife, and she appeared by counsel to contest this claim. There was no proof that the wife had any means. DENNING, J., held that after the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, a married woman might be in law liable to pay the costs in a divorce suit without special proof of means, and he made the order asked. A similar order in a similar case, *Jestice v. Jestice* (4), was made by WALLINGTON, J., a few weeks later, and is reported in a note to the report of *Tickle v. Tickle* (3), but in that case WALLINGTON, J., said that the wife had caused the costs to be incurred by her attitude. The reports of the judgments in these two cases are very brief. If the decisions lay down the proposition that the Act of 1935 made the wife's means irrelevant to the question whether she should pay her husband's costs in a divorce suit, I respectfully must say that I do not agree.

Although the court has complete power to make such an order without proof of separate means of the wife, in my opinion, a judge would not exercise his discretion improperly if he refused to make such an order in a case where the wife had done nothing to increase the costs of the husband and where there was no evidence that she had sufficient means to pay the husband's costs. The statute ordains that the judge who hears a petition for divorce must inquire into the whole matter. He must consider the question of condonation, connivance, conduct conducing, or unreasonable delay in presenting the petition. All this has to be done because the State is an interested third party in a divorce petition. Its interest is to see that due regard is paid to the binding sanctity of marriage. The costs of the hearing of the petition are costs which are in a sense required by the law to be incurred before a decree can be pronounced. In these circumstances I think it may well be considered proper that the costs of the petitioning husband should not be placed wholly on the wife's shoulders in a case such as the present one. Therefore, I think that the commissioner in this case could not be said to have exercised a wrong discretion if he had refused to make the wife pay the costs on the ground that he was not satisfied on the evidence as to her ability to pay them.

As regards the second point taken by counsel for the husband, it is not clear from the transcript what reason or reasons moved the commissioner to refuse to order the wife to pay the husband's costs in whole or in part. The transcript reads as if the main reason was that he considered the husband should have forgiven his wife. If it was apparent that this was the only reason, I should be disposed to think that it was not a valid reason. Of course, if it appeared from the evidence that the husband behaved towards his wife in a way which was

blameworthy, that would be a very adequate reason for refusing to make the order, but, so far as I can see from the transcript, no question was put to the husband by the court which suggested to him any such blameworthy conduct, so that the husband might have an opportunity of dealing with the point.

As regards the third point, the difficulty I feel about interfering with the exercise of the commissioner's discretion is that I do not know all the reasons which may have induced him to make the order. He may have thought that the evidence of the wife's means was insufficient to justify an order; or he may have thought that the husband, on his own evidence, made no attempt to establish a case of adultery and to bring the co-respondent to book, and that he should have done so; or he may have thought that the husband, although he was not bound to take the wife back, should have shown some ray of pity for her. All these are possible reasons for the exercise of a discretion in this case. I do not think a judge is bound to state all or any of the reasons for the exercise of his discretion. To quote the words ([1920] 2 K.B. 53) of LORD STERNDALÉ, M.R., in *Ritter v. Godfrey* (5) and cited with approval ([1927] A.C. 809) by VISCOUNT CAVE, L.C., in *Campbell (Donald) & Co. v. Pollak* (6):

"If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his discretion."

Again, applying in a measure the words of VISCOUNT CAVE, L.C., in a later part of his speech to this particular case, the commissioner deliberately intended to exercise his discretionary power and has acted on facts connected with or leading up to the litigation which have been proved before him or observed during the progress of the case. I think that the Court of Appeal in such a case, although it may deem his reasons insufficient and may disagree with his conclusion, ought not to interfere with the exercise by the judge of his discretion in the matter of costs.

In connection with a possible reason for the refusal to make the order asked for, I wish also to say a few words on the extension of the rule laid down in *Everitt v. Everitt* (7) and the cases therein cited to the present case and to cases like it. Where there is no doubt that the spouse has committed adultery, but proof of it cannot be obtained, it seems from the decision in *Everitt v. Everitt* (7) that the innocent spouse may refuse to cohabit with the guilty spouse and may, at the end of three years, petition for a divorce on the ground of desertion. In such a case there is no room for the argument, which was successful in *Pratt v. Pratt* (8), that repentance and a genuine wish to return home communicated to the deserted spouse brings the desertion to an end. If this is the law surely the court should require the deserted spouse to take all reasonable steps to obtain proof of the adultery, and, if possible, bring a petition on that ground, because adultery is the solid basis of the decree. Constructive desertion in such a case is, in my view, somewhat of a legal fiction. To take an extreme case. The wife in a temper tells her husband that she committed adultery on one occasion with a man, now dead, and then leaves the matrimonial home. The next day she implores the husband to let her come back and persists in her entreaties, but the husband refuses to do so or to have anything more to do with her, and makes no independent enquiries as to the truth of her statement. The husband waits for three years and then petitions for a divorce on the ground of desertion. Assuming that he satisfied the court that he honestly believed that his wife had committed adultery, the principle, as stated in *Everitt v. Everitt* (7) should enable him to obtain a decree. It may be that the commissioner had some thoughts of this kind when he refused to give costs against the wife, feeling that in reality the wife had not wished to desert the husband for three years—nay, on the contrary had earnestly and sincerely desired to return to him and had repeatedly told him so—and that she was in reality being divorced because



she had implanted in her husband's mind the belief that she had committed adultery, a belief which the husband entertained without much show of resistance. In my opinion, this appeal should be dismissed.

- SOMERVELL, L.J.:** The circumstances in which this court will interfere with a judge's order as to costs are set out in *British Russian Gazette and Trade Outlook Ltd. v. Associated Newspapers Ltd.* (9) and in *Lever Brothers Ltd. v. Masbro' Equitable Pioneers Society, Ltd.* (10), and I do not propose to re-formulate them. SCRUTTON, L.J., in *British Russian Gazette and Trade Outlook Ltd. v. Associated Newspapers, Ltd.* (9) makes it clear that the fact that leave to appeal was given does not bring about a substitution of the discretion of this court for the discretion of the judge. There is a *dictum* of VISCOUNT DUNEDIN in the opposite sense in *Campbell (Donald) & Co. v. Pollak* (6) ([1927] A.C. 757). We are, however, bound by the decision of this court, and, with all respect to VISCOUNT DUNEDIN, it seems to me right. Otherwise, a judge might feel he ought to give leave to appeal in any case where there was a reasonable scope for argument as to how he had exercised his discretion. Leave should, in my opinion, be given only in cases where he feels he may have proceeded on a wrong principle.
- C We were referred to defended and undefended cases in which costs were given against a wife: *Miller v. Miller* (11), *Milne v. Milne & Fowler* (1) and *Millward v. Millward and Andrews* (2). I agree with what has been said by BUCKNILL, L.J., on the decision in *Tickle v. Tickle* (3). In the present case I think there was sufficient evidence of means. I think in a case such as this a judge, although he grants a decree, is entitled to take into account the general conduct of the petitioner and respondent in relation to the marriage which is sought to be dissolved. Suppose, for example, he came to the conclusion that the husband petitioner, although entitled to his decree and not guilty of conduct conducing to the offence, had been in part responsible for the break up of the marriage, or was, perhaps, though guiltless of any matrimonial offence himself, glad to be free. I should have thought such matters were relevant for the judge to consider if he chose on the issue of costs. In many cases he may come to the conclusion that costs should follow the result in the ordinary way. In divorce cases there are often faults on both sides, and there should, I think, be a wide discretion in respect of costs which have not been incurred by reason of the respondent disputing issues on which the judge has found against him or her. Coming to the present case I think on the transcript, and not having seen the husband, I should have given him his costs. That, however, is not the issue. The commissioner seems to me to have based his refusal to give the husband his costs on his attitude when his wife implored him to take her back, said that she had learnt her lesson, would try to undo the wrong she had done, and so on. They are pathetic letters. On the other hand, she had left him, as she said, to go to another man, and two months after leaving him wrote saying she would not return and the marriage had better be ended.
- G If a petitioner was deprived of costs by reason only of the fact that he did not forgive and take back a wife in these circumstances, I would have said this was in itself no reason. There was, however, more than this, and the commissioner, who saw the husband, may have been in a position to draw inferences other than those which appear from the transcript. The sincerity of the letters was not questioned. They were not answered. The first letter was in January, 1947. The husband saw the wife in January, 1948, and told her to stop interfering and pestering him. She was very young at the time of the marriage. If he had answered the first letter saying he was sorry but after what had happened he felt or knew it would be hopeless, the picture would be a different one. Did his conduct then, and, possibly, the way in which he answered some of the questions put to him, provide relevant material with regard to his conduct and attitude as a husband which entitled the commissioner to exercise his

discretion as he did ? I do not find the question an easy one. I think, however, it is important that those who try this class of case should have a wide discretion as to costs, on the general lines which I have tried to indicate, and in the result I think we should not interfere.

**VAISEY, J.** (read by **SOMERVELL, L.J.**): I think that this appeal should be dismissed. It is sometimes regarded as a matter for regret that the divorce laws operate in some respects so mechanically and automatically, and without regard to the particular circumstances of the particular cases. A single act of adultery by either party to a marriage, if neither condoned to nor condoned, entitles the other party, if innocent, to a decree of divorce as of right. It matters not what the temptation or other precedent circumstances may have been, and neither the contrition of the erring party, however deep and sincere, nor the recriminations of the other, however violent or pharasaical, are allowed to have anything to do with the case. They lie wholly outside the purview of the judge who has no option but to grant the decree. I should be very sorry indeed to hold that the innocent, the injured, party is entitled without regard to any of those matters to which I have alluded, and in every event, to the costs of regaining his or her status of freedom from the matrimonial tie. Decent and courteous behaviour is, in my judgment, obligatory as between husband and wife in all circumstances. I am glad to be able to hold that the commissioner was entitled to exercise his discretion as to the costs of the husband in the present case if he thought, as he evidently did, that the husband had fallen short of the standard of conduct which was to be expected of him. I am not sure that I should myself have come to that conclusion, but if I had seen the husband in the witness box I might well have done so. Suppose that this had been an action for the dissolution, not of a marriage but of a partnership, in which the plaintiff had succeeded in all his contentions so that normally the defendant would have been condemned in costs, and suppose that the plaintiff had, before action brought, written a series of abusive letters to the defendant, surely, in such a case, the judge would have been entitled to show his disapproval of conduct so unbecoming in a partner by leaving him to bear his costs of the action. So too, in the present case, where there was conduct unbecoming in a husband, as the commissioner thought and was, I think, entitled to think. The discretionary control over costs is, no doubt, difficult to exercise, and the exclusion of irrelevant considerations is very important. None the less, I venture to think that it should be jealously guarded and not whittled down unnecessarily. I am glad to feel that we need not interfere with the commissioner's decision.

*Appeal dismissed.*

Solicitors: *Ashby, Rogers & Co.* (for the husband).

[*Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.*]

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## WINTER v. CARDIFF RURAL DISTRICT COUNCIL.

[HOUSE OF LORDS (Viscount Jowitt, L.C., Lord Porter, Lord Oaksey, Lord MacDermott and Lord Reid), January 23, 24, March 29, 1950.]

*Master and Servant—Duty of master—Proper system of working—Extent of master's duty—Need to give instructions—Question for decision.*

- A Apart from statute, an employer is under certain obligations to his servants to provide for their safety. He may delegate the carrying out of such obligations, but he cannot delegate or avoid his own responsibility for their proper performance. So, if the person left to carry out such an obligation is negligent in carrying it out and that negligence causes injury to a fellow servant, the employer is liable in damages and cannot rely on the rule of common employment. One of these obligations is to provide a safe system of working. A system of working normally implies that the work consists of a series of similar or somewhat similar operations and the conception of a system of working is not easily applied to a case where only a single act of a particular kind is to be performed. The duty to provide a safe system of working is not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. That duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case. It is always a question whether the negligence complained of is the failure of the employer to inaugurate and maintain a safe system or the casual departure from that system as the result of the negligence of an individual fellow workman. The difference is between a case where sufficient and adequate provisions have been made, which will, if carried out, protect the workman unless one of his fellows does not use proper care in carrying out the system, and a case where the system itself makes no such provision. The duty of the employer is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. Where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently it is natural and reasonable that it should be left to the foremen or workmen on the spot. The giving of proper instructions may well be a part of a proper system of working, and the omission to give them may constitute a defect in the system of working, or, alternatively, a breach of the employer's obligation to take reasonable steps for the safety of those employed on the task.

H [AS TO MASTER'S COMMON LAW DUTY TO SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-194, paras. 313-328; and FOR CASES, see DIGEST, Vol. 34, pp. 194-210, Nos. 1580-1729.]

Cases referred to:

- (1) *Priestley v. Fowler*, (1837), 3 M. & W. 1; 7 L.J.Ex. 42; 34 Digest 202, 1647.
- (2) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.



- (3) *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 97; 106 L.T. 161; 34 Digest 218, 1809.
- (4) *Colfar v. Coggins & Griffith (Liverpool), Ltd.*, [1945] 1 All E.R. 326; [1945] A.C. 197; 114 L.J.K.B. 148; 172 L.T. 205; 2nd Digest Supp.
- (5) *Speed v. Thomas Swift & Co., Ltd.*, [1943] 1 All E.R. 539; [1943] K.B. 557; 112 L.J.K.B. 487; 169 L.T. 67; 2nd Digest Supp.
- (6) *Rees v. Cambrian Wagon Works, Ltd.*, (1946), 175 L.T. 220; 2nd Digest Supp.

APPEAL from a decision of the Court of Appeal (BUCKNILL and SINGLETON, L.JJ., COHEN, L.J., dissenting) dated Dec. 17, 1948, affirming an order of MORRIS, J., dated Apr. 16, 1948.

While riding on one of the respondents' lorries which was carrying a heavy voltage regulator, the appellant, who was employed by the respondents as a labourer, was injured through the negligence of the respondents' charge hand in having failed to secure the regulator to the lorry. The Court of Appeal, affirming the decision of MORRIS, J., found that the appellant was in common employment with the charge hand; that the respondents had not failed to provide a safe plant or a safe system of work; and, therefore, that the appellant could not recover against them in respect of his injuries. The facts appear in the opinion of LORD PORTER.

*Beney, K.C.*, and *David Pennant* for the appellant.

*Glyn-Jones, K.C.*, and *Meurig Evans* for the respondents.

The House took time for consideration.

Mar. 29. The following opinions were read.

**LORD PORTER:** My Lords, this is an appeal from an order of the Court of Appeal dated Dec. 17, 1948, which by a majority (BUCKNILL and SINGLETON, L.JJ., COHEN, L.J., dissenting) dismissed the appeal of the appellant from a judgment of MORRIS, J., of Apr. 16, 1948.

The facts are short and not seriously in dispute. The appellant was a labourer, aged sixty-four, and was employed by the respondents in their electricity department. Prior to and on May 14, 1946, he was employed in a gang laying a cable in the village of Pentyrch, which is about one mile from the respondents' depot at Creigau. In connection with the work the respondents had near to Pentyrch a voltage regulator, weighing about fifteen hundredweight, and being about four feet, six inches high, four feet broad and one foot, six inches, deep. It had projecting handles or door knobs at the back and front, *i.e.*, on the two opposed sides measuring four feet, six inches, by four feet. When the laying of the cable was finished, the mains superintendent of the respondents, named Foster, instructed the foreman of the gang, one Hayman, a charge hand, to remove the regulator to the depot and for that purpose to make use of a named motor lorry belonging to the respondents. The lorry in question lacked a tail board and near side board and its off side board was unsupported. Block and tackle and a rope of about 150 feet in length, together with planks and rollers, were provided for the purpose of moving heavy weights on and off the lorry. Hayman had had no previous experience of transporting heavy loads, but he was believed by Foster to be a very capable and competent workman and quite capable of carrying out the job of moving the regulator without any instructions, a belief which MORRIS, J., found to be justified. In fact, Foster gave him no instructions as to how the regulator should be carried although he knew its dimensions and that the handles protruded, and was aware of the condition of the lorry and had ordered a new body to be fitted to it. Hayman, however, carried out the orders given him, and under his supervision, the gang, including the appellant, moved the regulator on the rollers up the planks into the lorry by means of the block, pulley and rope. They placed the regulator on its side on the front part of the platform with one end resting on a roller and the

other on some bricks so as to keep the handles and door knobs clear of the lorry's floor, and discussed the question whether they should lash the regulator to the lorry, but decided not to do so though they could have used the rope for this purpose had they wished to do so. The appellant, together with the other men who had been engaged in the loading, then mounted the lorry. Hayman sat in front with the driver and the others on the platform. The appellant sat on the near side on part of the regulator. The lorry was carefully driven, but when  
A nearing its destination, and while taking a corner of the road near Pentyreh Farm, the regulator slid across the platform and over the near edge, carrying the appellant with it, and fell on him as he lay in the roadway, causing him serious injuries. In the court of first instance the learned judge held that Hayman had been negligent in failing to lash the regulator to the lorry before starting on the journey to Creigau, but that the respondents were not liable, because  
B Hayman's negligence was that of a fellow servant of the appellant when engaged on a common employment, and this judgment was affirmed in the Court of Appeal. On this state of facts the appellant's case against the respondents was that they were negligent in that they failed to provide safe plant, failed to adopt a safe system of working, and did not exercise proper supervision over the conduct of the work. The statement of claim also contained an allegation that  
C they had been guilty of a breach of statutory duty in that the requirements of reg. 67 of the Motor Vehicles (Construction and Use) Regulations, 1941, had not been complied with. This last contention, however, was not persisted in save as providing a standard with reference to which the requisite care to be observed could be estimated. So regarded, it merges in the question whether the respondents were guilty of negligence for which the responsibility was theirs, though the actual immediate or intermediate cause of the injury was the negligence of a fellow servant.

The plant said to be unsafe was the motor lorry, and it was alleged to be unsafe because it lacked a back and near side board. I can imagine cases in which the lack of these fitments might constitute negligence, *e.g.*, if the lorry  
E were used to carry parcels and these were merely placed on its open floor, but an open lorry is a perfectly safe vehicle to carry a single heavy regulator. Side or back boards are neither suitable nor capable of retaining it unless it is tied. No doubt, the provision of a side board might have retarded its progress for a brief instant of time, but I can see no reason for supposing that the presence of a side board would have prevented the accident. On the contrary, it might well  
F have added to the danger by crushing the appellant's legs in the course of being carried away. In any case a truck provided with a platform and without back or side boards would be a safe vehicle on which to carry a heavy weight even if shaped as this regulator was, provided the regulator was made fast. Indeed, the provision of all three boards might be used as an argument (though I think the argument would be unsound) for contending that the men engaged in the  
G work had been induced to think the vehicle safer than it was. In my view, the lorry was adequate for its task and was provided with the necessary equipment in as much as the rope was available and known to be available for tying on the regulator, but was not used because the foreman, and, indeed, the men generally knew their journey was a short one and wrongly either thought the use of the rope to fasten the regulator unnecessary or were minded to take the  
H risk. Indeed, this is the explanation of the failure to fasten the regulator which the learned judge has accepted and is his reason for holding Hayman negligent. The substantial ground of appeal, however, is that the respondents' system of work was unsafe, and to establish this contention the appellant relies on the assertion that some senior official should have superintended the loading, and that Hayman was inexperienced and had failed to receive sufficient instruction in the course of his general training or to have been subjected to adequate supervision on this particular occasion.

The doctrine that a master is not responsible to a servant for the negligence of a fellow servant is not of very remote origin. It is said to have first been mooted in *Priestley v. Fowler* (1), and it has now been abolished. In the meantime it has given rise to a crop of cases in which the limitation of the doctrine and the consequent liability of the master have been discussed, and of these *Wilsons & Clyde Coal Co. v. English* (2) takes a leading place. LORD WRIGHT in that case, quoting the wording approved in *Bulter (or Black) v. Fife Coal Co.* (3) ([1912] A.C. 173), said ([1937] 3 All E.R. 640):

"The obligation is threefold, 'the provision of a competent staff of men, adequate material, and a proper system and effective supervision.'"

My Lords, in the present case the learned judge has found that Hayman was believed to be, and, in fact, was, competent to perform the duty placed on him, and, as I have indicated, the material provided was adequate for the purpose for which it was required. The only outstanding question, therefore, is whether there was an adequate system and effective supervision. I did not myself understand that any complaint was made of the system except that Hayman had not received specific instructions as to the carrying of heavy material of unusual shape, and that, in any case, if such material was to be transported, the master remained liable for the proper supervision of the means adopted for its carriage.

The duty cast on the master is, of course, not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. As the law stands, that duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case. Undoubtedly, such an obligation may be imposed on the employer if the circumstances require it, but it is always a question whether the negligence complained of is the failure of the employer to inaugurate and maintain a safe system or the casual departure from that system as the result of the negligence of an individual fellow workman. The difference, as I see it, is between a case where sufficient and adequate provisions have been made, which will, if carried out, protect the workman unless one of his fellows does not use proper care in carrying out the system, and a case where the system itself makes no such provision. One can illustrate the distinction by comparing the resultant liability where a well-trained chauffeur brings about an accident by careless driving with a case where such a driver is set the task of driving a motor of unusual construction without any steps being taken to see that he can fulfil the duty with which he is entrusted. In the first case the master would be free from blame in respect of injury to a fellow servant. In the second there would, I imagine, be a failure to provide a safe system of proper instruction and supervision.

In the present case the negligence appears to me to be the negligence of a fellow employee to fulfil a task which he was fully competent to carry out and which his master was justified in believing that he would so fulfil, and the accident to be due to that negligence and to no failure on the employer's part. Such was MORRIS, J.'s, judgment and he had ample evidence to support it. I would dismiss the appeal.

**LORD OAKSEY:** My Lords, I agree that this appeal should be dismissed. In my opinion, the common law duty of an employer of labour is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must



A exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs. It is not easy to define these spheres, but where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workmen on the spot. In the present case the question to be decided was whether to lash the regulator on the lorry or not to lash it, and both courts have held, as I think, rightly, that that was a matter for the decision of the charge hand on the spot. Transport of goods would, I apprehend, be impossible to carry on efficiently if the method of securing every load had to be decided by the employer. It might almost as well be suggested that the tying up of every parcel in a shop is a matter for the employer's decision. A good leader of men (and an employer is a leader of men) leaves to his men as much discretion as he can, otherwise unforeseen circumstances will upset the best laid plan. The question is in each case: Is it a matter for the employer's decision or for the man's?, and I have no doubt that the courts below were right in holding that in the present case it was for the charge hand to decide whether this load should be lashed on the lorry or not.

LORD MACDERMOTT (having stated the facts): My Lords, unfortunately for the appellant, he received his injuries before s. 1 (1) of the Law Reform (Personal Injuries) Act, 1948, which abolished the doctrine of common employment, came into force. He cannot, therefore, succeed against D the respondents merely by establishing negligence on the part of Hayman, for the latter was undoubtedly his fellow-servant. This was conceded, but the appellant contended that his injuries were also due to the negligence of the respondents, his employers, in failing to provide (a) proper plant and equipment for the job, and (b) a proper and safe system of working. If default of this nature was a cause of the accident, it is clear that the doctrine of common E employment would not afford a defence, for the duties underlying these two types of negligence are and remain the personal obligations of the employer: see *Wilsons and Clyde Coal Co. v. English* (2). These duties, it may be well to add, are not absolute in nature. They lie within, and exemplify, the broader duty of taking reasonable care for the safety of his workmen which rests on every employer, and they may be more accurately described as (a) the duty to F use reasonable skill and care to provide proper plant and equipment, and (b) the duty to use reasonable skill and care to provide a proper and safe system of working where the task is such as to call for the laying down of a system or mode of working in the interests of safety. The test throughout is, I think, that of what is reasonable and proper to be done for the safety of the workman in the circumstances of the particular case.

G For the appellant it was said that the respondents were in breach of the first of these duties because the lorry was not suitable for carrying the regulator in that its tail-board and near side board were missing. The learned trial judge rejected this contention and expressed the view that the lorry was quite safe and adequate for this purpose. The tail and side boards would, no doubt, have been useful to contain a loose load, such as sand or stones, but there is nothing H that I can find in the evidence to suggest that they were designed, or could properly have been used, without more, for the purpose of containing a weighty single object such as the regulator. Sides or no sides, the proper way to secure it was to lash it to the platform. If that had been done, as it could and ought to have been done with the rope provided, the accident would not have happened. Whether it would have happened differently or with better or worse results for the appellant had the missing boards been in position must on the evidence remain a matter of conjecture, and, in any event, the issue is not whether the

presence of the boards would have prevented the accident. It is whether the respondents acted with reasonable care for their workmen's safety in providing what was, to all intents and purposes, a lorry without sides, but with the necessary gear for transporting the load in safety. On this there was, in my opinion, ample evidence to support the finding of MORRIS, J. I cannot, for myself, see any sound ground on which a different conclusion might have been based.

The next question is whether the respondents were at fault regarding the provision of a proper and safe system of working. Since this House in *Colfar v. Coggins & Griffith (Liverpool) Ltd.* (4), approved the propositions laid down with respect to this obligation by the Court of Appeal in *Speed v. Thomas Swift & Co., Ltd.* (5) it cannot, I think, be doubted that the duty to provide a safe system can arise in relation to a single task which may never have to be repeated under the same conditions, but that does not mean that there must be a scheme of work thought out for every operation, nor can the duty always be distinguished from the kindred obligation to provide proper plant and equipment. Here, for example, the nature of the tackle provided indicated the scheme or method to be applied in placing the object to be removed on the lorry, and in that sense the job was one for the provision of a scheme of work. The appellant, however, made no complaint in respect of the method or scheme followed in hoisting the regulator on the lorry. His contention on this branch of the case was that the respondents, presumably through Foster, the mains superintendent, should have instructed Hayman to lash down the load when in position. It was admitted that no such instructions had been given and this omission, it was said on behalf of the appellant, constituted a defect in the system of working which ought to have been provided, or, alternatively, was in itself a breach of the respondents' personal obligation to take reasonable steps for the safety of those employed on the task. The giving of proper instructions may well be part of a proper system of working, but I do not think it really matters here under which of these alternatives the point is considered. The question of substance is the same in either case: Did the respondents fail to take due care for the safety of their workmen in not telling Hayman to lash the regulator with the rope provided? MORRIS, J., was of opinion that the respondents had not failed in their duty in this respect, and the majority in the Court of Appeal upheld him in this, COHEN, L.J., taking the contrary view.

For the appellant it was urged that the removal of the regulator was an unusual operation calling for a degree of skill and care which the respondents could not reasonably have expected Hayman to show unless he had been specially instructed. The load, it was said, was particularly awkward and difficult on account of the projecting knobs as well as of its weight, and the securing of it should not have been left to the discretion of one of Hayman's limited experience. My Lords, here again, the evidence, in my opinion, was amply sufficient to justify the learned trial judge in rejecting this point of view and in holding as he did on this aspect of the case. It is true that Hayman had not supervised the removal of a regulator of this sort before, but he had been in the employment of the respondents for fifteen years and was accustomed to moving electrical apparatus by lorry. According to his testimony this particular job was in the ordinary course of the day's work and he did not expect to receive any special instructions about it. Foster, the mains superintendent, said "he was a very capable and competent man," and considered him fit to deal with the removal of the regulator and to settle the details of the work. After referring to the evidence to this effect, MORRIS, J., in the course of a careful and considered judgment, states his conclusion as to the conduct of the respondents thus:

"It was, in my view, quite reasonable for them to give instructions to Hayman to remove the regulator, while leaving it to him to decide in detail as to the exact way in which he would perform his task."

The learned judge had previously referred at some length to *Colfar v. Coggins & Griffith (Liverpool) Ltd.* (4) and *Speed v. Thomas Swift & Co., Ltd.* (5), and I have no doubt that in reaching this finding he was directing himself to the duty to take reasonable care for the safety of their employees which lay on the respondents. That being so, I can see no ground for disturbing his decision that the respondents had not failed in their duty towards the appellant. In the event, no doubt, Hayman made a mistake and fell short of what was expected of him, but, as against this, it must be remembered that he was a witness and that the learned judge had an opportunity of assessing his intelligence and forming a view as to whether he was the kind of man to whom the respondents might reasonably commit this particular job without special instructions. For these reasons I am of opinion that the appeal fails and should be dismissed.

**LORD REID:** My Lords, apart from statute, an employer is under certain obligations to his servants to provide for their safety. He may leave a servant to carry out such obligations, but he cannot delegate or avoid his own responsibility for their proper performance. So, if the servant left to carry out such an obligation is negligent in carrying it out and that negligence causes injury to a fellow servant, the employer is liable in damages and cannot rely on the rule of common employment. One of these obligations is to provide a safe system of working. A system of working normally implies that the work consists of a series of similar or somewhat similar operations and the conception of a system of working is not easily applied to a case where only a single act of a particular kind is to be performed. Recently, however, this obligation has been extended to cover certain cases when only a single operation is involved.

I think that the justification for this is that, where an operation is of a complicated or unusual character, an employer, careful of the safety of his men, would organise it before it was begun and in that sense provide a safe system of working for it. Where such organisation is called for, an employer must provide it and he cannot delegate his responsibility for it, but cases in which such a duty has been found to exist are comparatively few and it has never even been suggested that such an obligation arises in every case where a group of the employer's servants are doing some work which may involve danger if negligently performed. In the most recent reported case, *Rees v. Cambrian Wagon Works Ltd.* (6), TUCKER, L.J., who delivered the judgment of the court said (175 L.T. 221):

"... the operation was one which required proper organisation and supervision, or, in other words, a reasonably safe system."

I think that this is the right criterion.

In the present case the operation in the course of which the appellant was injured was a simple one. A voltage regulator, weighing about fifteen hundred-weight, but of somewhat awkward shape, had to be loaded on a lorry and carried for a mile or so. The employer provided a lorry and tackle for loading the instrument on it. The loading was done safely and properly and without difficulty, but the load ought to have been tied to the lorry so that it could not move on the journey, and rope was available for this purpose. The man in charge did not think it necessary to do this and on the journey the load fell on the side of the road, carrying the appellant with it and severely injuring him. It was argued that the lorry was defective in that it ought to have had a side board and that the presence of a side board would have been some safeguard. This is by no means certain, but, assuming it to be so, it is certainly not the case that a lorry without a side board was an unsafe vehicle to carry the load. It is not disputed that, if the load had been tied on, the lorry was perfectly safe, side board or no side board. I, therefore, think that the absence of the side board was immaterial. It was also argued that the employers did not provide a sufficiently experienced man to take charge of the operation. The man whom they sent had been in the respondents' service for a number of years and he was



accustomed to moving electrical apparatus. It is true that he had never handled this particular type of instrument before, but he was regarded by his employers as a competent and capable man well qualified to be entrusted with this responsibility and he did not, himself, expect to receive specific instructions about this operation. I think that MORRIS, J., was well justified in saying:

"It was, in my view, quite reasonable for them to give instructions to Hayman to remove the regulator while leaving it to him to decide in detail as to the exact way in which he would perform his task. The matter was not either intricate or bewildering. It was not an enterprise calling for elaborate planning or for precise and detailed instructions. The job required the exercise of judgment on the spot."

On this finding I think that he was right in holding that it had not been established that the respondents were negligent in any of the respects alleged.

There have been many cases in which a system of working was admittedly necessary and was provided and the issue was whether a negligent act by a servant, which caused injury to a fellow servant, was an act which he was performing in the execution of his employer's duty to provide and maintain a safe system of work or was an independent or casual act of negligence. I do not think that these cases afford much help in determining whether a system of work was necessary at all, but in *Colfar v. Coggins & Griffith (Liverpool) Ltd.* (4), VISCOUNT SIMON, L.C., having referred to *Speed v. Thomas Swift & Co.* (5), said ([1945] 1 All E.R. 328):

"... the judgments of LORD GREENE, M.R., and MACKINNON and GODDARD, L.JJ., appear to me to carry the analysis of 'system of working' to the furthest point that can be reached. I agree with the propositions there laid down, but, as long as the doctrine of common employment continues to apply, do not think that the employer's liability at common law arising from this duty can be further extended."

My Lords, in my judgment, this appeal could not be allowed without a considerable further extension of that liability and I agree with your Lordships that this appeal should be dismissed.

**LORD PORTER**: My Lords, **VISCOUNT JOWITT, L.C.**, asked me to say that he agrees with the opinion which I have expressed.

*Appeal dismissed with costs.*

Solicitors: *Rowley, Ashworth & Co.* (for the appellant); *Gardiner & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

## ELWES v. ELWES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 8, 15, 1950.]

*Divorce—Decree absolute—Wife's petition on ground of adultery—Reconciliation after decree nisi—Resumption of cohabitation—Subsequent desertion by husband—Wife's application for decree absolute after more than a year—Need to disclose full facts—Notice to parties affected by charges—Jurisdiction of court—Matrimonial Causes Rules, 1947, r. 40.*

On June 14, 1948, the wife obtained a decree *nisi* against her husband on the ground of his adultery. Shortly afterwards the parties became reconciled and they lived together from September, 1948, to May, 1949, when the husband left the wife. She then applied out of time for the decree *nisi* to be made absolute.

HELD : (i) the husband's conduct in leaving his wife amounting to an act of desertion, there was no need for the wife, who had disclosed all the material facts that had arisen since the decree *nisi*, to have recourse to fresh proceedings.

(ii) the court had jurisdiction to allow the decree to be made absolute, and the wife, having adequately accounted for her delay, was entitled to a decree absolute.

*Per WILLMER, J.*: in the absence of any provision in the Matrimonial Causes Rules, 1947, parties and their professional advisers making applications for a decree *nisi* to be made absolute in cases where there has been a resumption of cohabitation are under a duty to disclose to the court all the material facts, and, if allegations are made which affect the opposite party or persons not parties to the suit, to serve a notice on such persons giving full particulars of the charges made.

*Beard v. Beard* ([1945] 2 All E.R. 306); *Moore v. Moore* ([1892] P. 382); and *Rogers v. Rogers* ([1894] P. 161), *applied*.

[EDITORIAL NOTE. Until recently decrees absolute were pronounced in open court as a judicial act, but now, under r. 40 of the Matrimonial Causes Rules, 1947, such decrees are granted by the ministerial act of the registrar. In this case WILLMER, J., called attention to the fact that that rule calls for no disclosure by applicants of their own conduct since the decree *nisi* was made, and that the registrar has no power to make any inquiry. Even when applications are made outside the year prescribed by the rule the only requirement is that the applicant should set out in an affidavit the grounds for the delay in making the application. Where there has been condonation of the respondent's offence after the decree *nisi* and the petitioner alleges fresh matrimonial offences he or she may, instead of bringing fresh proceedings, elect to rely on the original offence. In such cases the fresh charges set out in the affidavit may gravely affect third parties. In order to afford such parties the opportunity, if they are so minded, to answer these allegations WILLMER, J., pointed out that there was need to amend the rule, and until that change is made he emphasised the present duty resting on solicitors, first, to ensure that their clients disclose fully to the court all the material facts of their own conduct, and, secondly, to serve notice on all persons against whom allegations, generally charges of adultery, are made in affidavits supporting applications for decrees absolute.

AS TO DECREE ABSOLUTE, see HALSBURY, Hailsham Edn., Vol. 40, pp. 828-831, paras. 1325-1328; and FOR CASES, see DIGEST, Vol. 27, pp. 549-552, Nos. 6014-6055, Digest Supp. and 2nd Digest Supp.]

Cases referred to :—

- (1) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 2nd Digest Supp.
- (2) *Moore v. Moore*, [1892] P. 382; 62 L.J.P. 10; 67 L.T. 530; 27 Digest 366, 3517.
- (3) *Rogers v. Rogers*, [1894] P. 161; 63 L.J.P. 97; 70 L.T. 699; 27 Digest 486, 5172.

SUMMONS adjourned into court.

The wife applied more than a year after the date on which she had been granted a decree *nisi* on the ground of her husband's adultery for the decree to be made absolute. In her supporting affidavit she stated that, after becoming reconciled with her husband after the decree *nisi* had been granted, she lived with him for nine months, at the end of which he deserted her. The registrar referred the matter to WILLMER, J., who asked for the assistance of the King's Proctor and adjourned the matter into court for argument.

*J. E. S. Simon* for the wife.

*Colin Duncan* for the King's Proctor.

*Our. adv. vult.*

Mar. 15. **WILLMER, J.**, read the following judgment. This was an application by a wife petitioner for leave to apply, after the lapse of more than a year from decree *nisi*, to have the decree made absolute. The matter was referred to me by the registrar in view of the unusual circumstances disclosed in the petitioner's affidavit, and, having regard to the difficult questions that appeared to arise, I asked for the assistance of the King's Proctor and adjourned the summons for hearing in open court. The hearing took place on Mar. 8, when the matter was argued fully by counsel on behalf of the wife and of the King's Proctor. At the conclusion I was able to announce my decision, namely, that leave would be granted to apply forthwith to have the decree *nisi* made absolute (which has since been done), but, in view of the importance of the questions argued before me, I have thought it right to take time to reduce into writing the reasons for my decision.

The material facts were clearly and fully set out in the wife's affidavit, and may be very briefly stated. She obtained a decree *nisi* on June 14, 1948, on the ground of the husband's adultery. Shortly afterwards, owing to the tragic death of one of the children of the marriage, the parties became reconciled, and from September, 1948, until May, 1949, they lived together again at an address in Ireland where the husband had acquired a property. Differences then again arose between them, as a result of which the husband refused to continue living with the wife. I have before me two letters written by the husband in May and June respectively, which make it quite clear that it was his decision and his act which brought to an end the resumed cohabitation. No sufficient cause is put forward for his refusal to continue living with his wife, and I am left in no doubt—especially after hearing the result of the King's Proctor's independent investigation—that the husband's conduct amounted to an act of desertion. The parties have never since resumed cohabitation. The situation in this case, therefore, is exactly that which arose in *Beard v. Beard* (1), and on the authority of the decision in that case there can be no doubt that in the events which have happened the wife has good grounds for seeking relief. The question which gave rise to doubt in my mind is whether she is entitled to relief in these proceedings. It is clear that, if she had taken steps to have this petition dismissed and had then launched a fresh petition, alleging the original act of adultery, admitting the subsequent condonation, but setting up the husband's later desertion by way of revival of the condoned adultery, she would have had an impregnable case. The wife was reluctant to take that course, because, as she alleged, there were grounds for thinking that since the previous proceedings the husband had abandoned his English domicile and had acquired a new domicile of choice in Ireland. In the circumstances it was strenuously argued before me that there was no need to have recourse to fresh proceedings, but that the wife, having disclosed all the material facts which have arisen since decree *nisi*, was entitled to obtain her relief in this suit, in which no question of domicile arose.

I have come to the conclusion that this case is covered by the authority of *Moore v. Moore* (2). In that case a period of over eight years had elapsed, during part of which the wife resumed cohabitation with the husband and continued to live with him until she again left him on the ground of his cruelty. On an application to make absolute the decree *nisi* granted eight years before, it was held by GORELL BARNES, J., that the subsequent cruelty of the husband placed the petitioner in the position which she occupied when she obtained the decree *nisi*, and that she was entitled to have the decree made absolute. Two years later, in *Rogers v. Rogers* (3), where a wife, having obtained a decree *nisi*, condoned her husband's misconduct, but alleged that such condonation was cancelled by subsequent adultery on his part, counsel for the Queen's Proctor expressly raised the question whether it was competent for the court in the existing proceedings to take notice of the subsequent adultery for the purpose of granting a decree, or whether, on the other hand, there must be a fresh suit.



On this point, SIR FRANCIS JEUNE, P., held himself bound by *Moore v. Moore* (2) and stated that he would have held that the condonation proved did not form a ground for rescinding the decree, but on the particular facts of that case he held that the Queen's Proctor was entitled to succeed on the ground of collusion, and on that ground the decree *nisi* was rescinded.

- These cases were, of course, decided under the powers conferred by the Matrimonial Causes Act, 1857, as amended by s. 7 of the Matrimonial Causes Act, 1860. The statutory provisions now in force, namely, s. 181, s. 182 and s. 183 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Matrimonial Causes Act, 1937, do not differ in any sense material to the present case. The great change which has taken place is in the procedure prescribed by rules of court for obtaining a decree absolute. Whereas until recently the decree absolute was pronounced, as a judicial act, by the judge in open court, provision is now made, by r. 40 of the Matrimonial Causes Rules, 1947, for a decree absolute to be obtained by a ministerial act on the part of the registrar. No machinery exists under the rule for dealing with the sort of question that has arisen in this case. The rule imposes no obligation on the party who has obtained the decree *nisi* to make any disclosure with regard to his or her conduct since decree *nisi*, nor has the registrar any duty, or (it would seem) any power, to inquire. If the application is made within a year from the date of the decree *nisi*, it would appear that the registrar is bound under the rule to let the notice be filed, on being satisfied that no appeal is pending and that no appearance has been entered, or affidavit filed, on behalf of any person wishing to show cause against the decree being made absolute. If more than a year has elapsed, the party who obtained the decree *nisi* must, it is true, file an affidavit and the registrar has a discretion to grant or withhold leave, but it is clear that, so far as the rule is concerned, the applicant's affidavit is required only for the purpose of accounting for the delay, and the registrar's discretion is apparently limited to this aspect of the matter. What strikes me as even more arresting is the fact that no provision is made under the rule for giving notice to other parties who may be affected. Suppose a petitioner, after obtaining a decree *nisi*, has condoned the respondent's offence, but wishes to apply for a decree absolute on the ground that the original offence has been revived by fresh misconduct on the part of the respondent. It may be sought to make the most horrible charges, as, for instance, of cruelty or bestiality, but no provision is made by the rule for giving notice thereof to the respondent or for affording him or her an opportunity to be heard thereon. If it is alleged that the respondent has been guilty of subsequent adultery, there is no machinery under the rule for giving notice to the party with whom such adultery is alleged to have been committed. It may be that, if any such matter is brought to the attention of the court, the powers of the court under s. 197 of the Supreme Court of Judicature (Consolidation) Act, 1925, are sufficient to protect the rights of such third parties, but it is at least a matter for some surprise that no provision has been made in the rules for such an eventuality, and it seems clear that when the present rules were drafted it was never contemplated that applications for decree absolute might be made in such circumstances. Yet, if the wife is entitled to apply for a decree absolute in the present case, plainly she could equally have done so had she relied on an allegation of adultery, instead of desertion, as reviving the husband's previous misconduct.
- Having regard to the provisions of the rules as they now stand I have given anxious consideration to the question whether jurisdiction now exists to allow an application for a decree absolute in circumstances such as those of the present case. I have come to the conclusion that counsel for the wife and for the King's Proctor were well founded in their submission that the jurisdiction of the court cannot be restricted or taken away by a mere alteration of the rules. It is clear that in 1892 and 1894 jurisdiction existed to pronounce a decree absolute in a case such as the present, as is shown by *Moore v. Moore* (2) and *Rogers v.*

*Rogers* (3). If the court had jurisdiction at that date, such jurisdiction could only be taken away by subsequent statutory enactment. I can find nothing in any subsequent statute which either expressly or by implication takes away the jurisdiction that was exercised in those two cases. On the contrary, as I have previously pointed out, the provisions of the statutes in force today are, so far as this point is concerned, substantially the same as those in force sixty years ago. I have come to the conclusion that, provided I am satisfied on the particular facts of this case, I have undoubted jurisdiction to allow this decree to be made absolute. The fact that the present rules of court make no provision for dealing with this sort of case is much to be deplored, but I cannot regard it as a good reason for refusing to exercise a jurisdiction which I am satisfied I have. It is much to be hoped that, in view of what has come to light in this case, an early opportunity will be taken of re-considering and revising the present rules. In the meantime, in the absence of any provision in the rules, I think it right to take this opportunity to emphasise that in cases such as the present parties making applications for decree absolute, and their professional advisers, are under a duty to make the fullest possible disclosure to the court of all material facts, and, furthermore, where allegations are made which may affect the opposite party or persons not parties to the suit, notice should be served on such parties giving full particulars of the charges made. In the present case I am informed that the wife's solicitors did, in fact, take the precaution of serving notice of this application on the husband, with a copy of the wife's affidavit. I am satisfied that the husband has had an opportunity of rebutting the charge of desertion made against him, and that his failure to take advantage of that opportunity has been due to his recognition that he has no defence to the charge. I am also satisfied that the wife has adequately accounted for her delay in making application to have the decree made absolute—indeed the reasons for the delay reflect nothing but credit to her. In the circumstances I can see no good reason for withholding the relief sought by the wife, and I have, therefore, as already stated, granted leave to apply for a decree absolute.

*Decree absolute granted.* E

Solicitors : *Charles Russell & Co.* (for the wife); *Treasury Solicitor* (for the King's Proctor).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

## R. v. JOHNSTONE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Jones and Morris, JJ.), March 13, 1950.] G

*Criminal Law—False pretences—Indictment—Need to state to whom pretences made—Larceny Act, 1916 (c. 50), s. 32 (1)—Indictments Act, 1915 (c. 90), s. 3 (2), sched. I, appendix, form 12.*

The applicant was charged on an indictment containing eight counts of obtaining money by false pretences contrary to the Larceny Act, 1916, s. 32 (1), and was convicted on all counts. The grounds of his appeal were, *inter alia*, that the indictment was bad in that it did not state to whom the false pretences were made.

HELD: in view of the provisions of the Indictments Act, 1915, sched. I, appendix, form 12, it was no longer necessary to state to whom the pretences were made.

*R. v. Sowerby* ([1894] 2 Q.B. 173), no longer good law.

[AS TO INDICTMENT FOR OBTAINING BY FALSE PRETENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 569-572, para. 961; and FOR CASES, see DIGEST, Vol. 15, pp. 1008, 1009, Nos. 11,325-11,336.]

Cases referred to:

- (1) *R. v. Sowerby*, [1894] 2 Q.B. 173; 63 L.J.M.C. 136; 71 L.T. 300; 58 J.P. 577; 15 Digest 1009, 11,335.
- A (2) *R. v. Hunter* (1867), 17 L.T. 321; 32 J.P. 357; 15 Digest 992, 11,102.
- (3) *R. v. Carpenter* (1911), 76 J.P. 158; 15 Digest 1005, 11,267.

APPLICATION for leave to appeal against conviction at Kingston Quarter Sessions.

- Ackner for the applicant.
- B The Crown was not represented.

LORD GODDARD, C.J., stated the facts and continued: So far as the conviction is concerned, in the opinion of the court there is nothing to be said. There was one point taken in the notice of appeal which counsel for the applicant has, very properly, not pursued. It was said that the indictment was bad because

C the counts did not state, in so many words, to whom the false pretences were made. The first count was:

- “ . . . that on or about Nov. 5, 1948, at Reigate in the county of Surrey with intent to defraud you obtained from William John Moir a valuable security, to wit, a cheque for £170 6s. 0d., by falsely pretending that you were in a position to supply to the said William John Moir a secondhand
- D David Brown tractor.”

The count does not state that the false pretence was made to William John Moir, although it says that the applicant obtained the cheque by falsely pretending that he was in a position to supply that person with a tractor.

- E There is a passage in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 32nd ed., p. 687, which says:

“The indictment must state to whom the pretences were made, and from whom the goods, etc., were obtained.”

- The authority quoted for that proposition is *R. v. Sowerby* (1), decided in 1894, where the form of indictment in *R. v. Hunter* (2) was held to be bad. The
- F Indictments Act, 1915, sched. I, appendix, form 12, now makes provision for the form of a count for false pretences and the above statement in ARCHBOLD'S work is no longer accurate.

*Application refused.*

Solicitors: *Titmuss, Sainer & Webb* (for the applicant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]



## MUNRO v. MUNRO.

[COURT OF APPEAL (Bucknill, Denning, L.J.J., and Roxburgh, J.), March 9, 1950.]

*Divorce—Restitution of conjugal rights—Petitioner's refusal to share matrimonial home with mother-in-law—Departure from matrimonial home—Willingness to resume cohabitation elsewhere—Order that respondent "return home to the petitioner and render to her conjugal rights."* A

In June, 1947, the parties were married and went to live in a flat contained in a villa belonging to the husband's mother in the south of France. The mother was of a dominating personality, and the husband was addicted to drink and was without employment. In March, 1948, the wife, having failed to reform the husband and being of the opinion that the mother was having a bad influence on him, left her husband and went to live in London. In May, 1948, the husband visited the wife in London, but he refused to resume cohabitation there and suggested that the wife should return to the villa in France. This the wife was not prepared to do, although she was willing to make a home for the husband provided that it did not involve living with his mother. On a petition by the wife for restitution of conjugal rights an order was made that the husband "do within six months from the service of this order on him return home to the petitioner and render to her conjugal rights." For the husband it was argued that, for such an order to be well founded, the facts must disclose that the respondent to the petition had withdrawn from cohabitation, and that in the present case the wife had left the husband, and, therefore, she was not entitled to a decree. B C D

**Held:** the husband's offer of a home in the villa was one which it was reasonable for the wife to refuse; he had thus failed in his duty to provide a proper home for the wife and could be held liable for wilful neglect to maintain her; and, accordingly, a decree could be made directing him to render her conjugal rights. E

*McGowan v. McGowan* ([1948] 2 All E.R. 1032), *applied*.

*Fassbender v. Fassbender* ([1938] 3 All E.R. 389), *approved*. F

[AS TO RESTITUTION OF CONJUGAL RIGHTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 645-648, paras. 946-951; and FOR CASES, see DIGEST, Vol. 27, pp. 273-281, Nos. 2423-2512.]

Cases referred to:

- (1) *Fassbender v. Fassbender*, [1938] 3 All E.R. 389; 107 L.J.P. 123; Digest Supp.
- (2) *McGowan v. McGowan*, [1948] 2 All E.R. 1032; [1949] L.J.R. 197; 113 J.P. 27; 2nd Digest Supp.

**APPEAL** by the husband against a decree of restitution of conjugal rights granted to the wife by Mr. COMMISSIONER GRAZEBROOK, K.C., and dated Dec. 5, 1949, whereby it was ordered that the husband "do within six months from the service of this order on him return home to the petitioner and render to her conjugal rights." G

The wife, having, as she alleged, found life impossible in the home provided by the husband, left him. For the husband it was contended that, since the wife and not the husband had withdrawn from cohabitation, the case was not one in which such an order ought to be made, since, in view of its terms and the facts, it was inappropriate. H

*Mattar* for the husband.

*Melford Stevenson, K.C.*, and *O'Malley* for the wife.

**BUCKNILL, L.J.**, stated the facts and continued: The main point taken on behalf of the husband is that in law the facts do not establish a case in which a decree of restitution of conjugal rights ought to be made. It was said that the respondent to this form of decree must have withdrawn from cohabitation and must be ordered to return to it. It is said here that the husband never did withdraw from cohabitation, but that it was the wife who withdrew from cohabitation when she left the villa in France, because, as she says, life there was impossible, and came back to her home in Chelsea where she wanted her husband to live. It is true that the form of the order seems to indicate that the cases in which an order may properly be made are those where the respondent has withdrawn from cohabitation and the petitioner is wanting to get him or her back. It is also true that no case has been cited to us which is similar to the present case.

We have been asked to look on this case as one in which the husband has, in effect, offered no reasonable home. In the course of the argument I put a hypothetical case where the husband provided the wife with rooms in a house part of which was being used as a brothel. In such a case, in my opinion, a husband could not say that that was a proper home for the wife, and she would be entitled to leave and ask for a decree of restitution of conjugal rights and the provision of a proper home. That that is a correct view is borne out by the judgment of **HENN COLLINS, J.**, in *Fassbender v. Fassbender* (1) where the parties had never cohabited at all and, nevertheless, the learned judge there made an order for restitution of conjugal rights. If an order for restitution could not be made in a case such as the present, the wife might have been placed in a difficult position because, at any rate until the Law Reform (Miscellaneous Provisions) Act, 1949, was passed—it was not the law at the time this case was under consideration—she could only proceed in the magistrates' court for an order on the ground of wilful neglect to maintain, which was limited at that time to £2 per week. She could not get any order for maintenance on the ground of desertion from the High Court, but had to wait for three years until she could bring a petition for divorce on the ground of desertion. I think one ought to apply, in a case of this kind, the same sort of reasoning as that which was applied by the Divisional Court in *McGowan v. McGowan* (2) where the question was considered whether the offer of a home by the husband to the wife was a reasonable offer. If it was not a reasonable offer, the wife was entitled to reject it, and, if she was entitled to reject it, the court held that the husband would be liable to pay maintenance on the ground of wilful neglect to maintain, although he had, in fact, made an offer of a home.

I have come to the conclusion that the question which the learned commissioner put to himself was the right question, *viz.*: Was the offer by the husband to the wife of a home in this villa in all the circumstances one which it was reasonable for the wife to refuse? The learned commissioner came to the conclusion that it was. The husband has, therefore, not offered her a home which can reasonably be regarded as a home, and it was proper that a decree should be made directing him to render her conjugal rights. In my judgment, the appeal should be dismissed.

**DENNING, L.J.**: The setting up of a home by this couple has failed hitherto owing to the unreasonableness of the husband. He took his wife to the south of France to live in a flat next door to his own mother who has a very dominating personality, and he himself spent most of his time in drink and did no work. The wife stayed for six months, and, then, being unable to stand the conditions there any longer, she came back to England. It is plain that the wife had just cause for leaving. The only invitation which the husband has since made to her is that she should go back to live under the same conditions. That, clearly, she was not bound to do. What then is her remedy? She asks for an order for restitution of conjugal rights and I see no reason why

she should not have it. The conjugal rights of a wife comprise many things, the precise extent of which depends on the circumstances of each case. This wife is, I think, entitled to ask her husband to provide a reasonable home away from the mother-in-law, as he could and should do. The court, of course, does not, and cannot, attempt specifically to enforce an order for the restitution of conjugal rights, but the order means that, if the husband does not comply with it, the wife will at least be able to get maintenance without more ado. **A**

Until recently an order for restitution of conjugal rights was often the only way in which a wife could get reasonable maintenance. That has been remedied now by s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, which enables the High Court to make an order for periodical payments in the case of wilful neglect to maintain. In the present case it is not maintenance so much that this wife wants, as her conjugal rights. She wants to reform her husband. She wants him to get work and make a home for them both. So far as the court can help the wife to attain this object by an order for restitution of conjugal rights, I see no reason why she should not have it. The form of the order is not altogether apt for the present situation, but the meaning is clear enough and that is what matters. The husband must provide a reasonable home for his wife, failing which he must provide reasonable maintenance for her. I agree that this appeal should be dismissed. **B**

**ROXBURGH, J.:** I agree. **C**

*Appeal dismissed with costs.*

Solicitors: *Gustavus Thompson & Sons* (for the husband); *Washington, Fox & Co.* (for the wife.) **D**

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

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*Dictum of LORD MACDERMOTT, at p. 852, not adopted.* STANLEY v. COMPTON. [1951] 1 All E.R. 859. **E**

## BAKER v. TURNER.

*Dictum of LORD REID, at p. 854, applied.* ROGERS v. HYDE. [1951] 2 All E.R. 79. **F**

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord MacDermott and Lord Reid), February 7, 8, 13, 14, 15, March 29, 1950.] **F**

*Rent Restriction—"Separate dwelling"—Unfurnished tenancy—Sub-letting of one room, furnished, with use, in common with tenant, of kitchen—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16 (1), sched. I, para. (d)—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (2) (b).* **G**

*Appeal—Abatement—Leave to appeal—Conditional stay of execution—Condition not complied with and order executed—Destruction of lis.*

The contractual tenant of a dwelling-house to which the Rent Restrictions Acts, 1920-1939, applied, sub-let one room, furnished as a bed-sitting room, together with the right to use the kitchen. The landlord terminated the tenant's contractual tenancy by giving her notice to quit, and, on the expiration of the notice, sought possession of the whole house, or, alternatively, of the room sub-let, on the grounds that (i) as the use of the kitchen was shared, neither the tenant nor the sub-tenant had a separate dwelling, and that, therefore, neither was protected by the Rent Acts, and (ii) the tenancy of the room which was sub-let was not protected inasmuch **H**



as (a) the room was furnished and (b) its occupation was coupled with the use of the kitchen, and, therefore, it was not a separate dwelling.

HELD (LORD OAKSEY *dissenting*): (i) conceding that the sub-tenant had no separate dwelling, the house was still let to the tenant as a separate dwelling, and the landlord was, therefore, not entitled to possession of the whole house.

A

*Neale v. Del Soto* ([1945] 1 All E.R. 191), and *Cole v. Harris* ([1945] 2 All E.R. 146), *distinguished*.

B

(ii) the tenancy of the bed-sitting room was not deprived of the protection of the Rent Acts as against the landlord by s. 3 (2) (b) of the Act of 1939, because that sub-section applied only to a separate dwelling let furnished and *ex concessis* a bed-sitting room with the right to use the kitchen was not a separate dwelling; and the sub-letting of the bed-sitting room by the tenant was an exercise of a power contemplated by the Rent Acts, and, therefore, did not prejudice the tenant's protection so as to enable the landlord to recover possession of that room.

C

*Barrell v. Fordree* ([1932] A.C. 676), *distinguished*.

*Decision of the COURT OF APPEAL* ([1949] 1 All E.R. 560), *reversed*.

HELD, further, the fact that, following the decision of the Court of Appeal in his favour and the tenant's failure to comply with a condition on which a stay had been granted, the landlord had proceeded to execute the order, did not cause the *lis* to end or the appeal to abate.

D

*Sun Life Assurance Company of Canada v. Jervis* ([1944] 1 All E.R. 469), and *Metropolitan Real and General Property Trust, Ltd. v. Slaters & Bodega, Ltd.* ([1941] 1 All E.R. 310), *distinguished*.

*Per* LORD NORMAND, LORD MACDERMOTT and LORD REID: The implication contained in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (d), was that the court had no power under that paragraph to make an order for the recovery of possession of a dwelling-house to which the Act applied on the ground that a part of the dwelling-house was sub-let without the landlord's consent, provided that the tenant remained in occupation of the part not sub-let.

E

F

[EDITORIAL NOTE. It was conceded that the order for possession which

was made in this matter before the commencement of the Landlord and Tenant (Rent Control) Act, 1949, came within the words "anything done" in s. 10 of that Act. If, however, it had been successfully contended to the contrary, their Lordships' decision in this case must also have been in the tenant's favour, having regard to the retrospective effect of the Act under s. 10, and the terms of s. 9, which provides that where the tenant of any premises has sub-let a part, but not the whole, of the premises, then, as against his landlord, or any superior landlord, no part of the premises shall be treated as not being a dwelling-house to which the principal Acts apply by reason only that the terms on which the sub-tenant holds any part of the premises include the use of accommodation in common with other persons, or that part of the premises is let to any person at a rent which includes payments in respect of the use of furniture (proviso (i) to s. 12 (2) of the Act of 1920). Therefore, as regards circumstances similar to those in this case and in view of the present decision the law is unchanged by the Act of 1949. As to the meaning of "anything done," see also *Hutchinson v. Jauncey* (*ante* p. 165) and *Jonas v. Rosenberg* (*ante* p. 296).

H

AS TO "SEPARATE DWELLING," see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369; 370; and FOR CASES, see DIGEST, Vol. 31, p. 557, Nos. 7044-7048.]

## Cases referred to:

- (1) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 2nd Digest Supp.
- (2) *Sun Life Assurance Co. of Canada v. Jervis*, [1944] 1 All E.R. 469; [1944] A.C. 111; 113 L.J.K.B. 174; 170 L.T. 345; 2nd Digest Supp.
- (3) *Metropolitan Real and General Property Trust, Ltd. v. Slaters & Bodega, Ltd., Regal Property Trust, Ltd. v. Same, Freehold & Leasehold Investment Co., Ltd. v. Same*, [1941] 1 All E.R. 310; 110 L.J.K.B. 246; 2nd Digest Supp. A
- (4) *Cole v. Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50; 2nd Digest Supp.
- (5) *Llewellyn v. Hinson, Llewellyn v. Christmas*, [1948] 2 All E.R. 95; [1948] 2 K.B. 385; 2nd Digest Supp.
- (6) *Kenyon v. Walker, Stevenson v. Kenyon*, [1946] 2 All E.R. 595; 2nd Digest Supp. B
- (7) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest 557, 7040.
- (8) *Remon v. City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 31 Digest 556, 7032.
- (9) *Lovibond (John) & Sons, Ltd. v. Vincent*, [1929] 1 K.B. 687; 98 L.J.K.B. 402; 141 L.T. 116; 93 J.P. 161; Digest Supp. C
- (10) *Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest 576, 7254.
- (11) *Leslie & Co. v. Cumming*, [1926] 2 K.B. 417; 95 L.J.K.B. 1007; 135 L.T. 443; 31 Digest 557, 7041.
- (12) *Barrell v. Fordree*, [1932] A.C. 676; 101 L.J.K.B. 529; 96 J.P. 278; *sub nom., Fordree v. Barrell*, 147 L.T. 206; Digest Supp. D
- (13) *Wolfe v. Hogan*, [1949] 1 All E.R. 570; [1949] 2 K.B. 194.
- (14) *Roe v. Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; Digest Supp.
- (15) *Sharpe v. Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382; 114 L.J.K.B. 409; 172 L.T. 363; 2nd Digest Supp. E
- (16) *Vickery v. Martin*, [1944] 2 All E.R. 167; [1944] K.B. 679; 113 L.J.K.B. 552; 171 L.T. 89; 2nd Digest Supp.

APPEAL by the tenant from an order of the Court of Appeal, made on Feb. 17, 1949, and reported [1949] 1 All E.R. 560, dismissing her appeal from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Croydon County Court, and dated July 14, 1948, granting to the landlord possession of a dwelling-house. The Court of Appeal ordered execution to be stayed on certain conditions, but, the tenant having broken those conditions, the landlord proceeded to execution and had regained possession at the date of the hearing of the present appeal by the House of Lords. F

*Barry, K.C.*, and *Caulfield* for the tenant.

*Michael Hoare* for the landlord. G

The House took time for consideration.

Mar. 29. The following opinions were read.

**LORD PORTER:** My Lords, this is an appeal by the defendant from an order of His Majesty's Court of Appeal (England) dated Feb. 17, 1949, dismissing the appeal of the appellant, the defendant in the action, from the judgment of His Honour JUDGE SIR GERALD HURST, K.C., dated July 14, 1948, under which judgment was entered for the respondent, the plaintiff in the action for possession of a dwelling-house known as No. 22 Inwood Avenue at Old Coulsdon in the county of Surrey. H

The facts as proved or admitted are not in dispute and can be shortly stated. The respondent is the owner of the house in question which is of a rateable

value within the limits prescribed by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. The house is a small bungalow comprising three rooms and a kitchen, bathroom and lavatory with an attic room upstairs. Prior to January, 1948, the respondent let the house to the appellant's husband, C. L. Baker, on a weekly tenancy at a rent of £1 6s. 9d. per week. On Jan. 6, 1948, the appellant's husband died and the appellant, who was living in the house, succeeded to the tenancy and continued to live there. On Feb. 14, 1948, she sub-let, to a Mr. L. Setter at a rent of £1 15s. per week, a furnished bed-sitting room together with the right to use the kitchen. Mr. and Mrs. Setter went into occupation of the bed-sitting room and, in accordance with an arrangement made with the appellant when negotiating the sub-tenancy, paid about 6s. per week for gas and 1s. 2d. per week for electric light in addition to the rent of £1 15s. per week, and used the kitchen under the terms of the agreement concluded between them. The appellant and Mr. and Mrs. Setter each purchased their own food separately, and normally cooked their meals and ate them independently of each other. The appellant's contractual tenancy was determined by a written notice to quit which expired on Mar. 29, 1948, but the sub-tenancy subsisted, and at the date of the commencement of the present action both the appellant and Mr. and Mrs. Setter resided in the house in conformity with the terms agreed between them.

These being the facts, the respondent issued a plaint in the Croydon County Court for possession of the whole house, or, alternatively, of the furnished room let to Mr. Setter, on the grounds that (i) as the use of the kitchen was shared, neither the appellant nor Mr. Setter had a separate dwelling, and therefore no part of the house, as then divided, continued to be a separate dwelling so as to afford to either tenant or sub-tenant the protection of the Acts; (ii) that in any case the furnished room was no longer protected by the Acts, inasmuch as (a) it was furnished, (b) its occupation was coupled with the use of the kitchen, and therefore it was not a separate dwelling. The appellant on her part claimed the protection of the Acts, and maintained that nothing she had done deprived her of that benefit. The learned county court judge, following and extending the decision in *Neale v. Del Soto* (1), found that the agreement between tenant and sub-tenant resulted in a sharing of the kitchen, and so prevented the tenant from retaining, or the sub-tenant from acquiring, a separate dwelling—neither was separate, each was enjoyed with mutual, or, at any rate, shared rights over the kitchen. The Court of Appeal upheld this contention, and, I think, also decided that inasmuch as the bed-sitting room was let furnished it was by that circumstance alone taken out of the protection of the Acts.

When the questions were argued in the Court of Appeal it was thought that the house came under old control, *i.e.*, that it had been subject to the Rent Restrictions Acts passed prior to 1939, and, therefore, that the determination whether the bed-sitting room constituted a separate dwelling depended on the true effect of s. 12 (2) of the Act of 1920. It appears, however, that this was a mistake. The house actually was not built until about 1935, and, therefore, is subject to the provisions of the Act of 1939 and that only. But the error has no effect on the question to be decided. It is true that s. 12 (2) of the Act of 1920 has been repealed by sched. I to the Act of 1939, but, by s. 3 of this later Act, the principal Acts, *i.e.*, the Acts of 1920 to 1938, apply to every other dwelling-house (*i.e.*, to every house not already subject to the earlier Acts) of which the rateable value does not exceed a prescribed figure. By s. 16 (1) of the Act of 1933:

“ ‘ Dwelling-house ’ has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let.”

“ Dwelling-house ” therefore means separate dwelling-house, and the Act of



1939 applies, as, by s. 12 (2) of the Act of 1920, that Act applied, only to a house or part of a house let as a separate dwelling. So, with respect to houses let furnished, s. 3 (2) (b) of the Act of 1939 expressly provides that the principal Acts shall not apply to any dwelling-house *bona fide* let at a rent which includes payments in respect of use of furniture. The problem, therefore, is unchanged, though the question has now, as it turns out, to be decided in reference to a house subject to new and not to old control. But before the substance of the dispute is decided, a preliminary question has to be determined. It was contended on the part of the respondent that the right of appeal had lapsed on two grounds, (i) that leave to appeal to your Lordships' House had only been granted by the Court of Appeal on condition that the appellant gave three undertakings, that she had not carried out those undertakings, and that her conditional leave to appeal was therefore withdrawn, and (ii) that the learned county court judge's order for possession, as affirmed by the Court of Appeal, had been executed, the landlord had obtained actual possession of the premises, and that in face of this *fait accompli* the case was finally concluded and done with.

As to (i), the order of the Court of Appeal is in the following terms:

"Upon the defendant by her counsel undertaking (1) To pay the taxed costs of the appeal to this court to the plaintiff's solicitors within two months of the taxing master's certificate on their personal undertaking to return the same if the appeal to the House of Lords be successful; (2) To prosecute the appeal to the House of Lords with all reasonable despatch; (3) To pay her rent promptly pending the said appeal,

It is ordered that execution upon the aforesaid judgment of the Croydon County Court, in as far as it relates to possession of the premises described therein only, be stayed pending the hearing of the appeal to the House of Lords, with liberty to the plaintiff to apply to this court to remove the stay in the event of any breach of the defendant's undertaking.

It is further ordered that the defendant be at liberty to lodge a petition of appeal to the House of Lords on the ground that a question of public importance is raised by this appeal."

I do not read this order as bearing the meaning contended for by the respondent. It seems to me to make two separate provisions: (a) to grant a stay of execution on certain terms which have not been fulfilled, and (b) to give leave to appeal on a matter of public importance. It is the stay, not the leave to appeal, which is conditional, and the fact that the stay has ceased to operate is irrelevant to the continued existence of the right of appeal. Moreover, it is to be observed that the leave given is to lodge a petition of appeal, and it would be an odd result even if it were a possible one if a petition lawfully lodged to your Lordships' House, as has happened in this case, could be withdrawn without the leave of the House because some condition subsequent had not been fulfilled.

(ii) The argument that the appeal has abated because the judgment of the Court of Appeal had been executed would, I think, logically lead to the result that whenever a stay had not been granted a successful litigant, if sufficiently active and astute, could execute his judgment and so prevent the determination of any doubtful point of law, even in a case where an appeal lay as of right—e.g., from Scotland or Northern Ireland or from an appellate court to your Lordships' House—or from the High Court to the Court of Appeal. The contention was sought to be supported by a reference to *Sun Life Assurance Company of Canada v. Jervis* (2), and *Metropolitan Real and General Property Trust, Ltd. v. Slaters & Bodega, Ltd.* (3), but those cases gave rise to very different considerations. In the first, the appellants were given leave to appeal on the terms that they would pay the costs as between solicitor and client in the House of Lords in any event, and not ask for the return of any money

ordered to be paid by the Court of Appeal. It followed that, win or lose, they would receive nothing and consequently there was no actual living issue between the parties. In the present case, on the contrary, the appellant stands to gain any advantage which will accrue to her as the result of setting aside the order of the Court of Appeal and of the county court judge. As to the second case there was no dispute that the defendants owed a sum of money ordered by the court to be paid, but they applied under the Courts (Emergency Powers) Act, 1939, for a stay of execution and resulting postponement of payment. The learned judge, reversing the order of the master, gave the plaintiffs leave to proceed to execution and also granted leave to appeal, but made no order staying execution. Before the appeal was heard, the defendants paid all sums due under the judgment. In these circumstances, as the only remedy would have been to order the repayment to the defendants of a sum admittedly due and paid, the Court of Appeal held that the basis of the appeal was destroyed. But that decision depended, in my view, on the fact that the sum paid was admittedly due, and the only application before the court was for a temporary stay. If, as is the position in this case, the decision of the appellate court would have affected the substantive right of the parties, the decision would have been otherwise. The *lis* is not ended by the levying of execution or by the landlord obtaining possession of the house: he may have achieved his object by a mistaken decision which it is your Lordships' function to rectify. The preliminary point, in my opinion, fails, and accordingly the House is faced with the duty of determining whether the judgment of the Court of Appeal was right or not.

- In the first place, then, it has to be decided whether a bed-sitting room, if let separated from the rest of the house but with a super-added right for the tenants to use the kitchen of the house of which it formed part, can constitute a separate dwelling, and, further, whether, if it be not a separate dwelling, the remainder of the house which is not sub-let has ceased to be a separate dwelling because certain rights have been granted over its kitchen. My Lords, the effect on the letting or sub-letting a portion of a dwelling-house, which portion in itself constitutes a separate dwelling, of coupling the tenancy with a right to use other portions of the house in common with the landlord has been frequently dealt with by the Court of Appeal. The main results of decisions may, I think, be tabulated as follows: (i) A portion of a house which is let by a landlord to a tenant, even if in itself separate, ceases to be a separate dwelling or to be protected by the Acts if the terms of the letting contain a provision that the tenant shall have the right of using a living room belonging to the landlord: *Neale v. Del Soto* (1). (ii) To take away the protection of the Acts, the room over which rights are given must be a living room: a bathroom, lavatory or cupboard will not avail, but for this purpose a kitchen is a living room: see *Cole v. Harris* (4). (iii) Furthermore, if a landlord lets two portions of the same house to two separate tenants giving each a separate portion of the house of which he alone is in occupation, but at the same time grants to each tenant the joint use of other portions of the house, neither tenant is in possession of a separate dwelling: *Llewellyn v. Hinson* (5). (iv) A portion of a house let with such right over other portions can be recovered by whoever lets it without being met by the defence of the Acts, because the portion which is let is not a separate dwelling: *Kenyon v. Walker* (6). (v) The material time at which it has to be determined whether the house is protected or not is the moment when action is brought: *Prout v. Hunter* (7), and *Remon v. City of London Real Property Co.* (8).

What has never been determined is whether the portion retained has ceased to be a separate dwelling-house because the sub-tenant has been granted a right of user over a living room in the retained portion. The question might have arisen in *Kenyon v. Walker* (6). In that case the use of the kitchen for cooking purposes only was granted by a tenant to a sub-tenant, and, in spite

of the limited nature of the use so granted, it was held that no separate dwelling had been created, and that the tenant could recover possession from his sub-tenant. At the same time, however, the landlord claimed possession of the whole house, but his ground for so doing was not that the house had been divided into two portions, neither of which was separate from the other, but because, as he alleged, the tenant was charging an excessive rent to his sub-tenant, and that under s. 4 of the Act of 1933 that fact gave the court jurisdiction to make an order for possession. In this claim he failed, and he also failed to recover that part which was sub-let with rights over the retained portion because he had claimed to be re-possessed of the whole and not of a part of the house. Whether he could have recovered possession of the portion sub-let was not in issue or decided, and no claim was made nor the possibility envisaged that the retained portion had itself ceased to be a separate dwelling.

I have refrained in this analysis from speaking of a sharing of the kitchen between the two parties although that expression is frequently used in the relevant cases. The phrase is, in my opinion, inaccurate in expression and may give rise to inaccuracy of thought. A landlord who lets, or for the matter of that a tenant who sub-lets, a portion of the house he occupies and gives a right to his tenant to use the kitchen, does not share his kitchen. He retains many rights which the tenant does not enjoy. One can illustrate the difference by taking a case where a tenant first lets one portion of his house to one sub-tenant with a right to use the kitchen, and then another portion to another sub-tenant with a similar right. Unless his cooking facilities or other enjoyment of the kitchen were interfered with, the first sub-tenant would have no ground of complaint. But a sub-tenant would have no right to permit a third person to use the kitchen in any way even though that third person were an occupier of another part of the house or were a tenant of the person enjoying the facility. The tenant continues to have general control of the kitchen subject only to the rights he has granted: the sub-tenant has nothing but the rights which his landlord has given. The position is to some extent complicated by the assertion that the so-called statutory tenant has only a personal right. This statement is made in the plainest terms in *John Lovibond & Sons Ltd. v. Vincent* (9) following *Keeves v. Dean* (10). For the purpose for which it was used the expression was accurate enough: all it meant was that he had no interest which could be transmitted: it did not mean that his only right was to use the kitchen and that except for user he had no dominion over it. That the statement had no such meaning is clear from SCRUTTON, L.J.'s words in the latter case, where he says ([1924] 1 K.B. 694):

"... Parliament has ... called him a tenant, and he appears to me to have something more than a personal right against his landlord. I take it that he has a right as against all the world to remain in possession until he is turned out by an order of the court, and that he could maintain trespass against any person who entered the premises without his permission."

Such a right is, I think, inherent in the status of a statutory tenant and differs *toto coelo* from the right granted to a sub-tenant to use the kitchen for cooking or otherwise. It does not follow, therefore, that a statutory tenant has parted with his separate dwelling because he has given a right of user over his kitchen to a sub-tenant, even if it be conceded that the sub-tenant has not acquired a separate dwelling when the rooms let to him are coupled with a right to use the kitchen.

I have thought it desirable to make these observations to your Lordships because counsel for the appellant was content to accept the decision in *Neale v. Del Soto* (1) and the cases which followed its principles as being correctly decided. For the purpose of the present case, I also am prepared to treat these decisions as right, more particularly as the law as therein decided has now been altered by the Landlord and Tenant (Rent Control) Act, 1949. But such an



acceptance does not, in my view, make the position of the lessee in *pari casu* with that of the sub-lessee. For the reasons indicated above, the lessee, in my opinion, continues to have and enjoy a separate dwelling. With all respect to the view of the Court of Appeal, I do not assent to the conclusion that if A shares his kitchen with B and as a result B has no separate dwelling, it must follow that A on his part has no separate dwelling because he shares with B. The inevitability of the conclusion is, as I think, falsified because there is no true sharing, and because, in my opinion, the rules of formal logic must not be applied to the Acts with too great strictness. As SCRUTTON, L.J., has more than once pointed out, they must be viewed in the light of their aim and object, and it must always be remembered that the difficulty in construing them is enhanced by the fact that words and phrases apt to describe the relationship of a common law landlord and tenant one to another have been used without specific definition of another and statutory relationship, *viz.*, that of a protected tenant or sub-tenant to his immediate or perhaps remote landlord.

Even, however, if he fails in this claim the respondent maintains that he is entitled to recover the bed-sitting room because it is let furnished and therefore outside the protection of the Acts. The exemption from protection is now contained in s. 3 (2) (b) of the Act of 1939, which enacts that the principal Acts shall not apply to any dwelling-house *bona fide* let at a rent which includes payments in respect of the use of furniture. The principles at stake have been dealt with directly and indirectly in a number of cases, but it is, I think, enough to consider three only. In the first, *Prout v. Hunter* (7), a house let unfurnished was sub-let furnished, and the tenancy was held to be unprotected, and the landlord entitled to recover possession, because the occupying tenant held under a furnished letting. In *Leslie & Co. v. Cumming* (11), the tenant had sub-let, not the whole, but part only of the house furnished, and it was held that the landlord could not recover the whole house because each part was a separate dwelling and only part was let furnished. It was further held that he could not even recover part because his claim was to the whole. The third case, *Barrell v. Fordree* (12), is a decision of your Lordships' House. In that case, the tenant had sub-let furnished two portions of the house of which she was a statutory tenant as separate dwellings, she herself being tenant of the whole house unfurnished. In these circumstances, the House adjudged that the head landlord could recover the two portions sub-let furnished, inasmuch as they had become separate dwellings and as such, being furnished, had lost the protection of the Act. In none of the three cases were the occupants of the divided portions of the houses granted any right over other portions—each part was strictly self-contained and in *Barrell's* case (12), the decision turned directly on the fact that the rooms sub-let were separate dwellings. In the present case the facts are different. It is conceded on behalf of the respondent, and indeed strenuously argued, that the bed-sitting room is not a separate dwelling because the tenant thereof enjoys rights over the kitchen of the retained portion. In this set of circumstances it is said to be exempted from the protection of the Acts by reason of the terms of s. 3 (2) (b) of the Act of 1939. In my view, it is not. That sub-section exempts only a dwelling-house let furnished, and dwelling-house means a separate dwelling. *Ex concessis* the bed-sitting room is not a separate dwelling, and, accordingly, that sub-section has no application to it. The tenant could recover it because it is not a separate dwelling, but the landlord cannot recover it because it is not a separate dwelling, even though it has been let furnished. In my view, the landlord fails on both his contentions, and I would allow the appeal with such costs in your Lordships' House and below as the leave to appeal *in forma pauperis* permits, and declare that the landlord is not entitled to possession of the house, or any part of it.

**LORD NORMAND:** My Lords, on the two preliminary objections to the competence of the appeal I agree with all that has been said by my noble and

learned friend on the Woolsack and I have nothing to add. On the merits of the appeal there are two propositions to be considered. First, it is said by the respondent that if at the date of the termination of the contractual tenancy of a house (within the statutory rateable value), the state of things is that a room is in possession of a sub-tenant who has also under his sub-tenancy agreement the right to use the kitchen of the house for cooking and eating meals, and the tenant is living in the rest of the house subject to the sub-tenant's right to use the kitchen, neither the tenant nor the sub-tenant has a house let as a separate dwelling-house within the meaning of the Acts. If that proposition is correct the Acts do not apply to the house or to any part of it. The second proposition is alternative to the first: it is that if the room sub-let to the sub-tenant with the use of the kitchen is sub-let furnished, that room at least is not within the protection of the Acts, either (a) because, under s. 3 (2) coupled with s. 3 (1) and sched. I of the 1939 Act, the Acts do not apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of use of furniture so as to prevent the landlord from recovering possession, or (b) because the tenant has transferred and lost possession of the room under a sub-tenancy agreement, without thereby letting it as a dwelling-house or part of a dwelling-house to which alone the Acts apply.

I shall consider these propositions in their order, and it will be convenient to approach the first and major proposition by dealing with two matters about which there is little controversy between the parties. In *Prout v. Hunter* (7), it was decided that the date at which the landlord seeks to recover possession is the relevant time at which to consider the *status* of the house as a protected dwelling-house or a non-protected dwelling-house, and, if at that date there is a sub-tenant, the status of the house as affected by the sub-tenancy is a material consideration. In that case the plaintiff had let a flat unfurnished to a tenant, who had furnished it and sub-let it to a sub-tenant. The plaintiff gave his tenant notice to quit, and thereafter brought an action against the tenant and sub-tenant to recover possession. The Divisional Court held that proviso (i) of s. 12 (2) of the Act of 1920, which enacts that the Act "shall not . . . apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of . . . use of furniture," applied, and that the plaintiff was entitled to possession. This judgment was affirmed in the Court of Appeal. BANKES, L.J., said ([1924] 2 K.B. 741):

"It is argued that in s. 12 (2), the statute is dealing with the status of the house rather than with the rights of the particular party to the litigation. The Act is not to apply to a dwelling-house which is let furnished. But at what time is its status of a furnished house to be considered? It would seem that the material time is when the landlord seeks to obtain possession. If at that time the status of the house is that of a house let as a furnished house it is immaterial that at some earlier date its status was that of an unfurnished house."

The rule laid down in *Prout v. Hunter* (7) has frequently been followed and it is accepted by the parties to this appeal.

The other matter relates to the sub-tenancy in such a case as this. In *Neale v. Del Soto* (1), Mrs. Del Soto sub-let to a tenant two unfurnished rooms in a seven-roomed house of which she was lessee. The sub-tenancy agreement provided for the use by the sub-tenant jointly with the tenant of the garage, kitchen, bathroom, lavatory, coal-house and conservatory. The sub-tenant applied under s. 12 (3) of the Act of 1920 for an apportionment of the standard rent. The county court judge dismissed the application, holding that there was no letting of a separate dwelling-house to the sub-tenant. His order was affirmed by the Court of Appeal. MORTON, L.J., said ([1945] 1 All E.R. 193):

"The real substance of the matter is that there was a sharing of this house;

each party had the exclusive use of some rooms and the two parties together had the use in common of certain other rooms."

A In *Cole v. Harris* (4), however, it was held by a majority of the Court of Appeal that when the tenant had a lease of a bedroom, living room and kitchen together with the joint use with the landlord and another tenant of a bathroom and w.c. there was a letting of the three rooms as a separate dwelling-house and not a sharing of the whole house. MORTON, L.J., with whom MACKINNON, L.J., agreed, after referring to *Neale v. Del Soto* (1), said ([1945] 2 All E.R. 151):

"It is, however, a matter of great difficulty to determine where the line should be drawn, so as to distinguish between a 'sharing' of a house and a letting of part of a house as a separate dwelling."

B He subsequently said (*ibid.*, 152):

"... I do not think that the legislature intended that the sharing of a w.c. with the landlord or with others should be sufficient to prevent a letting of rooms from being a letting of part of a house as a separate dwelling within the meaning of the Acts."

C The test which he accepted (*ibid.*) is that it is not a sharing of the house when

"the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as 'living rooms' or 'dwelling rooms.' To my mind a kitchen is fairly described as a 'living room,' and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling."

D LAWRENCE, L.J., dissented, but his dissent was on the limited ground that a lavatory is an essential part of a dwelling-house. All the members of the court were agreed that "sharing" was a matter of degree, and that the sharing of accommodation not essential to a dwelling-house was immaterial. The only other case to which I need refer on this matter is *Llewellyn v. Hinson* (5). In that case two tenants had each of them exclusive possession of certain living rooms, but they shared in common a kitchen, a bathroom and a w.c. It was held that neither was protected by the Acts, since neither was a tenant of a house let as a separate dwelling or of part of a house so let. ASQUITH, L.J., referring to *Neale v. Del Soto* (1) and the cases which followed it, said ([1948] 2 All E.R. 96):

F "The gist of those decisions is that where what the landlord under the agreement of tenancy parts with to the tenant consists of two things (a) exclusive possession of a room or rooms, plus (b) user, jointly with someone else, of another living room or rooms, then the tenant cannot say that he is the tenant of a 'house or part of a house, let as a separate dwelling'."

G Counsel for the appellant did not challenge these decisions, which have lost their importance since the passing of the Landlord and Tenant (Rent Control) Act, 1949 (see s. 7, s. 8 and s. 9). But they decide nothing about the position of a tenant of a house who sub-lets a room to a sub-tenant with right to use the kitchen. There is in the passage cited above from the judgment of MORTON, L.J., in *Cole v. Harris* (4) ([1945] 2 All E.R. 152), a sentence which apart from its context would apply to the position of the appellant as well as to that of the sub-tenant in this case. But the present question was not before the court, and was not considered either in *Cole v. Harris* (4) or in any other of the cases. The statement cited above from the judgment of ASQUITH, L.J., in *Llewellyn v. Hinson* (5) therefore states the effect of the cases with the appropriate limitation.

H I turn now to the immediate question before the House. The argument for the respondent was not based on mere "sharing" and it distinguished the present case from a case in which either a lodger or someone living outside the tenant's house was given a contractual right to use the tenant's kitchen for cooking. The



argument came to this:—that when a sub-tenant must be held, under the rule established by *Neale v. Del Soto* (1) and the cases which followed it, not to have a house let as a separate dwelling, it necessarily follows that the tenant must be held not to have a separate dwelling, because he as much as the sub-tenant has but a share of the kitchen. It was this argument that was sustained by the Court of Appeal. My Lords, the test which must be applied is the test prescribed by the Act itself: Was the house, as occupied by the appellant, a house let as a separate dwelling? The conception of sharing may well have been helpful in considering the questions before the court in *Neale v. Del Soto* (1) and the other similar cases, yet it may prove misleading when it is used indiscriminately. It is not accurate to say that the kitchen was shared between the tenant and sub-tenant. If anything was shared it was the use of the kitchen, and the sharing of the use of a room is at best an inexact conception which may be serviceable in some cases but not in others. There are at least three differences to be noted between the tenant's and the sub-tenant's rights in relation to the kitchen, and these differences existed not only in the period between the grant of the sub-lease and the expiry of the notice to quit, but also thereafter. First, the tenant continued to have every use of the kitchen for every purpose that did not prevent the sub-tenant from cooking and eating meals in it; second, the tenant could have granted the right to other persons to use the kitchen, and the sub-tenant could neither have done this nor been entitled to object; third, the tenant continued to have the right to prevent the intrusion into the kitchen of strangers and trespassers, and no such right was conferred on the sub-tenant. These differences are differences of degree and kind and are inconsistent with the conception of a sharing of the use of the kitchen between the tenant and sub-tenant. In spite of the sub-tenancy agreement the tenant remained in possession of the kitchen, and continued to occupy it as part of a house let to her as a separate dwelling-house.

The respondent answered these difficulties by submitting that nothing but the user of the kitchen should be considered. That is, in my judgment, to ignore the statutory test whether the house is *let* as a separate dwelling-house. In *Wolfe v. Hogan* (13) the test of user *per se* was considered and rejected. The premises in that case were let as a shop, but subsequently the tenant used them both as a dwelling-house and as a shop. When the landlord sought to recover possession the tenant maintained that she was entitled to the protection of the Acts because there was no prohibition in the lease against the use of the premises otherwise than as a shop, and because they were at the time when the landlord sought to recover possession occupied by her as a dwelling-house. *EVERSHED, L.J.*, said ([1949] 1 All E.R. 573):

“ ‘Let as a separate dwelling’ must refer to the subject of a contract of letting as a separate dwelling. If it is to be shown that premises come within that definition, *prima facie*, at any rate, as it seems to me, it must be shown that the two parties to the contract have let, on the one hand, and taken, on the other hand, the premises in question as a separate dwelling. That may be shown either by the terms of the bargain or, where one party has altered the user with the full knowledge of the other, by that other party accepting the changed position, so that there must again be implied a mutual consensus of the two parties to the contract in regard to the use.”

In the present case the tenant, when the landlord served his notice to quit, still had the rights of occupation and possession which the lease gave her, save that she had parted with the right of possession and occupation of one room to her sub-tenant. Her contractual rights as regards the kitchen were not shared with her sub-tenant and her use of the kitchen was an exercise of her rights under her lease, and not of rights partitioned or shared under the sub-lease. I would therefore hold that the appellant was still the occupier of a separate dwelling-house consisting at least of the whole house except the room sub-let.

I think that the same conclusion may be reached from a consideration of the terms of sched. I, para. (d), to the Act of 1933. That paragraph empowers the court to make an order for recovery of possession of any dwelling-house to which the Act applies if

- A "the tenant without the consent of the landlord has ...sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let."

The implication is that the court has no such power if a part of the dwelling-house is sub-let without the landlord's consent provided that the tenant remains in occupation of the part not sub-let. This implication was, I think, judicially affirmed in *Roe v. Russell* (14). There the sub-let was a sub-let of a separate dwelling-house, but a sub-let of a non-separate dwelling-house is an exercise of a power to sub-let, and the word "sub-let" in the paragraph is not qualified by the words "as a separate dwelling-house" or by words which have that meaning by definition. There seems to me to be no sufficient reason for reading into the paragraph this qualification, and without it the tenant enjoys the same protection whether, as a result of a sub-lease by him, the sub-tenant has a dwelling "let as a separate dwelling-house" or a dwelling that falls short of being "let as a separate dwelling-house." If that is the correct view of the paragraph, it is in accordance with what I think are the realities of the situation and the true position of the tenant after he has granted a sub-lease of a room with use of the kitchen or of another living room, so long as he does not cease to occupy the dwelling-house except that part which he has sub-let.

- D The respondent's argument, based on the Landlord and Tenant (Rent Control) Act, 1949, s. 9 and s. 10, that the legislature must be taken to have approved of the judgment of the Court of Appeal, in this case appears to me to be without logical foundation. No such inference can be drawn from the cited sections. It may have been that Parliament thought that the Court of Appeal had erred in its construction and that it amended the Act so as to avoid the possibility of a repetition of the same construction. Or it may have been that Parliament thought that the Court of Appeal had correctly construed the Act and therefore that the Act stood in need of amendment. But it cannot be determined whether Parliament took the one view or the other. The respondent's claim that he is entitled to an order against the appellant for possession of the single furnished room calls in the first instance for consideration of s. 3 (2) (b) of the Act of 1939 which substantially re-enacts proviso (i) of s. 12 (2) of the Act of 1920. So far as material to the present case, s. 3 (2) (b) of the Act of 1939 provides that the principal Acts shall not apply to any dwelling-house *bona fide* let at a rent which includes payments in respect of use of furniture. But, by s. 16 (1) of the Act of 1933, "dwelling-house," unless the context otherwise requires, "has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let," and this definition is adopted by s. 7 (1) of the Act of 1939 for the purposes of that Act. It follows from this that "dwelling-house" in s. 3 (2) (b) means, unless the context otherwise requires, a "house let as a separate dwelling or a part of house being a part so let." There is nothing in the context which requires a different meaning to be put on the word "dwelling-house," and since the respondent's claim in respect of the one room is made on the footing that it was not let as a separate dwelling-house, it cannot find any support in s. 3 (2) (b). The fact that the room was let furnished is thus irrelevant, but there still remains the argument that the appellant by sub-letting it ceased to possess or occupy it and that she transferred it into the possession of a sub-tenant as a dwelling not protected by the Acts, because it was not sub-let as a separate dwelling-house. The question is whether the landlord can recover possession of the room while the tenant continues to reside in the remainder of the house as a separate dwelling-house. If, as I think, the

sub-let of a non-separate dwelling is an exercise of the power to sub-let and within the powers which the Act contemplates that the tenant may exercise without prejudicing the protection which the Act gives him in respect of the entire dwelling-house, the answer must be that the landlord's claim to recover possession fails. It may appear anomalous that the landlord can recover possession of a part of a dwelling-house which the tenant has sub-let furnished as a separate dwelling-house (*Barrell v. Fordree* (12)), but that he cannot recover possession if the sub-let was of part of the dwelling-house furnished with use of a kitchen which was not sub-let. On the other hand, the distinction between that kind of sub-let and a letting of rooms to lodgers who are permitted to cook their meals in the kitchen must appear unreal to those most concerned. There are many who, through shortage of houses and economic circumstances, are forced to be content with something less than a home wholly their own and furnished with their own furniture. If they take a house furnished as a separate dwelling, the Acts give them no protection. If they take from a landlord a lease of rooms, whether furnished or unfurnished, with a right to use a kitchen the Acts give them no protection. If they take a sub-let of rooms with right to use the kitchen from a tenant in occupation of the remainder of the house as a separate dwelling-house, they have no protection under the Acts against the tenant, but I think they have a qualified protection against the landlord through the protection to which the tenant, from whom they derive their rights, is still entitled. I would allow the appeal.

**LORD OAKSEY:** My Lords, I also agree with my noble and learned friend on the Woolsack on the preliminary objections, but, in my opinion, the judgments of the Court of Appeal and of the county court judge were right and this appeal should be dismissed.

The question is whether the appellant, who was at the date of the summons a statutory tenant, was a person who "retains possession of a dwelling-house to which" the Rent Restrictions Acts applied within the meaning of s. 15 of the Act of 1920, that is to say "a part of a house let as a separate dwelling." At that date, the appellant retained possession of the house originally let to her husband by the respondent except one room which the appellant had sub-let furnished with the right to use another room, *viz.*, the kitchen, jointly with herself. The appellant does not challenge the correctness of any of the decisions on these Acts, and it is therefore necessary to consider the few which are directly relevant.

In *Neale v. Del Soto* (1) the Court of Appeal decided that a tenant who rented two unfurnished rooms together with the use jointly with his landlord of other accommodation including the kitchen was not in possession of a separate dwelling-house, and in *Llewellyn v. Hinson* (5), where two tenants having exclusive possession of certain rooms in a flat shared the kitchen, a bathroom and a w.c., they were held not to be in occupation of separate dwelling-houses. In spite of these decisions, which are unchallenged, it is argued for the appellant that although a sub-tenant who shares the use of the kitchen with his landlord (the tenant) does not occupy a separate dwelling, yet the tenant who shares the use of the kitchen with the same sub-tenant does occupy a separate dwelling. This argument is, I understand, based on the view that the tenant's rights are different in quantity and quality from those of the sub-tenant. The tenant's rights are derived, so it is argued, from the head landlord, and they are or may be greater in quantity or degree since the sub-tenant only has the use of the kitchen for cooking, and possibly for eating, whereas the tenant may use it for any purposes not inconsistent with the use conceded to the sub-tenant. With the greatest respect to those of your Lordships who take a different view, I think that these considerations have nothing whatever to do with whether the dwelling in the room is separate. The words "separate" and "dwelling" do not appear to me to have any reference to legal interests or to the quantity or degree of enjoyment. If a bedroom is occupied by two persons, one in a bed and



the other on the floor, it does not appear to me to be used as a separate bedroom by the one in the bed any more than by the one on the floor. As to the quality of the rights, I think the rights of both the tenant and the sub-tenant are derived from the same Acts and from nowhere else, though it is true that the Acts adopt to a certain extent the terms of the tenancy and sub-tenancy agreements: see the Act of 1920, s. 15. It has been suggested that the position of lodgers created difficulty in the interpretation which I put on the words "separate dwelling,"

A but lodgers and persons residing with a statutory tenant are expressly referred to in the Acts (*cf.* the Act of 1933, sched. I, para. (b)). Moreover, lodgers are not in the same position as sub-tenants, and can never acquire the statutory rights which the Acts confer on sub-tenants. The position of lodgers has, therefore, in my view, no bearing on the meaning of the words "separate dwelling" in the Acts.

B On the subsidiary question whether the respondent is entitled in any event to an order for possession of the room let furnished by the appellant, I am also of opinion that the order of the Court of Appeal is right. The appellant's counsel contends that since the Acts have no application to the sub-tenancy agreement because, as he concedes, it did not create a separate dwelling, the respondent cannot recover possession of the furnished room sub-let on the ground that it is

C let furnished. But unless the Acts confer some protection on the appellant in respect of this room, the respondent, having given notice to quit in accordance with the terms of the tenancy agreement, is entitled at common law to possession of any part of the house not protected by the Acts, whether furnished or not.

LORD MACDERMOTT: My Lords, the relevant facts in this case are

D not in dispute. The premises in question are known as 22, Inwood Avenue, Old Coulsdon, Surrey. They consist of a bungalow containing three rooms and a kitchen, bathroom and lavatory, all on the ground floor, with an attic upstairs. Prior to 1948, the respondent let the premises at the weekly rent of 26s. 9d. to the appellant's husband. He died on Jan. 6, 1948, and the appellant then became the contractual tenant. On Feb. 14, 1948, the appellant sub-let one of the three

E ground floor rooms as a furnished bed-sitting room with—I quote from the rent book—"use of kitchen" to a Mr. Leonard Setter at a weekly rent of 35s. Mr. Setter and his wife went into occupation and paid, in addition to this rent, 6s. a week for gas and 1s. 2d. a week for electric light. On Mar. 29, 1948, the appellant's contractual tenancy was determined by notice to quit expiring on that date. On June 16, 1948, the respondent commenced the present suit in the

F Croydon County Court, claiming possession of the bungalow or, alternatively, of the room sub-let to Mr. Setter. The sub-tenancy was then still subsisting, but the appellant was the sole defendant and Mr. Setter was not a party to the suit at any time. The appellant, in her defence, claimed the protection of the Rent and Mortgage Interest (Restrictions) Acts. I shall speak of these statutes collectively as "the Acts" and of each of them by reference to the year of its

G enactment. The learned county court judge held in favour of the respondent, and ordered possession to be given of the entire premises. On Feb. 17, 1949, the Court of Appeal dismissed the appellant's appeal, and on Feb. 18 it gave her liberty to lodge a petition of appeal to your Lordships' House. To this summary of the facts it will be convenient to add here a reference to certain other matters which were conceded or agreed in the course of the argument.

H Before the creation of the sub-tenancy, the bungalow was let and used as a separate dwelling, and by reason of this, and of its rateable value, was a dwelling-house to which the Acts applied, being what is sometimes termed a "new control" house, that is to say, a house first brought within those Acts by the Act of 1939. The sub-letting was lawful, and the sub-let bed-sitting room, if a dwelling-house within the meaning of the Acts, was a dwelling-house *bona fide* let at a rent of which a substantial portion was attributable to the use of furniture; in short, a furnished letting for the purposes of the Acts. After the sub-letting,

and until evicted under the order for possession as mentioned later, the appellant continued to live in the bungalow, which was not at any material time used otherwise than as dwelling accommodation.

At the beginning of the hearing before your Lordships, counsel for the respondent submitted that the appeal was no longer competent. It is necessary for an understanding of this preliminary point to refer to the order of the Court of Appeal giving leave to appeal and to what happened thereafter. The material part of this order reads thus:—

“ And upon the defendant by her counsel undertaking 1. To pay the taxed costs of the appeal to this court to the plaintiff's solicitors within two months of the taxing master's certificate on their personal undertaking to return the same if the appeal to the House of Lords be successful. 2. To prosecute the appeal to the House of Lords with all reasonable despatch. 3. To pay her rent promptly pending the said appeal.

It is ordered that execution upon the aforesaid judgment of the Croydon County Court, in as far as it relates to possession of the premises described therein only, be stayed pending the hearing of the appeal to the House of Lords, with liberty to the plaintiff to apply to this court to remove the stay in the event of any breach of the defendant's undertaking.

It is further ordered that the defendant be at liberty to lodge a petition of appeal to the House of Lords on the ground that a question of public importance is raised by this appeal.”

The respondent's costs were taxed at some £90, the taxing master's certificate being given on June 24, 1949. On July 14, the appellant lodged her petition of appeal. On July 29, this House gave her leave to prosecute the appeal *in forma pauperis* and to dispense with printing. The appellant was unable to pay the respondent's costs as ordered by the Court of Appeal, and on Oct. 30 it removed the stay of execution, as from Nov. 30, on the application of the respondent. It does not appear whether the Court of Appeal was informed at the time of this application that this House had granted the appellant leave to proceed *in forma pauperis*. But, however that may be, the respondent proceeded to execution, and on Jan. 16, 1950, the appeal being then set down for hearing by this House, he caused the appellant to be evicted and her furniture to be seized.

Counsel for the respondent advanced two points in support of his contention. First, he said there was no longer a *lis*. The respondent having regained possession of the premises in dispute, there was, he argued, no living issue between the parties such as must exist before this House will embrace an appeal, and he cited *Sun Life Assurance Co. of Canada v. Jervis* (2). And, secondly, he submitted that the order of the Court of Appeal giving leave to appeal was conditional and that, in the events which had happened, such leave no longer existed. My Lords, both these points are, in my opinion, without substance. As to the first, the decision referred to has nothing to say to the facts of this case. I express no opinion as to what the appellant's precise position will be if she succeeds in this appeal; but that her rights must be affected by a favourable decision cannot be doubted. There is nothing in the present situation to make inapplicable the general rule that if a successful party chooses to execute on foot of a judgment which is under appeal, he does so at his peril and without thereby obtaining any right to halt an appeal then proceeding according to law. The second point was based on the view that the last paragraph of the order of the Court of Appeal was subject to the triple undertaking which is recited immediately before the penultimate paragraph, and has not been fully complied with. This is an impossible construction. The last paragraph is a separate and distinct part of the order, not only grammatically but of necessity. Once a petition of appeal is lodged for the consideration of this House it is not,

I apprehend, for the Court of Appeal to control the proceedings on it. The order seems to me to have been drafted with this in mind; and, apart from that, it is not possible to annex to leave to *lodge* a petition of appeal a condition such as that relating to the payment of rent pending the appeal, which could not, of course, be fulfilled until after the lodgment.

A I come then to the merits of the appeal. It is agreed that the enactment immediately in point is s. 3 (1) of the Act of 1939. By that sub-section, when read with the definition of "dwelling-house" in s. 16 of the Act of 1933, the Acts of 1920 to 1933 are made applicable, subject to the modifications prescribed by sched. I to the Act of 1939, to this bungalow if "let as a separate dwelling," or to a part of it "being a part so let." The issues for determination are whether, when the contractual tenancy ended on Mar. 29, 1948, the appellant was, by virtue of the Acts, entitled to retain possession of either the whole bungalow or the whole bungalow less the room sub-let. It is perhaps well to observe, at this stage, that no question arises as to the terms and conditions applicable to a statutory tenancy of the bungalow. Though s. 15 (1) of the Act of 1920 was much canvassed before your Lordships, it only deals with the rights and obligations of the tenant who retains possession under the Acts. It is, therefore, not directly relevant here, for the sub-letting was made during the contractual tenancy and the real question is whether the appellant ever became entitled to hold over as a statutory or protected tenant. It is common ground that, had the appellant not made the sub-letting, she would have been so entitled. What is urged against her is that, after and because of the sub-letting, the whole bungalow or, alternatively, the room sub-let, was not let as a separate dwelling, and was therefore not a dwelling-house to which the Acts applied.

B Before going further, it is necessary to refer to the nature of the main argument on which these contentions are founded, for it has been accepted by the courts below to an extent which breaks new ground in what is by now a much cultivated field. It consists of two propositions. The first but states a principle laid down by a group of Court of Appeal decisions, the most important of which are *Neale v. Del Soto* (1), *Sharpe v. Nicholls* (15), *Cole v. Harris* (4) and *Llewellyn v. Hinson* (5). I need not deal with the facts of these cases save to say that they related to a particular type of letting, namely, a letting of part of a dwelling-house by which the tenant obtained exclusive possession of one or more rooms with the use, jointly with his landlord or some one else, of some other part or parts of the house. The question raised—I think for the first time in *Neale v. Del Soto* (1)—was whether such a letting was a letting of part of a dwelling-house as a separate dwelling, and thus a dwelling-house within the meaning and protection of the Acts. The principle applied by the Court of Appeal in answering this question appears sufficiently from the following passages in two of the judgments. In *Cole v. Harris* (4), MORTON, L.J., says ([1945] 2 All E.R. 152):

G "I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as 'living rooms' or 'dwelling rooms.' To my mind a kitchen is fairly described as a 'living room,' and thus nobody who shares a kitchen can be said to be a tenant of a part of a house let as a separate dwelling."

H Then in *Llewellyn v. Hinson* (5), which applied this doctrine to cases in which the joint user was by the tenant and some one other than his landlord, ASQUITH, L.J., delivering the judgment of the court, states the principle thus ([1948] 2 All E.R. 96):

"This court cannot consider whether *Neale v. Del Soto* (1) and its satellite cases were properly decided. It can only inquire what they, in fact, decided, and about this there can, in our view, be little doubt. The gist of those



decisions is that where what the landlord under the agreement of tenancy parts with to the tenant consists of two things (a) exclusive possession of a room or rooms, plus (b) user, jointly with some one else, of another living room or rooms, then the tenant cannot say that he is the tenant of a 'house or part of a house, let as a separate dwelling.' The ratio is that the 'dwelling' of the tenant on the facts assumed consists of the totality constituted by (a) plus (b), and that part of the totality is not 'separately' let to him because the possession or user of it is to be shared by him with others, a state of affairs which is inconsistent with the word 'separately,' and, indeed, with the word 'let,' for both of these terms connote exclusive possession or enjoyment."

Such is what I may call the *Del Soto* doctrine which was adopted by the respondent as his first proposition. Before coming to his second it will be well to interpolate a reference to the Landlord and Tenant (Rent Control) Act, 1949, as ss. 7 to 10 thereof (inclusive) were obviously enacted to counter the wide-spread and important consequences of that doctrine. Section 7 deals with cases where a tenant shares accommodation with his landlord, and s. 8 with cases where a tenant shares accommodation with persons other than his landlord. Section 9 relates to sub-tenancies and provides, *inter alia*, that no part of the tenant's premises shall be treated as not being a dwelling-house to which the Acts apply by reason only

"(a) that the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons . . ."

This Act was passed on June 2, 1949, but s. 10 gives the sections already mentioned a retrospective effect, "but not so as to affect . . . anything done or omitted" during any period before the commencement of the Act. These are difficult words; but it is unnecessary to dwell on them, as it was conceded that the order for possession in this case came within the expression "anything done." That being so, I need not consider the scope of s. 7, s. 8 and s. 9, or say more than that, as I read them, they leave it open to this House to review the *Del Soto* doctrine should occasion to do so arise.

The respondent's second proposition was to this effect. If a tenant sub-lets part of his dwelling on sharing terms of the *Del Soto* type so that both tenant and sub-tenant share some part of the dwelling, such as the kitchen, which may be fairly described as living or dwelling accommodation, then the tenant can no longer be said to hold what is excluded from the sub-demise as a separate dwelling. That, taken with the first proposition, of which it was said to be a necessary consequence, comes to this. Once a tenant "shares" living accommodation with a sub-tenant in this way, each must stand deprived of the protection of the Acts for the same reason. What A shares with B, B shares with A and, therefore, neither has a separate dwelling.

These propositions were then applied in this manner. They were linked together and used to strip the entire bungalow of the protection of the Acts. Alternatively, if the second was ill-founded, the first remained and sufficed, it was contended, to justify an order for possession limited to the sub-let bed-sitting room. This alternative claim was also supported on another and distinct ground, which may be conveniently mentioned here. The bed-sitting room as a furnished letting was, the argument proceeded, outside the scope of the Acts by virtue of s. 3 (2) (b) of the Act of 1939 and could not, therefore, be withheld by the appellant having regard to the decision of this House in *Barrell v. Fordree* (12). The *Del Soto* doctrine was not challenged before your Lordships on behalf of the appellant, and the debate proceeded throughout on the basis that the sub-let bed-sitting room had not been let as a separate dwelling and accordingly was not at any time a dwelling-house within the meaning of the Acts. The respondent's first proposition was thus, if not conceded, at least not disputed. His second proposi-

tion, however, was vigorously contested, as was his application of the first to the alternative claim. I will revert to the *Del Soto* doctrine later. Meantime I assume its validity for the purpose of considering the contentions of the parties.

A I start, therefore, with the respondent's second proposition. The view of the Court of Appeal appears to have been that it flowed logically from the first. With all respect I am unable to agree. I appreciate that where the sharing is between two tenants of the same landlord it may well be that, if the test laid  
B down in *Cole v. Harris* (4) applies to one of the tenants, it must apply to the other. But where the sharers are tenant and sub-tenant, the matter seems to me to stand on quite a different plane. The word "sharing" is then only appropriate in a colloquial sense. There is no balance or equality of rights in respect of what is shared. The sub-tenant has but a right of user; the tenant,  
C on the other hand, remains tenant of the entirety of his kitchen or whatever the shared room is. He may keep others out of it—at least to the extent of those he has not undertaken to admit. He may decorate and re-furnish it. He may be liable to keep every part of it in repair. In short, he remains in possession subject, at most, to whatever right of user he has granted to others. In such  
D circumstances to say that, because the sub-tenant, by the kind of arrangement under discussion, has got what is not a separate dwelling, the separate dwelling which the tenant has had let to him must have ceased to be separate in whole or in part is, I think, a complete *non sequitur*. I can see nothing in the *ratio* of the *Del Soto* doctrine to require such a result. That doctrine was directed to the determination of the character of what has been let to the person granted a right to share. If part of the living accommodation as demised to him is not  
E to be enjoyed by him exclusively, then he has not been let, and is not tenant of, a separate dwelling. That reasoning cannot, however, be applied as a matter of course to the position of the person granting the right to share, for the facts regarding him and his tenancy need not be the same, and will generally be quite different. Here they are essentially different, for what was let to the appellant was the bungalow as a separate dwelling with the right to possession of the entirety—a right which, by reason of the sub-letting, was lost only as regards the bed-sitting room.

If then, as I would hold, the respondent's second proposition cannot be derived from the *Del Soto* doctrine, it remains to inquire whether the act of sub-letting a part of the bungalow as dwelling accommodation, but not so as to constitute a separate dwelling, has diminished the protection from eviction  
F which the appellant would otherwise have been entitled to under the Acts. It is, in my opinion, not open to doubt that a tenant who lawfully sub-lets a part of his house as a separate dwelling remains entitled to the protection of the Acts in respect of his entire holding. That seems to follow from *Roe v. Russell* (14), and to be the necessary effect of para. (d) of sched. I to the Act of 1933 and s. 7 (1) of the Act of 1923. The former of these provisions, when read  
G with s. 3 of the Act of 1933 and sched. I to the Act of 1939, in effect provides, as respects new control houses, that no order for possession of a dwelling-house to which the Acts apply shall be made unless the court considers it reasonable so to order and

"(d) the tenant without the consent of the landlord has at any time after Sept. 1, 1939, assigned or sub-let the whole of the dwelling-house or  
H sub-let part of the dwelling-house, the remainder being already sub-let."

Section 7 (1) of the Act of 1923 does not apply to new control houses, but it is nevertheless relevant to the point now under consideration for it shows, I think clearly, what the policy of the legislature was in this regard. I need not set out the sub-section *in extenso*. Suffice it to say that it provides, *inter alia*, that a statutory tenant may be made liable to an additional increase of rent in respect of his *entire* holding

"where part of a dwelling-house to which the principal Act applies is

lawfully sub-let, and the part so sub-let is also a dwelling-house to which the principal Act applies . . .”

Now that provision is in terms restricted to a sub-tenancy which constitutes a separate dwelling, but I do not think the language used can be said to suggest that a statutory tenant cannot sub-let dwelling accommodation which is not separate in this sense. What then of para. (d) which I have just quoted? Does its reference to the sub-letting of a part include the sub-letting of a part which is not in itself a dwelling-house? Even if this paragraph is to be read as relating to the sub-letting of dwelling accommodation only, it cannot, in my opinion, be restricted to the sub-letting of separate dwellings as, if it were, it would not apply at all (on the present hypothesis) where a whole house was, by a succession of sub-lettings, parcelled out to sub-tenants with the last having a right to use the kitchen. And if this is so, the right to sub-let short of the entirety which the paragraph plainly recognises ought not, in my opinion, to be so restricted either. I do not see anything in this to offend the policy of the Acts, or to conflict with any of their provisions. On the contrary, I think s. 5 (5) and s. 15 (3) of the Act of 1920 indicate that a tenant may (in the absence of any stipulation to the contrary) sub-let with impunity a part which is something less than a separate dwelling for they both say “any sub-tenant to whom the premises or *any part thereof* have been lawfully sub-let” in the event of the tenant’s interest coming to an end. Had the legislature intended to refer to a part which was also a separate dwelling, it is but reasonable to assume that it would have said so as it has in clear terms in s. 7 (1) of the Act of 1923 and s. 4 (1) and (4) of the Act of 1933.

For these reasons, I am of opinion that a tenant who lawfully sub-lets a part of his holding which, though dwelling accommodation, falls short of being a separate dwelling within the meaning of the Acts, does not thereby lose the protection of those Acts in respect of any part of the dwelling-house comprised in his tenancy. I, therefore, conclude that the respondent’s main contentions are unsupported either by the *Del Soto* doctrine or the relevant legislation. This means that the part of the bungalow which was not sub-let was protected, and also, if I am right in my reasoning, that the *Del Soto* doctrine affords the respondent no right as against the appellant to the recovery of the part which was sub-let. But the position as to that part also involves the further contention which was founded upon the furnished nature of the sub-letting, and the decision in *Barrell v. Fordree* (12). If that contention is to succeed, it must be by virtue of s. 3 (2) (b) of the Act of 1939, which provides that, subject to certain immaterial exceptions, the Acts shall not apply “to any dwelling-house *bona fide* let at a rent which includes payments in respect of . . . use of furniture.” On the assumption, however, that the *Del Soto* doctrine applies, the sub-letting was not of a dwelling-house, and s. 3 (2) (b) and *Barrell v. Fordree* (12) are alike inapplicable. This further submission cannot, therefore, succeed. On these grounds, I am of opinion that if the *Del Soto* doctrine is applied the respondent’s claim must fail in its entirety.

My Lords, thus far I have assumed the correctness of that doctrine. This has been a convenient procedure having regard to the course of the argument; and the appeal may properly be decided on it in view of the fact that the parties have been at one in accepting the sub-letting as not that of a separate dwelling. But the validity of the doctrine has not been debated and it is possible—I do not say more—that its effect has not been entirely neutralised for the future by the Act of 1949. I do not, therefore, express any final opinion regarding it. Nor do I state any conclusion as to the true construction of s. 12 (8) of the Act of 1920 which relates to the letting of rooms in a dwelling-house and has, perhaps, never received as much attention in this connection as it deserves. For the reasons already mentioned I would allow the appeal as regards the whole bungalow, with costs here and in the courts below.



**LORD REID:** My Lords, the respondent is the owner of a bungalow house at Old Coulsdon, Surrey. This house was not subject to rent control before 1939, but, being a dwelling-house of which the rateable value did not exceed £75, and not being otherwise excluded, it was brought within the scope of the Rent and Mortgage Interest Restrictions Acts by s. 3 (1) of the Act of 1939. The house was let to the appellant's husband on a weekly tenancy at a rent of 26s. 9d. per week, and, on the husband's death, the appellant succeeded to the tenancy. Shortly thereafter she offered accommodation to Mr. and Mrs. Setter, and this offer was accepted. A rent book was given to Mr. Setter which showed that a furnished bed sitting room was sub-let and "use of the kitchen" was given for a rent of 35s. per week from Feb. 14, 1948. Thereafter, the respondent gave to the appellant a notice to quit which terminated her contractual tenancy on Mar. 29, 1948, and on June 15, 1948, the respondent brought the present action in the county court for possession of the whole house, or, alternatively, for possession of the sub-let room. At that date, the Setters were living in the house under the agreement with the appellant. Neither the precise extent of the Setters' right to share the house, nor the way in which it was shared in practice, is very clear; but it appears that the Setters purchased their own food and cooked and ate their own meals in the kitchen. The notes of the learned county court judge record this evidence of the appellant :

"I said come and live with me and share home, pay 35s. a week and so much for gas, use of bathroom and kitchen . . . They have the run of the place."

That appears to be a fair description of the position. It is not disputed that Mr. Setter became in law the sub-tenant of the furnished room, and that, as regards the kitchen, he was only a licensee entitled by agreement to use it. I agree with your Lordships that the respondent's preliminary objections to the competency of the appeal cannot be sustained.

The main question in this case is whether the fact that the Setters were sharing the use of the kitchen under this agreement entirely deprives the appellant of the statutory right to retain possession of the house after the end of the contractual tenancy which she would otherwise undoubtedly have had. The statutory protection does not apply if the subject of which the owner seeks to obtain possession is not a "dwelling-house." "Dwelling-house" is defined as follows by s. 16 (1) of the Act of 1933 :

" 'Dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

I do not refer to s. 12 (2) of the Act of 1920 because that sub-section does not apply to a house brought under control by the Act of 1939, but there is no material difference between that sub-section and the definition which I have quoted. The respondent's case is that in June, 1948, when this action was brought the house was not "let as a separate dwelling" because it or at least an essential part of it was being shared with the Setters. The words "let as a separate dwelling" are difficult to interpret, but one or two points are now clear. In the first place, it is the state of things when the action is brought that matters. Secondly, "let" is not limited to a letting under a contractual tenancy. It has long been settled that the Rent Acts do not prevent an owner from terminating the tenancy of his tenant in the ordinary way : what they do is to give to a person who has been tenant a right to remain in possession after the tenancy has gone. A person with such a right is commonly called a statutory tenant, but that name, though convenient, is inaccurate. The true position of such a person was stated as long ago as 1923 by BANKES, L.J., in *Keeves v. Dean* (10) ([1924] 1 K.B. 690) :

"... he is not a tenant at all ; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has."

It follows that, as a main purpose of the Rent Acts is to confer a statutory right to possess after the end of a contractual tenancy, the word "let" must be interpreted in a sense wide enough to include subjects held or possessed by virtue of that right. The question at issue may therefore be stated in this way : Was the house on June 15, 1948, held or possessed by the appellant as a separate dwelling ?

It is, perhaps, easier to say what is not a separate dwelling than to say what is one. In *Neale v. De Soto* (1), the owner of a house, in addition to letting two rooms to a tenant, gave him the right to share the use of other rooms including the kitchen. In *Llewellyn v. Hinson* (5), the landlord let certain rooms to one tenant and other rooms to another tenant, and in addition gave to each of them the right to share in the use of the kitchen. In these cases, it was held that no separate dwelling had been let. I have no doubt that these decisions are correct. If a tenant has to share with another person a living room which is not let to him, it is, in my view, impossible to find anything which is let to him as a separate dwelling. It cannot be the let rooms plus the right to use the other room, because that other room is not let to him at all—he is only a licensee there. And it cannot be the let rooms alone, because his having to share another room shows that the let rooms are only a part of his dwelling place. It follows that the subjects let to Mr. Setter were not let to him as a separate dwelling, and that he did not become a statutory tenant. But I think that quite different considerations apply when the tenant has no right or need to go beyond the subjects let to him, but chooses to share the use of a part of those subjects with someone else. I do not think that it is possible to say that a tenant who agrees to share his house with lodgers or other licensees thereby ceases to possess his house as a separate dwelling. No doubt the words "separate dwelling" in an appropriate context might mean the dwelling place of a separate or single family or household, but it is to my mind clear that that is not their meaning in the Rent Acts. The Acts recognise that a tenant may sub-let or take in lodgers (*e.g.*, para. (b) of sched. I to the Act of 1933). I leave aside for the moment the question of sub-letting. I can find nothing in the Acts, or in any authority of which I am aware, to suggest that a tenant who lives in the house can cease to hold it as a separate dwelling merely because he has agreed to share it or some part of it with licensees. Such sharing might take many forms. On the one hand, a lodger might act and be treated as a member of the tenant's own family. On the other hand, lodgers might keep aloof from the tenant and his family and be given a right to the exclusive use of the kitchen at certain times of day. I can find nothing to suggest that one such form of sharing has different legal consequences from another. Indeed, the tenant may devote the greater part of his house to the use of lodgers without ceasing to hold the whole house as being let to him as a separate dwelling. In *Vickery v. Martin* (16), a tenant, who made a business of taking in paying guests and devoted the greater part of the house to that purpose, did not lose the statutory protection. If the Setters, instead of having a sub-lease of their bed-sitting room, had been lodgers or licensees, they might have had precisely the same right to share the use of the kitchen, but that sharing would certainly not, in my view, have impaired the appellant's statutory protection. Why should it be different because Mr. Setter had a sub-lease of the bed-sitting room instead of a licence to use it ? It was argued that a licence to use the kitchen coupled with a leasehold interest in another part of the house is materially different from a licence not coupled with a leasehold interest. But at the time when this action was brought there was no longer any leasehold. The appellant had no power to create a sub-tenancy to endure beyond her own tenancy and that came to an end on Mar. 29,

1948. I cannot find any difference in quality between a right to share accommodation enjoyed by one who was formerly a sub-tenant and still has an exclusive right to occupy another part of the house, and a similar right enjoyed by one who has no such exclusive right, which would justify the one, but not the other, being held to prevent a statutory tenant from holding her house as a separate dwelling.

A I turn now to the other element in the case, the fact that Mr. Setter was originally sub-tenant of the furnished bed sitting room and was still in exclusive occupation of that room when this action was commenced. It was argued that, even if the appellant succeeded on the main question because sharing the kitchen did not deprive the appellant of her whole protection, yet the facts that the bed-sitting room was sub-let to Mr. Setter and that he had no statutory tenancy took the bed-sitting room out of the appellant's separate dwelling, and entitled the respondent to recover possession of it. The question of the application of the Rent Acts to sub-letting is not an easy one and I shall try to confine myself to those aspects of it which are relevant to the present case, but, in view of an argument founded on the decision of this House in *Barrell v. Fordree* (12), it is necessary to go considerably beyond the facts of this case. B There is no doubt that the appellant was entitled during her contractual tenancy to sub-let a part of her house. In fact, she sub-let so that the sub-let part was not let as a separate dwelling. But she could have sub-let so that the sub-let part was let as a separate dwelling. In that case the sub-let part would have been a "dwelling-house" within the meaning of the Acts. It must then have come within the scope of either s. 3 (1) or s. 3 (2) of the Act of 1939. If it fell C under s. 3 (1), the sub-tenant would at the end of his contractual tenancy have had the ordinary rights of a statutory tenant, but if, for example, it had been let furnished and therefore fell within the scope of s. 3 (2) (b), the Acts would not apply to it. *Barrell v. Fordree* (12) was decided on the proviso to s. 12 (2) of the Act of 1920. That sub-section does not apply in the present case, but there is no material difference between it and s. 3 (2) of the Act of 1939. In *Barrell v. Fordree* (12) the tenant had sub-let parts of her house to two sub-tenants, and there was no sharing of accommodation. Those parts were sub-let furnished. It was never suggested that the parts sub-let were not let as separate dwellings. They were treated throughout as "dwelling-houses" within the meaning of the Acts, and, as they were let furnished, they were, by virtue of s. 12 (2), dwelling-houses to which the Acts did not apply. Accordingly, after the contractual tenancies were terminated, there was nothing to prevent the owner of the property from recovering possession of them. As I read it, the decision of this House was based entirely on the fact that the sub-let parts were dwelling-houses to which the proviso to s. 12 (2) of the Act of 1920 applied. But neither that proviso nor the corresponding provision in the Act of 1939, s. 3 (2) (b), applies to anything which is not a "dwelling-house." The words of s. 3 (2) are quite clear : D E F G

"The principal Acts shall not, by virtue of this section, apply . . . (b) save as is expressly provided in the said Acts, as amended by virtue of this section, to any dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture."

H I think that it is impossible to interpret "dwelling-house" in this context as having a meaning wider than that given to it by the definition in s. 16 (1) of the Act of 1933. Section 3 (2) of the Act of 1939 is, in effect, an exception from s. 3 (1) and "dwelling-house" must have the same meaning in the two sub-sections. "Dwelling-house" in s. 3 (1) cannot have a meaning wider than the definition, because, to give it a wider meaning there, would extend the whole system of rent control to some unspecified class of houses not included in the definition. For the reasons already stated, the room sub-let to Mr. Setter was not a "dwelling-house" within the meaning of the Rent Acts, and therefore neither s. 3 (2)



of the Act of 1939 nor the decision in *Barrell v. Fordree* (12) is of any avail to the respondent in this case. If he is to succeed, it must be on some other ground. There is no provision in the Acts which expressly applies to the present case, but, as I understood it, the argument for the respondent was that the Acts only protect a tenant who is in possession, and that a tenant who has sub-let a part of his house being no longer in possession of the sub-let part can derive no benefit from the Acts with regard to that part. It is true that a tenant who has wholly given up possession of his house loses his statutory protection, but it does not necessarily follow that a tenant who has retained possession of and continues to live in part of the house will lose his protection for the rest of the house which he has sub-let. The Act of 1933 provides in sched. I, para. (d), that a court has power to make an order for recovery of possession if the tenant has assigned or sub-let the whole of his house, or has sub-let part of it the remainder being already sub-let, that is to say if he has parted with possession of the whole house. This general provision by omitting the case when the tenant has retained possession of part of the house and sub-let the rest clearly distinguishes it. It does not prevent an order for recovery of possession in such a case if, as in *Barrell v. Fordree* (12), the circumstances bring it within some other provision of the Acts which warrants such an order. But it does, I think, indicate that the mere fact that a part of the house is sub-let is not enough, and I can find nothing else in the present case to warrant the order which the respondent seeks. For these reasons, I think that the respondent has no right to resume possession of the sub-let room. I therefore agree that the appeal should be allowed.

*Appeal allowed with costs. Cause remitted to Croydon County Court with a declaration that the respondent was not entitled to possession of the premises or any part of them.*

Solicitors : *Beaumont, Son & Rigden* (for the tenant) ; *Kinch & Richardson* (for the landlord).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

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*Applied.* DENNIS REED, LTD. v. GOODY. [1950] 1 All E.R. 919.

## GRAHAM AND SCOTT (SOUTHGATE), LTD. v. OXLADE.

[COURT OF APPEAL (Cohen, Asquith and Singleton, L.JJ.), February 28, March 1, 14, 1950.]

*Agent—Estate agent—Commission—Contract to pay commission on introduction of person “willing and able to purchase”—Person willing to purchase “subject to satisfactory survey”—“Subject to contract.”*

The plaintiffs, a firm of estate agents, after being instructed by the defendant to negotiate the sale of his property, wrote to him: “We beg to confirm and thank you for your instructions to assist in the disposal of your property . . . We confirm that in the event of our introducing a person or persons willing and able to purchase we shall look to you for the payment of the usual commission . . .” The defendant accepted the terms contained in this letter, and the plaintiffs introduced a person who was prepared to purchase the property “subject to contract [and] satisfactory survey.”

**HELD:** proof of an offer on a condition which left the offeror free at his will, even if the offer were accepted, not to proceed with the purchase was not evidence that the offeror was a person able and willing to purchase, and, therefore, the plaintiffs had not discharged the onus which rested on them of proving that the person whom they had introduced was willing to purchase the property, and their claim must fail.

*Per SINGLETON, L.J.*: I do not know that there is any decision of the Court of Appeal which supports the view that commission is payable to estate agents if all they do is to produce a person who is willing to purchase "subject to contract." It may be so if the owner has agreed to such a term, or if he has introduced it himself. The question must always be determined by the terms of the contract between the owner of the property and the agents.\*

*Giddys v. Horsfall* ([1947] 1 All E.R. 460), *overruled*.

*E. P. Nelson & Co. v. Rolfe* ([1949] 2 All E.R. 584), *discussed*.

*Decision of ROXBURGH, J.* (*ante*. p. 91), *affirmed*.

[AS TO REMUNERATION OF AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436; and FOR CASES, see DIGEST, Vol. 1, pp. 488-503, 508-518, Nos. 1664-1728, 1753-1801.]

Cases referred to:

(1) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.

(2) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; 103 L.J.K.B. 634; 152 L.T. 88; Digest Supp.

(3) *Giddys v. Horsfall*, [1947] 1 All E.R. 460; 2nd Digest Supp.

(4) *Chillingworth v. Esche*, [1924] 1 Ch. 97; 93 L.J.Ch. 129; 129 L.T. 808; Digest Supp.

(5) *E. H. Bennett & Partners v. Millett*, [1948] 2 All E.R. 929; [1949] 1 K.B. 362; [1949] L.J.R. 1050; 2nd Digest Supp.

(6) *E. P. Nelson & Co. v. Rolfe*, [1949] 2 All E.R. 584; [1950] 1 K.B. 139.

(7) *Dennis Reed, Ltd. v. Nicholls*, [1948] 2 All E.R. 914; 2nd Digest Supp.

(8) *Cunliffe v. Goodman*, *ante* p. 720.

(9) *Salisbury v. Gilmore & Marcel*, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of ROXBURGH, J., sitting as an additional judge of the King's Bench Division, dated Dec. 16, 1949 (reported *ante* p. 91), whereby he dismissed the plaintiffs' claim to commission on the introduction to the defendant of a prospective purchaser of the defendant's house.

On Sept. 1, 1949, the plaintiffs, who were estate agents, received instructions from the defendant to sell his property, 2, Merrivale, Southgate, N.14, at the price of £5,000, nothing being then said about commission. On the same day the plaintiffs wrote to the defendant: "... we beg to confirm and thank you for your instructions to assist in the disposal of your property as above. As instructed we are quoting £5,000 freehold and hope to have the pleasure of submitting an acceptable proposal within the course of a day or two. We confirm that in the event of our introducing a person or persons willing and able to purchase we shall look to you for the payment of the usual commission ..."

The plaintiffs introduced as a proposed purchaser a Mrs. Smith, who at first was prepared to offer £4,450, but subsequently increased her offer to £4,650. This figure was accepted by the defendant who instructed the plaintiffs to proceed with the sale. On Oct. 3, 1949, the plaintiffs wrote to the defendant: "... we beg to confirm that acting in accordance with your instructions we have accepted the increased offer of our applicant Mrs. Dinah Smith ... to purchase your property as above in the sum of £4,650 freehold, subject to contract, satisfactory survey, vacant possession on completion on or before Oct. 27 ...". On the same day the defendant's solicitors had written to the plaintiffs informing them that the offer of Mrs. Smith was not acceptable to the defendant who was arranging to dispose of the property elsewhere. ROXBURGH, J., held that, in view of the condition contained in the words "subject to satisfactory survey," the prospective purchaser was not "a person willing to purchase" within the

\* See now *McCallum v. Hicks*, post p. 864.

meaning of the agreement, and, therefore, the plaintiffs were not entitled to their commission.

*Stanley Rees* for the plaintiffs.

*Neil McKinnon* for the defendant.

*Cur. adv. vult.*

Mar. 14. The following judgments were read.

**COHEN, L.J.** (after stating the facts): The learned judge found that the defendant had entered into a contract with the plaintiffs on the terms set out in the letter of Sept. 1, but he came to the conclusion that the plaintiffs had never found a person able and willing to purchase. He intimated that, had he not been bound by authority, he would have found that any offer which was not a firm offer capable of acceptance so as to constitute a contract would not establish that the person making the offer was willing to purchase, but he recognised that the authorities made it impossible for him to hold that an offer "subject to contract" might not be evidence that the person making it was *willing* to purchase. He stated, as was the fact, that there was no reported case dealing with an offer "subject to satisfactory survey." Such a condition, he said, left the person making the offer the arbitrator of whether the survey was satisfactory. He considered it would be strange if an estate agent could earn his commission when the necessary business of having a survey had not been carried out. Accordingly, while he recognised that there was no logical distinction between "subject to contract" and "subject to survey", he held that the fact that an offer was "subject to survey" precluded the possibility of the maker of the offer being a person willing to purchase before he had expressed his satisfaction with the survey. Counsel for the plaintiffs said that the distinction between "subject to contract" and "subject to survey" was a distinction without a difference, since under a provision "subject to contract" an intending purchaser could refuse to sign a contract if he was dissatisfied with a survey. With this view I agree. I turn, therefore, to consider what is the state of the authorities on the subject.

I commence with *Luxor (Eastbourne) Ltd. v. Cooper* (1). As the court construed the contract in that case, commission was only payable if the introduction actually resulted in a sale. In such a contract their Lordships refused to imply a term that the principal would not dispose of the property himself or through other channels or otherwise act so as to prevent the agent from earning his commission. Some of their Lordships, however, pointed out the distinction between such a contract and a contract under which commission becomes payable on the agent introducing a person who makes an adequate offer. Thus, **VISCOUNT SIMON, L.C.**, said ([1941] 1 All E.R. 40):

"It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not."

**LORD RUSSELL OF KILLOWEN** makes the distinction clearer. Thus, he says (*ibid.* 44):

"I do not assent to the view, which I think was the view of the majority in *Trollope (George) & Sons v. Martyn Bros.* (2), that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands and compels him, as between himself and the agent, to



bind himself contractually to sell to the agent's client who offers that price, with the result that, if he refuses the offer, he is liable to pay the agent a sum equal to, or less than, the amount of the commission, either (a) on a *quantum meruit*, or (b) as damages for breach of a term to be implied in the commission contract."

Later he says (*ibid.*, 47):

A "I have already expressed my view as to the true meaning of a contract to pay a commission for the introduction of a purchaser at a specified or minimum price. It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

B This decision inspired estate agents to set about devising formulae intended to ensure that principals should not be able to escape liability by refusing to accept offers from persons willing to purchase. One such formula came under consideration by LEWIS, J., in *Giddys v. Horsfall* (3). In that case the plaintiff's terms of commission were set out in a letter to the principal which contained the following paragraph:

C "We take this opportunity of enclosing herewith a copy of our terms of commission which are on the usual scale and which would become payable by you in the event of our being instrumental in introducing a party prepared to purchase on the terms of your instructions or on terms acceptable to you."

D Giddys introduced a Mrs. Stow who made an offer "subject to contract" at the price required by the defendant. The defendant refused to sell at that price, but when Mrs. Stow was so informed, she increased her offer to the price demanded by the defendant. After negotiation, however, the defendant refused to proceed. LEWIS, J., held that Giddys were entitled to their commission. He cited the passages I have read from the speech of LORD RUSSELL OF KILLOWEN in the *Luzor* case (1), and said the question he had to decide was whether the contract clearly showed that the commission was to be payable if Giddys introduced a person who was willing to purchase, and he answered the question in the affirmative. He, therefore, gave judgment for Giddys. The arguments in the case are not reported, and there is nothing in the report of the judgment to show that the learned judge's attention was called to such cases as *Chillingworth v. Esche* (4), which establish that, as a general rule, where an offer is made and accepted "subject to contract" neither party is bound unless and until a definite contract is executed. The point was, however, I think, present to his mind for towards the end of his judgment LEWIS, J., says ([1947] 1 All E.R. 463):

G "It might be the fact that, as Mrs. Stow did not, in fact, purchase and did not even enter into a binding contract, the plaintiffs should be held to be wrong, but looking at that paragraph [from the commission note], I think it is abundantly clear that the plaintiffs were saying: 'The scale commission—the arithmetic of it—is to be found on the printed circular which we enclose, and commission at that rate will be payable by you if we introduce a *bona fide* person who is prepared to pay and is capable of paying the price you are asking for "Redlands".' Mrs. Stow was perfectly able and willing and capable. She was anxious to buy and I am constrained to say that the plaintiffs are entitled to the commission which they claim."

H In my opinion, therefore, *Giddys v. Horsfall* (3) is authority for the proposition that a person may be willing to purchase notwithstanding that his or her offer may have been made subject to contract.

In *E. H. Bennett & Partners v. Millett* (5), the contract between principal and agent was in slightly different terms from that under consideration in *Giddys v. Horsfall* (3), but the court construed it as having the same effect. The

agents introduced a person who signed a memorandum containing an offer of the price required by the principal, the memorandum being expressed to be "subject to contract." It is clear from the report that no argument was addressed to the judge based on the memorandum being expressed to be "subject to contract" and that he did not have the point in mind. This case, therefore, carries the matter no further than *Giddys v. Horsfall* (3).

The only other case to which I need refer is the decision of this court in *E. P. Nelson & Co. v. Rolfe* (6). In that case the contract between principal and agent was in similar terms to that in *Giddys v. Horsfall* (3) and indistinguishable in any material particular from the contract in the case before us. In *E. P. Nelson & Co. v. Rolfe* (6), however, the person introduced by the plaintiffs never actually got to the stage of making an offer. The material facts are stated by BUCKNILL, L.J., as follows ([1949] 2 All E.R. 586):

"... Mrs. Payne arrived, having been sent by the plaintiffs. She liked the bungalow, but said she wished her husband to see it, but he could not come until the next day, and asked the defendant to keep it for them. The defendant said she could not do so, as it might be sold before they had reached a decision. Mrs. Payne then went away, but she returned in the afternoon with her husband. The defendant then said that the house was sold, that she had given an option on it, and that a deposit had been paid."

It was admitted that at all material times Mr. Payne was able, ready and willing to purchase the premises, and the only question decided was that an obligation, binding morally or in a business sense but not in law, to sell to someone else, did not excuse the principal from his liability to pay commission under such a contract as we are considering. It is, however, relevant to observe that both *Giddys v. Horsfall* (3) and *E. H. Bennett & Partners v. Millett* (5) were cited, for BUCKNILL, L.J., says (*ibid.*, 587):

"That being so, it seems to me that these terms are perfectly plain. It is not disputed that Mr. Payne was a man able, ready and willing to purchase the property. The property was not, in fact, sold at the time when his wife came to see it, and, therefore the defendant is liable. I need not refer to the various cases which have been drawn to our attention in the course of the argument except to point out that in no less than three cases, *Giddys v. Horsfall* (3), *E. H. Bennett & Partners v. Millett* (5) and *Dennis Reed, Ltd. v. Nicholls* (7), a contract in its essentials similar to this has been before the courts and in each case the defendant has been held to be liable to pay the commission although the person introduced has not purchased the property."

That being the state of the law counsel for the defendant invites us to say that *Giddys v. Horsfall* (3) was wrongly decided and that the proper view is that which obviously commended itself to ROXBURGH, J., in the present case, that is, that under a contract to pay a commission to an agent who introduces a person able and willing to purchase a property the agent can never recover unless he can prove that the person so introduced made an offer, or was willing to make an offer, which by acceptance could be turned into a firm contract.

Counsel for the plaintiffs submitted that we were precluded from so holding by the decision of this court in *E. P. Nelson & Co. v. Rolfe* (6). I do not think this is so. The question of the effect of the words "subject to contract" does not appear to have been discussed and the question did not arise on the facts of the case. As I read the judgment, we were in that case only relying on the decisions cited as authority for the proposition that the mere fact that the person introduced did not actually purchase the property did not preclude the agent from recovering commission. *E. P. Nelson & Co. v. Rolfe* (6) carried the matter a stage further in that it established that the fact that the person introduced had not actually made an offer was not fatal to the agent's claim. It is not,

however, in my opinion, any authority for the proposition that an offer on a condition which leaves the offeror free at his will, even if the offer is accepted, not to proceed with the purchase is evidence that the offeror is a person able and willing to purchase. The only case which supports this proposition is that of *Giddys v. Horsfall* (3), and that case is not binding on us. I am unable to agree with it. In reaching my conclusion I am not saying that the introduction into the preliminary arrangements of the expression "subject to contract" would necessarily in all cases prevent the agent establishing that the person he introduced was willing to purchase. It clearly would not be fatal to the agent's claim if it was introduced by the vendor in accepting an unqualified offer, but, if it was introduced by the prospective purchaser, the normal inference would be that he did so with a view to reserving to himself a *locus poenitentiae*, conduct which seems to me inconsistent with the view that he is a willing purchaser.

In reaching my conclusion I derive some assistance from a recent decision of this court in *Cunliffe v. Goodman* (8). In that case we had to consider the effect of the decision of this court in *Salisbury v. Gilmore and Marcel* (9) where it was held that, in deciding whether a tenant had proved that premises were, shortly after the termination of the tenancy, to be pulled down, the test was the intention of the landlord at the termination of the tenancy. In *Cunliffe v. Goodman* (8) the question was as to the meaning in that contract of the word "intention." We came to the conclusion that, while the intention might be revocable, it must not be provisional or conditional. I said in that case (*ante*, p. 723):

"Reading the correspondence as a whole, I have come to the conclusion that the landlord never reached more than a provisional decision. She would obviously not re-build unless the proposed scheme would provide an adequate return on the capital she would have to sink in it. It was plain that she could not reach a judgment on this point until she knew (a) what conditions the authorities would impose as to rent, etc., (b) what the proposed buildings would cost, and (c) what interest she would have to pay in order to finance the scheme. The financial aspect was plainly present to her mind throughout, and, reading the correspondence as a whole, I find it impossible to conclude that the tenant has discharged the onus which rests on him of proving that before Nov. 30, the landlord had decided to pull down the building and that that intention was still existing at that date."

Applying that case by analogy to the case before us, I think that the agent may prove that a person he has introduced is willing to purchase the property by showing that that person has made an unqualified offer or expressed an unqualified intention to make an offer notwithstanding that such an offer until accepted could be withdrawn. On the other hand, if the evidence shows that the offer is qualified by a condition inserted to prevent the other party turning the offer into a contract by acceptance, I think it is impossible to say that the agent has discharged the onus which rests on him of proving that the person he has introduced was willing to purchase the property. In my opinion, the agent only succeeded in *E. P. Nelson & Co. v. Rolfe* (6) because, as BUCKNILL, L.J., said, it was not disputed that Mr. Payne was a man able, ready and willing to purchase the property. Had the evidence indicated that when Mr. Payne returned with his wife to inspect the bungalow, he had not expressed his willingness to buy, the decision might, I think, well have been the other way.

In the present case there was some evidence that Mrs. Smith was keen on purchasing. She had continually increased her offer to meet the rising appetite of the defendant and she was described by her husband as anxious to purchase, but she never made an unqualified offer and her anxiety was at all material times qualified by "subject to satisfactory survey." Such an offer meant that Mrs. Smith had constituted herself the arbitrator whether the survey was satisfactory and the principal could not by accepting her offer constitute a binding contract. In these circumstances I think the learned judge was right in



his conclusion and that the plaintiffs had not established that Mrs. Smith was a "person willing to purchase the property." For these reasons I think the appeal fails and should be dismissed.

ASQUITH, L.J.: I agree.

SINGLETON, L.J.: This is a case of importance from the point of view of estate agents and also from the point of view of the public. It appears that since the decision of the House of Lords in *Luxor (Eastbourne), Ltd. v. Cooper* (1) estate agents have adopted a new form of contract under which one who wishes to dispose of his property and who puts it into the hands of agents is asked to sign a form or to agree to a term that the ordinary rate of commission shall become payable to the agents in the event of their being instrumental in introducing a person prepared to purchase, or willing and able to purchase, on the terms of the clients' instructions. That kind of contract was considered by LEWIS, J., in *Giddys v. Horsfall* (3), in which case the agents had produced a Mrs. Stow who was prepared to purchase at an agreed figure, but whose offer was "subject to contract." The owner backed out. It was held by LEWIS, J., that, though the owner was not bound to sell to Mrs. Stow, still the agents were entitled to their commission as against the owner. The plaintiffs rely on that decision and they claim that it was approved by this court in *E. P. Nelson & Co. v. Rolfe* (6). In that case the court decided that an owner might be liable to pay commission although the person introduced had not purchased the property. BUCKNILL, L.J., in the course of his judgment, referred to *Giddys'* case (3) as one of several supporting that view. Further than this the court did not go. No question arose on the words "subject to contract." There was no such term in that case. I do not know that there is any decision of the Court of Appeal which supports the view that commission is payable to the agents if all that they do is to produce a person who is willing to purchase "subject to contract." It may be so if the owner has agreed to such a term, or if he has introduced it himself. The question must always be determined by the terms of the contract between the owner and the agents.

In the case under appeal commission was payable to the agents "in the event of our introducing a person or persons willing and able to purchase." The agents introduced a Mrs. Dinah Smith. Their letter of Sept. 26, 1949, introduces the words "subject to contract." It appears uncertain how the words "subject to contract" came to be introduced. It may be that they have become more or less common form with some people, but a further term or condition was introduced in the letter from the agents dated Oct. 3 (which contains the introduction on which they rely as giving them a right to commission). The agents wrote to the owner:

"... acting in accordance with your instructions we have accepted the increased offer of our applicant, Mrs. Dinah Smith ... to purchase your property as above in the sum of £4,650 freehold, subject to contract, satisfactory survey ..."

"Subject to satisfactory survey" means either subject to the proposed purchaser receiving a surveyor's report which is satisfactory to him, or subject to the report being a satisfactory one. So far as I can find, there had been no mention of this beforehand. Mr. Ewen, the agents' manager, gave evidence as to a conversation with the defendant on the afternoon of Oct. 3 in which the defendant told him he could carry on with the sale to Mrs. Smith at £4,650, and the defendant was not called to deny this. Mr. Ewen did not say that there was any mention of "subject to survey." There is importance in such a term. There might be dry rot in the house, the drains might be out of order, or the value when the condition of the property was seen might be far below that which was asked. These are matters of a kind which the owner might

prefer not to have raised, and there is no reason why he should agree to the introduction of any such term.

It was submitted that the words "subject to satisfactory survey" add nothing to the words "subject to contract," and that, consequently, this court ought to follow the decision of LEWIS, J., in *Giddys'* case (3) (and inferentially of this court in *Nelson's* case (6)) and hold that commission is payable to agents in the present case. In *Chillingworth v. Esche* (4) the purchasers agreed to purchase certain freehold land from the vendor subject to a proper contract to be prepared by the vendor's solicitors. It was held that the document was only conditional and did not contain a firm contract. WARRINGTON, L.J., said ([1924] 1 Ch. 109):

"It has been held over and over again that where you have a document relating to the sale and purchase of land framed in these terms, the object of inserting those words is to avoid binding the parties unless and until the contract referred to has been prepared and signed by both parties."

Later he says (*ibid.* 111):

"I am clearly of opinion that this document of July 10, 1922, was nothing more than a conditional offer and acceptance, and would only ripen into a contract when a formal document was signed."

SARGANT, L.J., said (*ibid.*, 114):

"... they are words appropriate for introducing a condition, and it would require a very strong and exceptional case for this clear *prima facie* meaning to be displaced."

Bearing this in mind I cannot accept the decision of LEWIS, J., in *Giddys'* case (3) as correct. An owner is willing to sell his property for a certain sum. If on a contract such as there was in that case the agent produces a person willing to purchase at that price the agent may well be entitled to commission, but, if the person introduced makes his offer or acceptance "subject to contract," I do not think that the agent is entitled to commission unless it can be said that the owner has, in one way or another, agreed to that term. In other words, the acceptance is a conditional acceptance and no more than that.

In the present case there was introduced the further term "subject to satisfactory survey." To the mind of the trained lawyer that may add nothing beyond "subject to contract," but it did mean something to the purchaser and to the agents, else it would not have been introduced. It was said in the course of the argument that the words "subject to contract" have become more or less common form, inserted by agents, but, if an owner receives an acceptance "subject to satisfactory survey," attention is drawn to the fact that the person is keeping open questions in regard to the condition of the property. Why should it be regarded as an acceptance of the owner's offer of the property? It is not an unconditional acceptance, nor is it one which the owner is bound to accept even if he was prepared to accept an offer "subject to contract." The latter is usually taken to mean "provided that our respective lawyers can agree upon the form of contract," though it may have a wider legal significance. The owner may well be disposed to say: "I am not going to accept an offer which re-opens the question of the condition of the property"—the more so if he has an equally good, or a better, offer independent of any such term.

In my view, it has not been shown that the person introduced, Mrs. Dinah Smith, was willing to purchase. The evidence of Mr. Smith shows that she required a surveyor's report and her offer (or acceptance) was conditional on that. In order that the agents may substantiate their claim to commission they must show that they introduced someone willing to purchase on the owner's terms or on terms acceptable to him, and they have not done that. No doubt Mrs. Smith was anxious to purchase the property, but her willingness to do so was dependent on the surveyor's report, and it was so stated in the letter of Oct. 3. Any other view would put agents in a position which, to my mind, is

completely untenable. A property might be in the hands of half a dozen agents each of whom produced a person prepared to pay the price asked "subject to contract and subject to satisfactory survey." Is each entitled to commission regardless of the introduction of that term which proved a complete obstacle in each case? The same firm of agents might produce first one and then another person each of whom was prepared to purchase at the price asked subject to such terms, and each might turn down the property on surveyor's report. Is the firm entitled to commission in respect of each introduction? Surely not unless the owner can be said to have embraced in his offer those conditions, or to have accepted them. I agree with ROXBURGH, J., that the agents have not proved that they are entitled to commission, and I am in favour of dismissing the appeal.

*Appeal dismissed with costs.*

Solicitors: *William White & Co.* (for the plaintiffs); *Craigien, Hicks & Co.* (for the defendant).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

## McCALLUM v. HICKS.

[COURT OF APPEAL (Bucknill, Denning, L.J.J., and Hodson, J.), March 20, 1950.]

*Agent—Commission—Estate agent—Agreement to purchase "subject to formal contract."*

The defendant verbally instructed the plaintiff, an estate agent, to "find someone to buy my house," a price of £1,250 being mentioned, but nothing being said about commission. The plaintiff introduced a Mrs. K. who offered £1,200 for the house, and an agreement was entered into between the defendant and Mrs. K. whereby Mrs. K. agreed to purchase the house for the price offered "subject to formal contract." Before any further steps had been taken in the matter, the defendant withdrew his instructions from the plaintiff. On a claim by the plaintiff for commission,

**HELD:** on construction, the words "find someone to buy," meant "find a purchaser"; an agreement by the defendant to pay the plaintiff a commission on his finding a purchaser was to be implied; an agreement to pay commission in that event contemplated the agent procuring a binding and enforceable contract to purchase; the agreement between the defendant and Mrs. K. was not such a contract, but was made "subject to formal contract;" and, therefore, the plaintiff was not entitled to commission.

[AS TO AGENT'S RIGHT TO REMUNERATION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-263, paras. 432-436, and 1949 Supp. Tit. Agency; and FOR CASES, see 2nd DIGEST Supp.]

Cases referred to:

- (1) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (2) *Giddys v. Horsfall*, [1947] 1 All E.R. 460; 2nd Digest Supp.
- (3) *Bennett (E. H.) & Partners v. Millett*, [1948] 2 All E.R. 929; [1949] 1 K.B. 362; [1949] L.J.R. 1050; 2nd Digest Supp.
- (4) *E. P. Nelson & Co. v. Rolfe*, [1949] 2 All E.R. 584; [1950] 1 K.B. 139.
- (5) *John Lee & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 581.
- (6) *Graham & Scott (Southgate), Ltd. v. Oxlade*, ante p. 856.
- (7) *Prickett v. Badger*, (1856), 1 C.B.N.S. 296; 26 L.J.C.P. 33; 140 E.R. 123; 1 Digest 509, 1754.

APPEAL by the defendant from an order of His Honour JUDGE PRATT made at



Newton Abbot County Court, on Dec. 15, 1949, whereby he awarded the plaintiff £37 10s. in respect of commission.

The defendant instructed the plaintiff, an estate agent, through his (the plaintiff's) clerk to "see if he can find someone to buy my house." No written memorandum of the contract was drawn up and nothing was said as to commission. The plaintiff introduced a Mrs. Kelly as a prospective purchaser and an agreement was entered into "subject to formal contract" between the defendant and Mrs. Kelly, by which the defendant agreed to sell the house to Mrs. Kelly for £1,200. The defendant subsequently refused to complete. On a claim by the plaintiff for commission the learned county court judge held that the words "someone to buy" should be construed as someone who was ready, willing and able to buy, that Mrs. Kelly was such a person, and, therefore, that the plaintiff was entitled to commission.

*E. Dennis Smith* for the defendant.

*Herrick Collins* for the plaintiff.

BUCKNILL, L.J., stated the facts and continued: The whole point in this case is whether the contract between the plaintiff and the defendant was that the defendant should pay a commission if the plaintiff found a purchaser or whether he should pay a commission if the plaintiff found someone ready, willing and able to buy the house. The learned county court judge said: "I must interpret 'someone to buy' as someone who was ready and willing and was able to buy," and he found as a fact that the plaintiff did the work he was instructed to do. A good deal has to be read into what took place to spell out a contract between the plaintiff and the defendant, because there is no mention in any conversation between the parties about a commission. Therefore, one must imply an agreement by the defendant to pay a commission if the plaintiff could find someone to buy his (the defendant's) house. To me that means: "I will agree to pay a commission if you find a purchaser of my house." "Someone to buy" is a more colloquial way of saying "a purchaser." If one reads the expression in the way in which the learned judge has read it, it seems to me not only to be a strained construction of those words, but also to introduce a term which is unreasonable. It is unreasonable in two respects. First, it would mean that, in a case of this kind, if Mrs. Kelly, before any formal contract had been made, had decided to withdraw from the negotiations because she had found another house more suitable, the defendant would have been liable to pay the commission because the plaintiff had found someone who was, at any rate at one time, ready, able and willing to purchase. Then, again, if the defendant were a poor man, without any private means other than his house, he would pay the commission out of the purchase price, which he would not receive until a formal and binding contract had been made. It would be unreasonable to suppose that he ever contemplated having to pay a commission to anyone who had not, in fact, found a purchaser for the house. In addition, the defendant, being anxious to sell the house quickly, had put the house in the hands of a number of agents, and it would be unreasonable if he thereby made himself liable to pay commission to any agent who found a person ready, able and willing to buy. In my view, the learned judge put an erroneous construction on the contract made between the plaintiff's agent and the defendant, and this appeal should be allowed.

DENNING, L.J.: The words "find a purchaser" and "introduce a purchaser" have a meaning which is well understood. When a house owner goes to a house agent and asks him to "find a purchaser," that means that the agent is to find a person who will actually complete the purchase of the house, it being understood that the agent's commission is to be paid out of the purchase price. That is the common understanding of men in these matters. If the sale is not completed, the agent gets no commission unless he has procured an actual binding and enforceable contract for purchase. Once the purchaser and vendor

have signed and exchanged a contract, the agent has earned his commission because, if the purchaser does not complete, the vendor can recover the amount of the commission from the purchaser by way of damages. LORD ROMER put it succinctly in *Luxor (Eastbourne), Ltd. v. Cooper* (1), where he said ([1941] 1 All E.R. 64):

“Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase . . .”

It is only then that the agent becomes entitled to commission.

Some agents recently have been endeavouring to alter the ordinary understanding of the expressions “find a purchaser” or “introduce a purchaser” by getting a house owner to sign a document which makes him liable for commission if the agent introduces “a person able, ready and willing to purchase.” Once such a form is signed, they say they are entitled to commission if they introduce a person who makes an offer but does not sign a binding contract. If this is correct, it means that where a number of house agents induce a house owner to let them put his house on their books, the owner may find himself liable to pay commission, not only on the sale which is completed through one agent, but also on offers which have been made through other agents and never reached a binding contract: see, for instance, *Giddys v. Horsfall* (2), *E. H. Bennett & Partners v. Millett* (3), and *E. P. Nelson & Co. v. Rolfe* (4). This is so contrary to the common understanding of men, and also to common fairness that the courts will endeavour to interpret the contract so as to avoid such a result. As I pointed out in *John Lee & Son (Grantham), Ltd. v. Railway Executive* (5) ([1949] 2 All E.R. 584), the common law is vigilant to prevent any abuse of freedom of contract, and, rather than permit any abuse, it will assume that the party intended to be reasonable and will give the contract a reasonable interpretation. This is especially so in the case of forms which the public are invited to sign without legal advice. So, recently, in the notable decision of *Graham & Scott (Southgate), Ltd. v. Oxlade* (6) this court held that a person could not be said to be “willing” to purchase if all he had done was to sign “subject to contract” or “subject to survey.” This shakes the authority of previous cases and opens the way to an interpretation of the new form of words so as to give them the same effect as “find a purchaser.” A person may not properly be said to be “willing” to purchase so as to entitle an agent to commission unless he is irrevocably willing, that is, unless he has given irrevocable proof of his willingness by entering into a binding contract to purchase. In the present case, however, there was nothing in writing. There was simply an oral request. The house owner went to the house agent and said: “See if you can find someone to buy my house.” What is the proper interpretation of that contract? I have no doubt that it is the same as: “Find me a purchaser.” The agent is entitled to a commission if the sale is completed, or if a binding contract is made. Neither of those two things happened. The sale was not completed, and there was no binding contract. It was all “subject to formal contract.” The house owner sold his house through another agent and paid that agent commission. The plaintiff is not entitled to any commission. I agree with my Lord that the appeal should be allowed.

**HODSON, J.:** The learned county court judge found as a fact that at the end of August, 1949, the defendant instructed the plaintiff to find someone to buy his house at £1,250, or near offer. It is not necessary, in my opinion, for this court to go further than to construe those words. In the *Luxor* case (1) VISCOUNT SIMON, L.C., referred ([1941] 1 All E.R. 41) to the usual arrangement made with house agents, and quoted with approval the observations of WILLIAMS, J., in *Prickett v. Badger* (7), where the latter speaks of (1 C.B.N.S. 305):

"... the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but, if not, then he is to get nothing."

It is necessary, as LORD RUSSELL pointed out in the *Luxor* case (1), for an agent, if he wishes to go beyond the usual established practice, to introduce terms which make it clear that he is to get a commission at a point short of a completed sale.

- A On the interpretation of these words I think it is impossible so to find. "Someone to buy my house" means in its plain meaning, in the light of the established practice, a buyer of the house, which in terms is equivalent to a purchaser of the house. There was in this case no contract for sale, as has been admitted. In those circumstances, I think it unnecessary to consider further whether, if the learned county court judge had been justified in interpreting the words as being
- B willing, able and ready to buy at the figure named, there was evidence in this case which would justify a judgment in favour of the plaintiff. I agree that the appeal should be allowed.

*Appeal allowed with costs.*

- Solicitors: *Church, Adams, Tatham & Co.*, agents for *Lee-Barber, Goodrick & Co.*, Torquay (for the defendant); *Baileys, Shaw & Gillett*, agents for *Tozers, Newton Abbot* (for the plaintiff).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

*Explained.* HOLLOWAY v. MOBBERLEY & PERRY, LTD. [1950] 2 All E.R. 761.

*Doubted.* MOBBERLEY AND LTD. v. HOLLOWAY. [1950] All E.R. 627.

D

## HARRIS v. ROTOL, LTD.

[COURT OF APPEAL (Cohen, Asquith and Singleton, L.J.J.), March 6, 7, 28, 1950.]

- E *Workmen's Compensation—Industrial disease—Certifying surgeon's certificate given after July 5, 1948, in respect of disablement suffered before that date—Workmen's Compensation Act, 1925 (c. 84), s. 43 (1), (2)—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 89 (1) (a).*

- F On Aug. 17, 1949, a workman obtained a certificate of a certifying surgeon appointed under the Workmen's Compensation Act, 1925, that he was suffering from dermatitis and that the date of his disablement was Feb. 6, 1948. He claimed compensation from his employers under s. 43 of the Act of 1925. The National Insurance (Industrial Injuries) Act, 1946, which came into force on July 5, 1948, provides by s. 89 (1) that workmen's compensation shall not be payable in respect of any employment on or after the appointed day (July 5, 1948), and that, accordingly (*inter alia*), the Act of 1925 was repealed as from that day,
- G provided that "(a) the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where . . . the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury."

- H HELD: the right to compensation under s. 43 of the Act of 1925 did not arise until the certificate was given, and, as no certificate was given before the appointed day, no right to compensation could arise under that section because the certifying surgeon, having regard to s. 89 (1) of the Act of 1946, became *functus officio* on the appointed day, and, therefore, the application of the Act of 1925 was not saved by proviso (a) to s. 89 (1) as regards the workman's disablement.

*Hales v. Bolton Leathers, Ltd.* ([1950] 1 All E.R. 149), *applied*.



[FOR THE NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946, s. 89 (1), see HALSBURY'S STATUTES, Vol. 39, p. 400.]

Case referred to:

(1) *Hales v. Bolton Leathers, Ltd.*, [1950] 1 All E.R. 149.

APPEAL by a workman from an order of His Honour JUDGE DONALD HURST, K.C., made at Gloucester County Court, and dated Dec. 5, 1949, dismissing an application for compensation under the Workmen's Compensation Act, 1925, s. 43, based on a certificate of a certifying surgeon dated Aug. 17, 1949, on the ground that, at the date of the certificate, the certifying surgeon was *functus officio*. The facts appear in the judgment of COHEN, L.J.

*Beney, K.C.*, and *E. V. Falk* for the workman.

*Lloyd-Jones, K.C.*, and *Lyne* for the employers.

*Cur. adv. vult.*

Mar. 28. COHEN, L.J., read the following judgment. The workman in this case seeks to recover compensation under the Workmen's Compensation Act, 1925, s. 43. He alleges that the date of disablement was Feb. 6, 1948, that being the date so certified by a certificate dated Aug. 17, 1949, of a certifying surgeon appointed under the Act of 1925. The employers made no admission as to the facts, and took a preliminary objection in the following terms:

"The respondents deny their liability to pay compensation on the ground that [the workman's] right to claim compensation under the Workmen's Compensation Acts did not arise before July 5, 1948, as from which date the Workmen's Compensation Acts were repealed, and they contend, therefore, that they are not liable to pay compensation under the said Acts in respect of incapacity from the alleged industrial disease."

This objection was based on an argument that the right to compensation did not exist until a certificate was given by a certifying surgeon, and that, as in the present case that certificate was not given until after the appointed day fixed pursuant to the National Insurance (Industrial Injuries) Act, 1946, the workman had no right to compensation at the appointed day.

The learned judge upheld this contention, and dismissed the application saying:

"The certificate of the certifying surgeon was headed Workmen's Compensation Act, 1925, s. 43 (1) (i). I consider, and so held, that on the date when the certificate was given, namely, Aug. 17, 1948, that particular section no longer existed. I held that on July 5, 1948, the certifying surgeon was *functus officio* the Act of 1925, and could give no certificate under that Act. I was fortified in this view by the wording of the National Insurance (Industrial Injuries) Act, 1946, s. 89 (1) (b), which appeared to me to provide for such a contingency as the present, by the existence of S.R. & O., 1948, No. 1262 (National Insurance (Industrial Injuries) (Medical Certification) Regulations, 1948), and by the existence of s. 89 (1) (c) covering such exceptions as were intended by the legislature."

From this award, the workman appeals. The relevant section of the Act of 1946 is s. 89. This provides:

"(1) Workmen's compensation shall not be payable in respect of any employment on or after the appointed day, and accordingly the enactments set out in sched. IX to this Act are hereby repealed as from that day to the extent mentioned in the third column of that schedule . . ."

In the schedule appears the Act of 1925. Had the section stopped there the learned judge would have been right, since the appointed date was fixed as July 5, 1948, but then follow three provisos:

A “(a) the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of a disease or injury prescribed for the purposes of Part IV of this Act, the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury; (b) regulations may make such transitional or consequential provisions as appear to the Minister to be necessary or expedient, having regard to the repeal of the said enactments in relation to diseases and to injuries not caused by accident, including provision for modifying or winding-up any scheme made thereunder; (c) the repeal of the Workmen’s Compensation Act, 1925, shall not affect any rules of court made under the Workmen’s Compensation (Transfer of Funds) Act, 1927, or the power to make new rules of court thereunder.”

B The first part of the first proviso applies to all accidents, notional as well as actual. Its effect has been considered by this court in *Hales v. Bolton Leathers, Ltd.* (1). The judgment of the court was delivered by SOMERVELL, L.J., and he considers the position in the case of an actual accident, saying ([1950] 1 All E.R. 152):

D “We will take a case, put by BUCKNILL, L.J., in the course of the argument, of a groom kicked by a horse before the appointed day. The groom is not ‘disabled’ at the time and is able to carry on with his work. After the appointed day injury develops and he has to go to hospital. His right to compensation, as it seems to us, ‘arises’ at the time of his disability or incapacity. The Act of 1925 gives compensation, not for pain and suffering, but for total or partial incapacity, but in the case put, this right, though arising after the appointed day, is in respect of employment before the appointed day, and the proviso to s. 89 (1) preserves his rights under the Workmen’s Compensation Acts. The case where incapacity is continuing at the appointed day is plainly covered. There is also, as it seems to us, no difficulty about the case where there has been a temporary recovery at the appointed day, but later incapacity, the result of the pre-appointed day injury, re-develops. This re-development gives a right to compensation which ‘arises’ after the appointed day, but it is in respect of employment before the appointed day. If this is right, then the words ‘the right to compensation’ are given what seem to us their natural construction, and, so far as ordinary accidents are concerned, the provisions clearly mean what one would expect them to.”

E From this passage it is clear that in the case of an ordinary accident, *i.e.*, an accident which is not a notional accident within s. 43 of the Act of 1925, the proviso will operate if the accident arose out of employment before the appointed day notwithstanding that the right to compensation (which arises only at the time of disablement or incapacity) does not arise until after the appointed day.

G We are, however, concerned not with an ordinary accident but with a notional accident, and I must, therefore, refer to s. 43 of the Act of 1925 which, so far as material, provides:

H “(1) Where—(i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in sched. III to this Act and is thereby disabled from earning full wages at the work at which he was employed; . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or

suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—(a) The disablement or suspension shall be treated as the happening of the accident . . . (2) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given.”

Then there are provisos which I need not read. As regards notional accidents, SOMERVELL, L.J., says (*ibid.*, 153) that the early part of the proviso does not apply completely, at any rate, to the case of industrial diseases. None the less, counsel for the workman here say that the principle laid down by SOMERVELL, L.J., applies equally to the notional accident in this case. They put their case in two ways. First, they say that the certificate is mere matter of proof, not a necessary element in the right, and that, although the certificate was not given until after the appointed date, it has retrospective effect under s. 43 (2). Secondly, they say that, having regard to the interpretation placed on the first part of the proviso by SOMERVELL, L.J., the exception in it should be construed as if it read “if the right does not arise out of employment before the appointed day.” On that construction, they say that, as the disability plainly arose out of employment before the appointed day, they are not within the exception to the proviso.

Counsel for the employers seeks to support the conclusion of the judge by saying that (i) s. 43 (1), by its very terms, makes the giving of a certificate a *sine qua non* and, indeed, the first step in founding a right to compensation; (ii) no certificate having been given before the appointed day, no right to compensation can have arisen before that day, and it can never arise thereafter since, under the opening words of s. 89, s. 43 has been repealed; (iii) we need not, therefore, consider the exception to the proviso since the workman never brings himself within the opening part thereof. This construction, he says, does not make the proviso meaningless in the case of notional accidents, since, if a certificate had been given before the appointed day, the proviso would operate, and it would be necessary to preserve the old Acts in operation for many purposes, *e.g.*, for the purpose of review under s. 11 of the Act of 1925.

Counsel for the workman argued that this construction would lead to strange results—for instance, if A. and B. both had similar notional accidents on the same date and one obtained a certificate before the appointed date but the other did not, they would have different rights although their cases were indistinguishable. I am not, however, impressed by this argument. It seems to me that the policy of the Act is to make a clean cut and to provide that any rights accruing after the appointed date should be dealt with under the new Act. A more serious criticism of the argument of counsel for the employers is, however, that it would leave a hiatus. Counsel for the workman says that there are cases where the workman would have no remedy for the period between the date of contraction of the disease and the appointed date. To appreciate this criticism I must turn to the provisions of the Act of 1946. Section 1 provides:

“(1) Subject to the provisions of this Act, all persons employed in insurable employment shall be insured in manner provided by this Act against personal injury caused on or after the appointed day by accident arising out of and in the course of such employment.”

Part IV deals with notional accidents arising out of industrial diseases and industrial injuries not caused by accident. Section 55 provides:



"(1) Subject to the provisions of this Part of this Act, a person who is under this Act insured against personal injury caused by accident arising out of and in the course of his employment shall be insured also against any prescribed disease and against any prescribed personal injury not so caused, being a disease or injury due to the nature of that employment and developed on or after the appointed day."

A Sub-section (2) gives power to the Minister to prescribe what diseases are to be included under Part IV. Sub-section (3) enables him to include in regulations made under sub-section (2) a provision ante-dating the effect of the regulations to any specified date not being earlier than the appointed date. Sub-section (4) provides:

B "Provision may be made by regulations for determining the time at which a person is to be treated for the purposes of this Act as having developed any disease or injury prescribed for the purposes of this Part of this Act, and the circumstances in which any such disease or injury is, where the person in question has previously suffered therefrom, to be treated as having recrudesced or as having been contracted or received afresh."

C Regulations have been made under the above powers which are difficult to construe. I need not, I think, refer to them in detail since it was agreed that the effect of them is that a workman who was found to be suffering from dermatitis after the appointed date could recover compensation for any period of disablement or incapacity subsequent to that date, but that there is no provision enabling him to do so in respect of any earlier period of incapacity unless, of course, he had obtained a certificate of a certifying surgeon before the appointed date and could rely on the first proviso to s. 89 (1). D Counsel for the workman was, therefore, right in saying that under the Act and regulations as they stand there is a hiatus not covered by either Act. No doubt it was not Parliament's intention to leave such a hiatus, and, if there is an ambiguity in the construction of s. 89 (1), we might adopt that construction which would fill the gap. E I am, however, unable to find that ambiguity. It is, I think, clear from what was said by SOMERVELL, L.J., in *Hales'* case (1) that the right to compensation does not arise until the time of the disability or incapacity. It is also, I think, plain that, under s. 43 of the Act of 1925, until a certificate is given there is no right to compensation at all. In these circumstances, I think that counsel for the employers was justified in saying that F in any case where there was no certificate before the appointed day, the certifying surgeon was *functus officio* and could not, thereafter, found a right by giving a certificate.

I arrive at this conclusion with less reluctance because (a) in the present case on the facts the hiatus does not exist, (b) I think counsel for the workman was right in suggesting that the Minister could, if he thought fit so to do, G bridge the gap by regulation under the power conferred by proviso (b) to s. 89 (1). For these reasons I am of opinion that the appeal should be dismissed. ASQUITH, L.J., asks me to say he has read this judgment, and agrees with it.

SINGLETON, L.J.: I agree.

H *Appeal dismissed with costs.*  
Solicitors: W. H. Thompson (for the workman); Peacock & Goddard, agents for Cartwright, Taylor & Corpe, Bristol (for the employers).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

## PARMEE v. MITCHELL.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.), March 17, 1950.]

*Rent Restriction—Alternative accommodation—Sub-tenant of part of house purchasing reversion—Whether part of house occupied by tenant suitable alternative accommodation as compared with whole house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) (b).* A

The defendant, who was the tenant of a dwelling-house within the Rent Restrictions Acts, sub-let the upper part of the house to the plaintiff. Subsequently, the plaintiff purchased the reversion on the defendant's tenancy and gave the defendant notice to quit. The plaintiff sought an order for possession of the whole house, offering, as alternative accommodation, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (b), the part of the house already occupied by the defendant. B

HELD: (i) there would be an order for possession, subject to a proviso that the defendant should be entitled to remain in occupation of the part which he, in fact, occupied. C

(ii) (SIR RAYMOND EVERSLED, M.R., *dubitante*): the part of the house already occupied by the defendant could properly be regarded as suitable alternative accommodation. D

*Thompson v. Rolls* ([1926] 2 K.B. 426), approved.

[AS TO ALTERNATIVE ACCOMMODATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 398; and FOR CASES, see DIGEST, Vol. 31, pp. 582-584, Nos. 7311-7330.] E

Case referred to:

(1) *Thompson v. Rolls*, [1926] 2 K.B. 426; 135 L.T. 446; 31 Digest 580, 7291.

APPEAL by the defendant from an order of His Honour JUDGE HARGREAVES, made at West London County Court, on Dec. 19, 1949, granting possession of a dwelling-house to the plaintiff, and further ordering that the operation of the order for possession be subject to the plaintiff granting the defendant alternative accommodation in the part of the house already occupied by the defendant. The defendant contended that no suitable alternative accommodation was offered to him, and that it was not reasonable to make the order. The facts appear in the judgment of JENKINS, L.J. F

*C. C. P. Hodson* for the defendant.

*R. B. Willis* for the plaintiff.

SIR RAYMOND EVERSLED, M.R.: I will ask JENKINS, L.J., to give the first judgment.

JENKINS, L.J.: This is an appeal from an order of the learned county court judge giving the plaintiff possession of the premises, No. 19, Ackmar Road, S.W.6, subject to granting the defendant alternative accommodation, which consisted of the part of the premises then actually occupied by the defendant. G

Originally the plaintiff was the defendant's tenant of the upper part of the house. Later, the plaintiff bought the house, and thus became the defendant's landlord while at the same time he was the defendant's sub-tenant of the upper part. The plaintiff having bought the house, wishes to be in occupation of the upper part of the house in his own right as owner instead of holding it as sub-tenant of the defendant, or, in other words, to simplify the position so that he will be in possession of the house as owner, occupying the upper part himself and letting the lower part to the defendant. He puts his case in this way. It is said that the defendant by himself or his tenant, the plaintiff, is in possession of the whole of the premises. It is said that the lower part of those premises, H

now in the actual occupation of the defendant, constitutes suitable alternative accommodation, and it is claimed, therefore, that, subject to the court considering it reasonable to make the order, the case is one in which an order for possession can properly be made under s. 3 (1) (b) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The propriety of the order made by the learned county court judge has been attacked by counsel for the defendant on the ground that it does not lead to any alteration in the physical possession of the premises, but merely strengthens the plaintiff's position in point of title and deprives the defendant of such chance as he might otherwise have, if he were so minded, of extending his accommodation by obtaining possession, on one or other of the statutory grounds, of the upper part of the house against the plaintiff as his tenant. These arguments are, at first sight, attractive because superficially it seems somewhat absurd to make an order for possession subject to alternative accommodation being provided and to treat as alternative accommodation the rooms already occupied by the tenant, thus, in effect, cancelling the operation of the order for possession, but I think that that difficulty is only superficial. It is true that the defendant is only in occupation of the lower part of the house, but he is, nevertheless, in possession of the whole. The plaintiff has no option but to make a claim for possession extending to the whole of the premises, for that is the only way in which he can determine the defendant's interest.

Looking at the matter from that point of view, the alternative accommodation offered is not simply the identical premises of which the defendant is in law in possession, but the part of those premises of which he is in actual physical occupation and which represents the only part of such premises that is necessary to provide the accommodation he wants. The lower part of the premises can, therefore, in my view, properly be regarded as "alternative accommodation" although it is part of the entire house of which the defendant is at present in possession. That view is borne out by the judgments of the Divisional Court in *Thompson v. Rolls* (1), where there arose a situation in some respects similar to that in the present case, the difference being that the rooms not occupied by the defendant, instead of being sub-let to the plaintiff, were used by the defendant for furnished letting. The Divisional Court found no difficulty in holding that the rooms in the actual occupation of the defendant in the entire house could be regarded as alternative accommodation as compared with the house as a whole. In my view, that decision was right, and I hold, accordingly, that the decision of the county court judge in the present case was in substance correct. I think, however, that the form of the order he made is, perhaps, capable of some improvement. On the whole, I think it is right that there should be an order for possession of the whole of the premises subject to a proviso that the defendant is to be entitled to remain in occupation of the lower part of the premises on suitable terms. I gather that the appropriate rent for that part of the premises has already been fixed, and I, therefore, suggest that the proviso should be simply to the effect that, notwithstanding the order for possession, the defendant is to be entitled to remain in occupation of the lower part of the premises as a weekly tenant of the plaintiff at that weekly rent. As the appeal has in substance failed I think the defendant should pay the costs.

**SOMERVELL, L.J. :** I agree. Prior to the notice to quit the defendant was, of course, the tenant of the whole of these premises, part of which he had sub-let to the plaintiff. After the service of the notice to quit, apart from the Rent Restrictions Acts, *prima facie* the plaintiff would have been entitled to an order for possession of the whole premises, but, having regard to the Rent Restrictions Acts, the defendant's position falls to be considered. The learned judge said :

"There was no suggestion that this part [the lower part] was not



suitable to the defendant's needs in all the respects required by the Act, including the rent required for it."

Therefore, it seems to me that, subject to the defendant being safeguarded with respect to that accommodation, there is no obstacle provided in the Acts to the making of an order for possession. The only question that arises, as it seems to me, is whether the order for possession should be made for part of the house—that part which the defendant does not desire to occupy—or for the whole house. I have come to the conclusion that the proper form of order is that there should be an order for possession of the whole house. This is necessary and right in order to get rid of the defendant's right to possession of the whole house as statutory tenant. The order should, however, be subject to the defendant remaining as tenant, on terms which, apparently, have been agreed, of that part of the house which he has occupied and will continue to occupy. I think that the appeal, therefore, fails, subject to some possible question as to the wording of the order. A  
B

**SIR RAYMOND EVERSLED, M.R. :** I have felt no doubt that the substance of the order made by the county court judge was just and correct, but, during the argument of counsel for the defendant, I think I felt a greater difficulty than my brethren with regard to an order in this form in the circumstances of this case—an order adjudging that the plaintiff recover possession of all the premises and that the defendant give the plaintiff possession of all the premises, an order which was not intended ever to be executed in those terms or to affect in the least the actual physical possession by either the plaintiff or the defendant of any room in the house, but, in view of the opinion of my brethren, and realising that "possession" does not by any means necessarily mean physical possession, I do not further pursue that matter. I add that, were it not for the fact that the defendant has claimed to be entitled to remain as the landlord of the plaintiff in respect of the rooms originally sub-let—a claim which I think cannot be sustained—the difficulty would never have arisen. All that I think the defendant is entitled to is to be protected in some proper form in his continued occupation of the rooms in which he now in fact lives as his home. It is unnecessary to express any view whether the accommodation actually enjoyed by a tenant could ever be "alternative accommodation" in itself, and in this case I certainly do not decide that it could, but I think, for the reasons which JENKINS, L.J., has stated, that that point does not here call for decision. I agree that the appeal should be dismissed, but I think that the order should be varied on the lines which JENKINS, L.J., has suggested. C  
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*Appeal dismissed with costs. Order for possession varied accordingly.*

Solicitors : *Parfitt, Cresswell & Williams* (for the defendant); *Willis & Willis* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

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R. v. MINISTER OF HEALTH. *Ex parte* DINGLE  
AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.),  
March 28, 1950.]

*National Health Service—Medical practitioner—Compensation for loss of right to sell practice—Assessment—“Last two accounting years immediately preceding the appointed day”—National Health Service Act, 1946 (c. 81), s. 36 (1)—National Health Service (Medical Practices Compensation) Regulations, 1948 (S.I. 1948, No. 1506), reg. 2 (1), reg. 7 (2).*

On July 5, 1948, the appointed day under the National Health Service Act, 1946, the name of one F.R.D., a medical practitioner, was entered on the list of medical practitioners undertaking to provide general medical services under the Act, and he thereupon became entitled to compensation under s. 36 (1) of the Act in respect of the loss suffered by him by reason of his inability to sell the goodwill of his practice by virtue of s. 35 (1) of the Act. By para. 7 (2) (a) of the National Health Service (Medical Practices Compensation) Regulations, 1948, “annual loss” is defined as “the average gross yearly receipts of [a] practice, as certified by a qualified accountant, calculated by reference to the last two accounting years immediately preceding the appointed day.” On Feb. 5, 1949, F.R.D. died. The applicants, as his personal representatives, submitted a claim for compensation to the Ministry of Health and supplied a certificate of the yearly receipts of the deceased's practice for the two years ending July 4, 1948. The Minister of Health refused to consider the claim unless the applicants furnished the gross receipts of the practice for each of the last two accounting years adopted for income tax purposes prior to July 5, 1948. On an application for an order of *mandamus*,

**HELD:** the “last two accounting years immediately preceding the appointed day” meant the last two annual periods before the appointed day for which the deceased normally had his accounts made up for income tax purposes, and not an account made up *ad hoc* for the two years ending on the appointed day irrespective of whether that was the date on which the deceased did, in fact, customarily make up his accounts. The applicants, therefore, had failed to supply accounts for the requisite period, and the application should be dismissed.

[FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 36 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 371.]

**MOTION** for *mandamus* directing the Minister of Health to consider and determine the claim for compensation under s. 36 (1) of the National Health Service Act, 1946, submitted by the applicants as personal representatives of a deceased doctor.

The deceased, who died on Feb. 5, 1949, was, up to the date of his death, and immediately before July 5, 1948, the appointed day under the National Health Service Act, 1946, engaged as principal in general medical practice in and around Gateshead-on-Tyne. On the appointed day the name of the deceased was entered on the list prepared by the local executive council of medical practitioners undertaking to provide general medical services, and the deceased, thereupon, became entitled to compensation in accordance with s. 36 (1) of the Act in respect of loss suffered by him by reason that he then became, and thenceforward would be, unable to sell the goodwill of his practice in view of the provisions of s. 35 (1) of the Act. The applicants submitted a claim for compensation to the Ministry of Health and supplied a certificate by qualified accountants of the yearly receipts of the practice of the deceased for the two years ending July 4, 1948. The Minister claimed to be entitled to be furnished with the gross receipts of the practice for each of the last two accounting years used for income tax

purposes prior to July 5, 1948. The applicants refused to comply with that request, and, thereupon, they were informed by the Minister that, having regard to the construction placed on reg. 7 (2) of the National Health Service (Medical Practices Compensation) Regulations, 1948, it must be held that the figures had not been furnished to enable the annual loss to be estimated in accordance with the said regulations, and that the claim as submitted could not be considered.

*Havers, K.C., and Cantley* for the applicants.

*The Attorney-General (Sir Hartley Shawcross, K.C.) and J. P. Ashworth* for the Minister.

**LORD GODDARD, C.J.:** Counsel for the applicants has moved for an order of *mandamus* directed to the Minister of Health commanding him to hear and determine an application by the administrators of the estate of one Dr. Dingle for compensation to which they claim to be entitled under s. 36 (1) of the National Health Service Act, 1946.

The point involved is a very short one. As medical practitioners who are on the list of doctors appointed to serve under the National Health Service Act, 1946, are, by virtue of s. 35 (1) of the Act, prohibited from selling their practices, provision is made for them to receive compensation for the loss of the right to do so, the compensation being paid when they retire from practice or at death. Certain regulations have been made for the purpose of assessing the compensation, and the main provision is in reg. 7 (2) of the National Health Service (Medical Practices Compensation) Regulations, 1948 (S.I. 1948, No. 1506), which provides:

“For the purpose of these regulations ‘the annual loss’ [*i.e.*, the loss sustained by the practitioner by his being unable to sell] means (a) in respect of the practice (not being a partnership practice) in which the practitioner was engaged on the appointed day, the average gross yearly receipts of that practice, as certified by a qualified accountant, calculated by reference to the last two accounting years immediately preceding the appointed day.”

If there was nothing else in the regulation, I should say that that provision meant that the compensation was to be calculated by reference to the accounts of the last two years made up in the normal way in which the doctor kept his accounts. Regulation 2 (1), however, provides:

“‘accounting year’ in relation to a medical practice means the period of twelve months for which the accounts of the practitioner engaged in that practice are made up.”

That assumes that a doctor, like any other professional man, will make up his accounts annually, to some particular date of his own choice. Whatever date he chooses, however, is that at which the necessary figures must be arrived at for the present purpose. Dr. Dingle’s administrators, however, have claimed to be entitled to take the two years immediately preceding the date on which the Act came into operation, and they have had accounts made up for two years to July 4, irrespective of whether those were the dates on which Dr. Dingle used, in fact, to make up his accounts. Therefore, the Minister has only asked for the accounts to which he is entitled, *i.e.*, the accounts for the normal accounting year which Dr. Dingle used in his practice, and this application must fail.

**HUMPHREYS, J.:** I agree.

**JONES, J.:** I agree.

*Application dismissed with costs.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *P. B. Dingle*, Manchester (for the applicants); *The Solicitor, Ministry of Health* (for the Minister).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]



## HEATH v. HEATH.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Hodson, J.), March 23, 1950.]

*Divorce—Petition—Service by registered post—No acknowledgment—Need for substituted service—Probability that petition was received—Discretion to dispense with substituted service—Matrimonial Causes Rules, 1947, r. 8 (1), (2), (3), r. 10.*

A A wife filed a petition for divorce on the ground of desertion against her husband, an American domiciled in Missouri, U.S.A., whom she had married in England in March, 1945. In October, 1945, the husband went back to America, and from that date he refused to make a home for the wife and had not maintained her or the child of the marriage, but in various letters he had said he did not intend to live with her and offered to do all he could to facilitate a divorce if she brought proceedings. The petition was sent by registered post to his last known address with a request that he would sign the acknowledgment of service. He made no reply, nor was the letter returned through the post, and inquiries made personally at the given address by a firm of American lawyers failed to trace him. An application was made in chambers for an order that the petition should proceed to trial forthwith, but WILLMER, J., declined to make the order and directed that there should be substituted service by advertisement in a Missouri newspaper.

D HELD: (i) although service of a petition by registered post was only effective if the respondent signed the acknowledgment of service the court could dispense with the further expense of personal service or substituted service by advertisement if the probability was that the respondent had received the petition and either declined or omitted to sign the acknowledgment.

E (ii) in the present case the facts and correspondence showed that the wife had done all that she possibly could do to effect service, and, although the Court of Appeal was reluctant to interfere with an order based on the discretion of the judge (as this order was by virtue of the Matrimonial Causes Rules, 1947, r. 10), the court could do so where they were satisfied after examining all the facts that the judge was wrong.

*Observations of LORD WRIGHT, in Evans v. Bartlam ([1937] 2 All E.R. 654), applied.*

F [AS TO THE SERVICE OF DIVORCE PETITIONS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 705-707, paras. 1055-1060; and FOR CASES, see DIGEST, Vol. 27, pp. 395, 396, Nos. 3909-3929, and 2nd Digest Supp.]

Cases referred to:

G (1) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; 157 L.T. 311; Digest Supp.

(2) *Weighman v. Weighman*, [1947] 2 All E.R. 852; 2nd Digest Supp.

H APPEAL from an order of WILLMER, J., dated Feb. 20, 1950, refusing to allow a wife's petition for dissolution of marriage to proceed to trial until substituted service of the petition had been effected by advertisement in a newspaper in Missouri, U.S.A., where the husband was domiciled. An attempt had previously been made to serve the petition by registered post, but the husband had not acknowledged service, and the letter had not been returned through the post. The facts appear in the judgment of BUCKNILL, L.J.

*C. Trevor Reeve for the wife.*

BUCKNILL, L.J.: This appeal raises an interesting and important question in divorce jurisdiction. On Dec. 11, 1944, the petitioner, then Margaret Elizabeth Heap, aged twenty, born of English parents and an English citizen,

married in England Willie Heath, aged twenty-two, an American soldier serving in this country. In March, 1945, three months later she gave birth to a son of whom the husband is the father. In July, 1945, the husband went back to America and was demobilised there in the following October. From that date until now he has never contributed anything towards the wife's support or towards that of his son. From time to time the husband wrote letters to his wife from an address in Missouri which he gave as that of his home—405, Fletcher Street, Sikeston. That is the address to which the wife always wrote to him and where he obviously received her letters. There is a letter written by him from Sikeston on Dec. 2, 1945, in which he says this (*sic*):

"I dont guess there is any use of you in try to come over here for you are just as well of over there as you would be here. So if you ever want a divorce let me know and I will sign any kind of papers that you need me to to help you get it or if you want me to I will get it over here if you will sign the papers. I dont care if I ever get a divorce or not, cause I dont ever expect to get married any more. You are better of with your mother and father for they are old and need you there and my father and mother need me as he isnt able to work anymore . . . So if you want to get lose from me just let me know and I will do all I can to help you."

According to the wife's affidavit she from time to time pressed her husband to allow her to go over to America and to join him there or asked him to come to this country and join her here, but he did neither. The last letter she received was a typewritten letter from 405, Fletcher Street, Sikeston, dated Feb. 26, 1947. It is not in his handwriting and cannot be certainly identified as his, but its contents seem to me to indicate clearly that the letter was typed by him or by someone at his dictation. It says (*sic*):

"I guess that you think that I am pretty low down and I dont blame you for I didnt do a thing that I promised I would. I dont know what made me do like I have, I guess that I just went wild when I got home so if you want to get a divorce you can put in for it and send me the papers and I will sign them and send them back to you and you let me know how mutch it cost and I will send you the money."

Here, then, is a very definite request to her to send him the papers for a divorce which he says he will sign and send back to her. After that letter she received no further communication from him.

On Mar. 15, 1949, the wife filed a petition for divorce on the ground of the husband's desertion. Although the husband was domiciled in America she was entitled to proceed in this country by virtue of s. 1 of the Matrimonial Causes (War Marriages) Act, 1944. Having filed the petition the next difficulty in her way was to get it served. The Matrimonial Causes Rules, 1947, deal very clearly with the method of service of such a petition. Rule 10 says:

"Unless otherwise directed, and save where the provisions of r. 8 (4) have been complied with, a petition shall not proceed to trial or hearing unless the respondent . . . (a) has entered an appearance; or (b) is shown by affidavit in accordance with Form 11 (which shall be filed) to have been served with the petition personally or in accordance with an order for substituted service; or (c) has returned to the solicitor for the petitioner, or to the petitioner if he is acting in person, an acknowledgment of service in accordance with Form 4 . . ."

The husband has not done any of the things indicated in paras. (a), (b) and (c), and, therefore, unless directions are given, this petition cannot proceed to trial.

The question is whether those directions ought to be given in this case. The mode of service of the petition is dealt with by r. 8, which says:

“(1) Unless otherwise directed (a) a copy of every petition shall be served personally or by registered post upon every respondent . . . (2) For the purposes of the foregoing paragraph of this rule a document shall be deemed to have been duly served by registered post if the document is sent by prepaid registered post to the party to” be served, and an acknowledgment of service in accordance with Form 4 of his identity and of his receipt of the document is signed by him and returned to the solicitor for the petitioner, or to the petitioner . . . (3) An application for leave to substitute for the modes of service prescribed by the foregoing paragraphs of this rule some other mode of service, or to substitute for service notice of the proceedings by advertisement or otherwise, shall be made *ex parte* by lodging with the registrar an affidavit . . .”

The vital question before WILLMER, J., was whether in this case he should give directions for leave to substitute for such service as is prescribed by r. 8, paras. (1) and (2), notice of the proceedings by advertisement in some newspaper.

Although the husband has not signed an acknowledgment of service in this case very careful steps have been taken to get the petition served on him by registered post. On Mar. 19, 1949, the solicitors acting for the wife, who is proceeding here as a poor person, wrote to the husband (addressed to him at 405, Fletcher Street, Sikeston) a registered letter in which they said:

“We have been instructed by your wife, Mrs. Margaret Elizabeth Heath, and we enclose herewith copy of a petition for dissolution of marriage which she has presented to the High Court of Justice. We also enclose memorandum of appearance (in duplicate) and notice to appear. We further enclose a form of acknowledgment of service, and shall be glad if you will please sign the same where we have written your initials in pencil, insert the date below your signature, and then return the acknowledgment to us at your earliest possible convenience.”

This letter was despatched by air mail. The petition, in addition to asking for a decree on the ground of desertion, asked that the husband should be condemned in the costs of the proceedings. It may well be that the husband noticed the claim for costs and decided that he was not going to sign any acknowledgment of service, and, therefore, he did not return it to the wife’s solicitors as requested. One wonders what has happened to the communication and whether it has not been received by the husband. The solicitors wrote again to the husband on May 7, 1949, at the same address, but received no reply. The solicitors then took the matter up with a firm of lawyers, Blanton & Blanton, carrying on business at Sikeston, Missouri. They sent to Blanton & Blanton copies of the letters which they had written to the husband and asked them to do their best to help them to get the husband to sign the acknowledgment of service of the petition. Blanton & Blanton tried hard to get the husband to their office. They wrote to the wife’s solicitors on Sept. 3, 1949:

“We have not overlooked your air mail letter of July 29, 1949. We, however, have been diligently endeavouring to get the defendant into our office to talk to him about this case.”

They wrote again on Oct. 3, 1949:

“In reply to your air mail letter of Sept. 30 we regret exceedingly that our repeated efforts to get Mr. Heath into our office to get him to execute the waiver of service has been unsuccessful. We will make one more effort, and if still unsuccessful, will return to you the papers as you suggested.”

Finally they wrote on Oct. 21, 1949:

“I have again called at 405, Fletcher Street, Sikeston, but the parties who now live there state that Mr. Heath has not resided at that place for many months, that they do not know his present whereabouts, that the mail we



have been sending him had been left at the post office, which has apparently been forwarding my letters to Mr. Heath. However my last communication to Mr. Heath dated Oct. 3 has been returned to me by the post office marked 'unclaimed'. The envelope indicates that the mail carrier has tried two or three addresses without success."

That letter shows that Messrs. Blanton & Blanton had been writing to the husband at 405, Fletcher Street letters which had not been returned to them but had been received by the husband either at the post office or had been forwarded by the post office to him. It was only their last letter of Oct. 3 to the husband which failed to find him. I think that those facts establish beyond any reasonable doubt that this petition, which was sent in March, 1949, to the husband by registered post and has never been returned to the sender, was, in fact, received by him. That being so, what ought to be done?

There has been no proper service because, under r. 8, the husband must sign an acknowledgment of service, but is it a case where under r. 10 the judge should direct that the petition shall proceed on the grounds that he is satisfied that the petition has in fact been received? The only suggestion now made is that an advertisement should be put in the local Sikeston paper which would cost about £7. I ask myself what use would that be? Is it more likely that the husband will see the advertisement than that he received the registered letter sent to him at the address where he had been living? I see no reason to suppose that that would be more likely. I think that it would impose a great hardship on the wife to insist on advertisement in this case. In divorce causes it is highly important that a respondent should be fully informed of the proceedings which are being taken against him, but there is another point of view and that is the point of view of the petitioner. Here is a woman who has had a baby by this man three months after the marriage, has been deserted by him, and has had no maintenance from him for four years. She has done everything she can through the Poor Persons' Committee to get him served with the petition. He does not answer letters. Apparently he wants to be divorced, and yet it is suggested that this further expense ought to be incurred before the case can proceed. I am far from saying that advertisements are not useful in notifying parties in such a case as this. Where costs are being asked for the fact that the respondent does not reply to the advertisement is no evidence that he has not seen it. I think that everything that could reasonably be done here has been done to effect service.

One other point about which I ought to say a word is this. This is an appeal from an order which is based on the judge's discretion. If I thought that this was merely a matter of discretion I would be very reluctant to interfere with the decision of the judge. WILLMER, J., gave leave to appeal, and I, therefore, assume that he considered that the case raised some point of principle apart from the special facts of the case. It is difficult, however, to lay down any principle in a case of this kind, except the principles I have tried to indicate. One is that all reasonable steps should be taken to see that a respondent has knowledge of the proceedings, and the other is that an unreasonable burden should not be put on an innocent petitioner before she can be released from a marriage which is no marriage now except in its legal aspects, and from a man who has deserted her and her child in the way that this man has left this woman. I think, therefore, that this is a case in which we may properly allow the appeal.

**DENNING, L.J.:** It is very important that everything that is reasonable should be done to bring a petition to the notice of a respondent. At one time there had to be personal service. Now service by registered post is permitted, but it is only effective if the acknowledgment of service is signed by the respondent. Often the respondent does not sign or return the acknowledgment, but, when that happens, it does not necessarily mean that the wife has to go to the expense of personal service or advertisement. If the probabilities are that the respondent

has received the petition and simply declined or omitted to sign the acknowledgment, then the court can dispense with further service. That is a course which I have repeatedly taken when sitting in chambers in the Divorce Division. On the facts of the present case I should unhesitatingly have dispensed with further service.

A The only remaining question is whether this court should interfere with what is primarily a matter for the discretion of the judge. On this topic I would refer to what LORD WRIGHT said in *Evans v. Bartlam* (1). If this court is satisfied that the judge below was wrong then it can interfere. LORD WRIGHT said ([1937] 2 All E.R. 654):

B "The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of supervision."

In this case the judge had considerable doubt because he gave leave to appeal. I am clearly satisfied that he was wrong and that the appeal should be allowed.

C HODSON, J.: In form this was a summons by the petitioner for leave to proceed without service of the petition on the respondent, and, in form also, WILLMER, J., made an order that the petitioner's application for leave to proceed in that way was refused. In her affidavit in support of the summons the petitioner made it plain what she was really seeking to do, namely, to obtain an order to proceed without further service of the petition. It is necessary to consider the effect of the relevant rules, rr. 8 and 10 of the Matrimonial Causes Rules, 1947. [His LORDSHIP read the rules and continued]: Rule 8 (2) really deals with the proof of what has been done, but what has to be done still remains the same thing, namely, the copy of the petition has either to be served personally or by registered post. Rule 10, which deals specifically with proof of service, as the side note indicates, begins with the words "Unless otherwise directed." D Those words confer a discretion on the court to direct that, even though the particular formalities indicated in r. 10 have not been complied with, yet the court can draw the proper inference, namely, that in a given set of circumstances the petition has actually been served. In my judgment, the right inference to draw from the facts in this case is that this petition was brought to the attention of the respondent by being sent to him by registered post in the manner which the rules provide. For my part, I think WILLMER, J., did not attach the right weight to the fact that the document had been sent and that the correspondence which followed between the attorneys in America and the solicitors in England supported the inference that it had reached the respondent. If he did not, in our opinion, lend sufficient weight to that consideration, this court is justified in interfering with the exercise of his discretion under r. 10. I agree the appeal should be allowed.

G Solicitor: A. M. V. Panton, Law Society Services Divorce Department (for the petitioner).

*Appeal allowed.*

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

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*Re* DEAN'S WILL TRUSTS. COWAN *v.* BOARD  
OF GOVERNORS OF ST. MARY'S HOSPITAL, PADDINGTON  
AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 28, 1950.]

*Charity—Charitable purpose—Gift to a hospital to provide "accommodation for the use of relatives who come from a distance of patients who are critically ill."* A

By his will, dated June 19, 1947, a testator, who died on Apr. 8, 1948, gave his residuary estate to the treasurer of St. Mary's Hospital, Paddington, London, "for the purposes of that hospital and I direct that the same shall be applied by the governing body or management committee of the hospital for the purpose of providing accommodation for the use of relatives who come from a distance of patients who are critically ill and for the assistance of the work of the almoners of the hospital and any money not so applied shall be administered as a capital fund separate from the general funds of the hospital." It was accepted that the assistance of the work of the almoners was a charitable purpose, and that the purposes of the hospital generally were charitable. B

Held: the provision of accommodation for relatives of patients critically ill was a purpose of the hospital, and, therefore, was charitable. C

[AS TO CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 111-115, paras. 147-152; and FOR CASES, see DIGEST, Vol. 8, p. 145, Nos. 40-49.]

ADJOURNED SUMMONS to determine, *inter alia*, whether, on the true construction of the will of Dugald Smith Deans, the bequest of the testator's residuary estate constituted a valid charitable gift or whether it failed either wholly or in part for uncertainty or as transgressing the rule against perpetuities. D

The second question raised by the summons was whether, if the bequest were valid, the plaintiff ought to pay and transfer the said residuary estate to the Board of Governors of St. Mary's Hospital, Paddington, on any, and, if so, what, trusts. HARMAN, J., held that, in view of the decision in *Re Kellner's Will Trusts* ([1949] 2 All E.R. 774) and having regard to the National Health Service Act, 1946, s. 60, the residuary estate was payable (with the consent of counsel for the governors of the chartered corporation of the hospital) to the said board, to be held by them so far as practicable on the trusts declared by the will. E

*R. W. Goff* for the plaintiff, the surviving executor of the will. F

*Ungoed-Thomas, K.C.*, and *N. S. S. Warren* for the governors of St. Mary's Hospital and the governors of the chartered corporation of St. Mary's Hospital.

*N. S. S. Warren* for the governors of the chartered corporation of St. Mary's Hospital.

*Neville Gray, K.C.*, and *Rink* for the next-of-kin.

*Denys B. Buckley* for the Attorney-General. G

HARMAN, J.: This is a question arising out of the will, dated June 19, 1947, of one Dugald Smith Deans, who died on Apr. 8, 1948, leaving a considerable residue to the treasurer of St. Mary's Hospital, Paddington. That was before the appointed day (July 5, 1948) under the National Health Service Act, 1946, and the body controlling the hospital at that time was a corporation set up in the nineteen-twenties under a charter, a print of which is before me. I am not concerned at this stage with the Act of 1946. The instant question is whether the residue is validly devoted to charitable ends. It is said that it is not, because some of the purposes on which the money is to be spent are not, or may not be, charitable in the legal sense. It is said that it is enough to render the bequest bad if some part of it may not be devoted to charitable purposes, and that what I must find, if I am to hold that the gift is charitable, is that it is devoted wholly to charity. That, I think, is right. H



The testator makes the bequest in favour of "the treasurer of St. Mary's Hospital, Paddington," and that I take to be a gift direct to the hospital, *i.e.*, to the corporation which then controlled the hospital. He goes on, "for the purposes of that hospital." If you stop there, there would not be any doubt that that is a good charitable bequest, but the testator continues:

A "and I direct that the same [the residue] shall be applied by the governing body or management committee of the hospital for the purpose of providing accommodation for the use of relatives who come from a distance of patients who are critically ill and for the assistance of the work of the almoners of the hospital."

B Those two purposes are to cover the whole of the money. It is mandatory that they should do so. It is clear that the gift is not limited to the spending of the income, and no question of perpetuity is involved in this case. It occurs to the testator then that that may not exhaust the whole of his fund. He continues:

"and any money not so applied shall be administered as a capital fund separate from the general funds of the hospital."

C At the date of the will (June 19, 1947) the Act of 1946 was on the statute book, having received the royal assent on Nov. 6, 1946, although it had not come into force, and one can have no doubt that in using the words he did the testator was trying to provide for that which he thought might come about under the new Act. He goes on:

D "And as from the appointed day under the National Health Service Act it shall be applicable by the hospital management committee for the special purposes above-mentioned [the two purposes recited] and any money not so applied shall be applicable for any purpose other than the general maintenance of the hospital at the committee's discretion."

E The hospital management committee is a body set up in the case of a non-teaching hospital, and was not set up in the case of this hospital because it was designated a teaching hospital. Of the two purposes specifically mentioned, it is admitted that one of them is charitable, namely, the work of the almoners. The controversy has been confined to the other purpose.

F In my judgment, none of the cases to which I have had my attention called has application to this one, which is a simple case where the language of the will, rightly interpreted, does not really lead me into any difficulty. As I see it, the testator has given his residue "for the purposes of" the hospital, but not for all those purposes, *i.e.*, not for the purpose of general maintenance, but primarily for two other purposes which, in his view at any rate, are purposes of the hospital, one of them being the almoners' work (which nobody doubts to be a purpose of the hospital), and the other the provision of accommodation for relatives. If and so far as that is a purpose of the hospital, then, in my judgment, there is no difficulty because the purposes of the hospital generally are admittedly charitable purposes. If one of the purposes was not a "purpose" of the hospital properly so called, difficulty might arise, but I find no difficulty in saying that the provision of such accommodation may be a very important purpose of a hospital of this kind for the spiritual and psychological comfort of its patients, and, indeed, to aid their recovery. It may be absolutely necessary

H to house their relations near them when they are *in extremis*. It may make all the difference between life and death to a patient to know that his mother, his child, or his nearest relative, is at hand. Even though he or she may never see the relative in question, it may be vital to have that support. I am not at all surprised that Colonel Parkes, the house governor of the hospital, making an affidavit in support of the summons, says that accommodation for relatives has frequently been provided by the almoner, and, indeed, that the provision of such accommodation is one of the functions of the almoner of this hospital

and would be regarded as a normal service. That I accept. In my judgment, therefore, the special purposes indicated by the testator are purposes of the hospital and are good charitable purposes, and this gift is a good and valid charitable gift, and I so declare.

*Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the corpus of the estate.*

Solicitors: *Murray, Hutchins & Co.* (for the plaintiff); *Beachcroft & Co.* (for the governors of the hospital); *Cree, Godfrey & Wood* (for the next-of-kin); *Treasury Solicitor.*

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

## WHITTY AND OTHERS v. SCOTT-RUSSELL.

[COURT OF APPEAL (Bucknill and Asquith, L.JJ., and Roxburgh, J.), March 15, 16, 17, April 3, 1950.]

*Rent Restriction*—"Dwelling-house"—*Premises comprising house and cottage, contiguous but without internal communication*—*Covenant by tenant, in original tenancy agreement, to use "the premises as a private dwelling-house only"*—*Cottage sub-let by tenant*—*Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16 (1)*—*Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), s. 3 (3).*

By a written agreement, dated June 26, 1937, premises comprising a "dwelling-house and cottage with the garden and land thereto belonging" were let (for the first time in that conformation) at a rent of £75 a year for a term of three years. The house and cottage were contiguous, but without internal communication, and the garden was considerably larger than the site of the premises. The tenant covenanted "to use the premises as . . . a private dwelling-house only," and throughout the agreement the words "the premises," which were used frequently, referred to both the house and the cottage. The tenant took the cottage with the house because the landlord refused to let them separately, but he had no intention of living in the cottage and sub-let it immediately. On the expiration of the three years, he held over as a yearly tenant. In December, 1948, he received a notice to quit, but he failed to deliver up possession on the expiration of the notice and claimed to be within the protection of the Rent Restrictions Acts.

HELD: (i) as the house and cottage together constituted "the premises" under the original tenancy agreement and the agreement provided for the user of "the premises as a private dwelling-house only," the house and cottage together were "let as a separate dwelling" and, therefore, were one "dwelling-house," within the definition in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1), notwithstanding that the cottage was sub-let at all material times.

*Langford Property Co., Ltd. v. Goldrich* ([1949] 1 All E.R. 402). and *H Wolfe v. Hogan* ([1949] 1 All E.R. 570), applied.

(ii) for the purposes of the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), the "dwelling-house" was the complex constituted by the house plus the cottage, and was let together with land which, under the sub-section, was to be treated as part of the dwelling-house, and, therefore, s. 3 (1) of the Act applied, and the house and cottage together were a dwelling-house within the protection of the Rent Restrictions Acts.

[AS TO PREMISES WITHIN THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 368-373, and 1949 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 557-559, Nos. 7042-7067, p. 561, Nos. 7085-7088, and Supplements.]

Cases referred to:

- A (1) *Langford Property Co., Ltd. v. Goldrich*, [1949] 1 All E.R. 402; [1949] 1 K.B. 511; [1949] L.J.R. 663.
- (2) *Langford Property Co., Ltd. v. Batten*, [1949] 2 All E.R. 422.
- (3) *Wolfe v. Hogan*, [1949] 1 All E.R. 570; [1949] 2 K.B. 194.
- (4) *Gidden v. Mills*, [1925] 2 K.B. 713; 134 L.T. 31; 31 Digest 559, 7063.
- (5) *Barrett v. Hardy Brothers (Alnwick), Ltd.*, [1925] 2 K.B. 220; 94 L.J.K.B. 665; 133 L.T. 249; 31 Digest 561, 7090.
- B (6) *Epsom Grand Stand Assocn., Ltd. v. Clarke*, [1919] W.N. 170; 31 Digest 581, 7296.
- (7) *Read v. Goater*, [1921] 1 K.B. 611; 90 L.J.K.B. 580; 125 L.T. 87; 31 Digest 561, 7088.
- (8) *Rider v. Rollit*, (1920), 36 T.L.R. 687; 31 Digest 557, 7038.
- (9) *Amphlett v. Dorrell*, [1948] 2 All E.R. 674; [1949] 1 K.B. 276; [1949] L.J.R. 219; 2nd Digest Supp.
- C (10) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.
- (11) *Murgatroyd v. Tresarden*, [1946] 2 All E.R. 723; [1947] K.B. 316; 2nd Digest Supp.
- (12) *Cow v. Casey*, [1949] 1 All E.R. 197; [1949] 1 K.B. 474; [1949] L.J.R. 565.
- D

APPEAL by the landlords from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Tunbridge Wells County Court, and dated Dec. 15, 1949, in an action for possession of premises. The premises, which comprised a house and cottage and the garden and lands belonging thereto were let to the tenant by a written tenancy agreement, dated June 26, 1937, for three years at a rent of £75 a year, the tenant covenanting to use the premises as a private dwelling-house only. On the expiration of the three years, the tenant held over as a yearly tenant. The landlords served a notice to quit expiring on June 24, 1949, but the tenant failed to deliver up possession and contended that he was within the protection of the Rent Restrictions Acts. The county court judge held that the house and cottage together were one dwelling-house, within the meaning of the Acts, and that the tenant was protected by the Acts. The facts appear in the judgment of the Court of Appeal delivered by ASQUITH, L.J.

*John Elton* for the landlords.

*J. F. E. Stephenson* for the tenant.

*Cur. adv. vult.*

- G Apr. 3. ASQUITH, L.J., read the following judgment of the court. This is an appeal by the landlords from the refusal of the county court judge for Tunbridge Wells to grant them an order for possession of certain premises on the ground that such premises were protected by the Rent Restrictions Acts. The premises in question consisted of a dwelling-house and cottage and garden, known as Tower House and Cottage, Wadhurst, Sussex. The case proceeded on certain facts admitted in a specific document, but the facts alleged in the particulars of claim, which are somewhat more ample, were also common ground. These facts were that the premises in question only assumed their present conformation in 1937. The house and cottage were semi-detached, namely, contiguous but without internal intercommunication, and the garden covered considerably more than the site of the house. This complex of premises was let by Sir John Whitty, predecessor in title of the plaintiffs, the present landlords, to the tenant by a written agreement of June 26, 1937, for a term of three years
- H



at a rent of £75 a year payable quarterly. The tenant held over on the expiration of the three years as a yearly tenant. Sir John Whitty died on May 8, 1948, and his executors determined the tenancy by notice to quit, dated Dec. 22, 1948, and expiring on June 24, 1949. The plaintiffs became joint owners of the property by a vesting assent of Apr. 11, 1949. The tenant failed to deliver up possession on the expiration of notice to quit and still retains possession, the county court judge having held that he was entitled to do so under the Rent Restrictions Acts. A

The terms of the agreement of tenancy of June 26, 1937, so far as relevant, further provide that the parcels are the "messuage or dwelling-house and cottage with the garden and land thereto belonging . . . described in the plan attached hereto." The tenant covenants variously in regard to "the premises." He covenants to repair the premises (except the roof and outer walls) and (this is important) "to use the premises as and for a private dwelling-house only"; also not to assign or under-let the premises without written consent of the landlord, such consent not to be unreasonably withheld. The landlord covenants "to keep the outer walls and roofs of the said dwelling-house and cottage in good repair and condition," and there is a covenant for the quiet enjoyment of "the premises." Throughout this instrument "the premises"—a phrase constantly recurring—means an amalgam or conglomerate which includes either all three components—dwelling-house, cottage and garden—or at least the house and cottage, as in the case of the covenants to repair and to use as a private dwelling-house only. B C

The county court judge, His Honour SIR GERALD HURST, K.C., in a very short judgment on the agreed facts, says: D

"I held the defendant was a protected tenant of the premises comprised in the tenancy agreement, although the cottage had been sub-let by him from the start . . . I accepted the defendant's contention that the house and cottage were one dwelling-house within the meaning of the Rent Restrictions Acts. The case seemed to me governed by the judgment of SOMERVELL, L.J., in *Langford Property Co., Ltd. v. Goldrich* (1). An additional ground of defence is afforded by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3): see *Langford Property Co., Ltd. v. Batten* (2)." E

At the trial the onus was on the tenant to establish that the Rent Restrictions Acts protected him. This involved proving two things: (i) that the complex let to him was a "dwelling-house" within the relevant statutory definition, and, further, (ii) that it was a "dwelling-house to which the [Rent Restrictions] Acts apply." The county court judge evidently held that the tenant had established both propositions, as he had to do in order to succeed. The landlord alleges that neither has been established. F

We will examine each of these propositions in turn. First, was the "complex" let a "dwelling-house"? The material definition of a "dwelling-house" for the present purpose is that contained in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1). This definition is expressed to mean the same as the corresponding definition in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, though the language of the Act of 1933 is slightly different, and runs as follows: G

" . . . a house let as a separate dwelling or a part of a house being a part so let." H

In the present case, is what is let "a house" or two houses, and is it let as a "separate dwelling" or as two separate dwellings? Or is only part of it let as a separate dwelling? The main authority relied on by the tenant on this issue is *Langford Property Co., Ltd. v. Goldrich* (1). That was a case in which two flats, not contiguous but forming part of the same block of flats under a single roof, were held to be a "dwelling-house" within the definition. SOMERVELL, L.J.,

in a judgment with which the other two members of the court concurred, said ([1949] 1 All E.R. 404):

“In my opinion, if the facts justify such a finding, two flats or, indeed, so far as I can see, two houses, could be let as a separate dwelling-house within the meaning of the definition.”

A The learned lord justice, if he had wished to adhere precisely to the terms of the definition, would have said “two houses” could be “a house let as a separate dwelling,” and, therefore, a “dwelling-house.” He appears to base this conclusion partly on the terms of the lease, under which the subject-matter let is expressed to be two flats; partly on the Interpretation Act, 1889, whereby the singular *prima facie* includes the plural, hence “house” in the definition includes houses; but partly also (in relation to the part of the definition which reads “let as a separate dwelling”) on the fact that the tenant in that case wanted the two flats as a home for his family or its overflow, which one flat would have been unable to accommodate. If the Interpretation Act, 1889, alone were concerned, this reasoning would be open to the comment that, if the inclusion of the plural in the singular permitted one to read “house” as including houses, it would equally permit (or perhaps require) one to read “let as a separate dwelling” as including “let as two separate dwellings.” An impartial application of the Interpretation Act might lead to odd results.

C It is unnecessary, however, to speculate on this, since we are bound by the decision in *Langford Property Co., Ltd. v. Goldrich* (1), of which this was part of the *ratio decidendi*. It enables us to read “house” as covering two houses. But is this (composite) “house” in the present case “let as a separate dwelling”? D In the *Goldrich* case (1) the tenant’s purpose in taking two flats was that his family should occupy both, as, in fact, they did. SOMERVELL, L.J., said ([1949] 1 All E.R. 404):

E “Here the tenant wished to accommodate in his home the relatives to whom I have referred and he wanted more accommodation than could be conveniently found in one flat. He, therefore, took the two flats and made those two flats his home.”

It would seem that the circumstance that the tenant intended to make the two flats—the totality of the parcels let—his home was thought material, and, indeed, necessary, by SOMERVELL, L.J., to his decision that the flats were let “as a separate dwelling.” If the flats had been let to the tenant, one to be dwelt in F by him and his family, the other not to be so dwelt in, the decision might, it appears, have been different. In the present case the tenant only took the cottage along with the house because the landlord refused to let the one without the other. He never lived in, and never from the start intended to live in, the cottage. It is, however, argued in answer to this objection that the Court of Appeal, in certain of its decisions of which the most recent is *Wolfe v. Hogan* (3), has held G that, where there has been a formal instrument of letting the terms of which express the purpose for which the premises were let, this is conclusive, and evidence of any other purpose derived from, *e.g.*, the actual use, is excluded. In that case DENNING, L.J., used language which lends strong colour to such a contention when he said, in the opening sentences of his judgment ([1949] 1 All E.R. 575):

H “In determining whether a house or part of a house is ‘let as a dwelling’ within the meaning of the Rent Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further, but, if there is no express provision, it is open to the court to look at the circumstances of the letting.”

In that case there was no express provision in the lease as to the “purpose.” In the present case the tenant expressly covenanted to use the premises as “a

private dwelling-house only," and, if the proposition stated by DENNING, L.J., is to be taken as both authoritative and unqualified, it clinches the tenant's argument. EVERSLED, L.J., in the first judgment, appears to accept this view, though whether with some, and, if so, what, qualifications is a question which must be explored. BUCKNILL, L.J., gave no reasons but simply agreed with the judgment of EVERSLED, L.J. EVERSLED, L.J., cited *Gidden v. Mills* (4) and, among other passages from judgments of the Court of Appeal he cited ([1949] 1 All E.R. 574) a passage from the judgment of SCRUTTON, L.J. ([1925] 2 K.B. 227) in *Barrett v. Hardy Brothers (Alnwick), Ltd.* (5):

" 'The important matter is the rights under the lease, not the *de facto* user '."

EVERSLED, L.J., also cited (*ibid.*) a passage from the judgment of BANKES, L.J. ([1919] W.N. 171) in *Epsom Grand Stand Assocn., Ltd. v. Clarke* (6):

" 'If an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say that they were let as a dwelling-house '."

He then went on to approve a passage from MEGARRY ON THE RENT ACTS, 4th ed., p. 19:

"Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. Thus, if the premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because somebody lives on the premises . . ."

MR. MEGARRY goes on to say that actual user at the time when possession is claimed must be considered where the tenancy agreement contemplates no specified use. The only qualification annexed to this general statement by EVERSLED, L.J., is contained in the following passage from his judgment ([1949] 1 All E.R. 574):

"Again I wish to make it quite plain that I am saying nothing which should be taken as indicating that, if a tenant does change the user and creates a dwelling-house out of what was formerly a shop, and if that fact is fully known to and accepted by the other party to the contract (whether or not there is a prohibition), the result may not very well be that there will then be inferred a contract to let as a dwelling-house, although it may be a different contract in essentials from the contract which was originally made and expressed."

In other words, where the original contract was for a particular user, but, by the time the plaint is issued, it has been superseded by a subsequent contract providing for a different user, the subsequent contract may be looked to in deciding whether the premises are let as a "dwelling" or "separate dwelling." This qualification (which was *obiter* in *Hogan's* case (3)) does not apply to the facts of the present case, in which there have not been two successive contracts providing for different users, and the principle is asserted without any such qualification in earlier decisions of the Court of Appeal. In these circumstances, we are of opinion that the "complex" let in this case was a "dwelling-house" within the definition, and we are fortified in that opinion by the concession, in argument, that if X took a tenancy of a house consisting of, say, three floors and sub-let one floor at once and permanently, the fact of the sub-lease would not deprive the subject-matter of the head lease of its character as a dwelling-house, provided that in other respects it possessed that character. It cannot, in our view, make a crucial difference that, in the case supposed, the part sub-let



and the part not sub-let possess internal intercommunication through the common stair, whereas in this case the two units, one of which is sub-let, are two houses clamped together and without such internal intercommunication. Indeed, the judgment of SOMERVELL, L.J., in the *Goldrich* case (1) appears to decide that two houses, even if wholly detached, can be "a house" within the definition; and *Barrett v. Hardy* (5), *Epsom Grand Stand Assocn. v. Clarke* (6) and, as we read it, *Wolfe v. Hogan* (3) decide that "a house" expressed in the contract of tenancy to be let "as a private dwelling-house" is none the less a house "let as a dwelling" and a "separate dwelling" although one of its components was sub-let from the start. We would only add to the authorities cited one more quotation from MEGARRY ON THE RENT ACTS, 5th ed., pp. 35, 36:

"Meaning of 'dwelling' . . . It seems to be immaterial whether the person who dwells on the premises is the tenant or his sub-tenants . . ."

The tenant, however, loses the protection of the Acts if he sub-lets the whole of the premises and moves out. For these reasons, we conclude that the subject-matter of the head lease in this case was a "dwelling-house" within the definition in s. 16 (1) of the Act of 1933.

The second question is whether that subject-matter was not only a "dwelling-house," but a dwelling-house "to which the [Rent Restrictions] Acts apply"? It is common ground that, if the Acts apply at all, they can only do so by virtue of the Act of 1939. Section 3 (1) of that Act applies the Acts to this "dwelling-house" "subject to the provisions of this section." The provisions of the section are, so far as material, those contained in the latter part of sub-s. (3), which is as follows:

" . . . and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house."

It has been strenuously argued for the landlords that this sub-section excludes the dwelling-house here in question from the operation of the Rent Restrictions Acts. The argument is based on the grounds: (i) that, this being a dwelling-house let together with land other than its site, the concluding words of the sub-section so exclude it unless the conditions in the preceding limb of the sub-section are satisfied ("save as aforesaid"), and (ii) that these conditions are not satisfied, since, although the cottage is let together with the house, the cottage is not "premises let together with a dwelling-house," because "premises" must here be read as premises which are themselves not a dwelling-house or capable of being a dwelling-house. The argument relies, as regards the last link, on a passage (admittedly an *obiter dictum*) from the judgment of COHEN, L.J. ([1949] 2 All E.R. 427) in *Langford Property Co., Ltd. v. Batten* (2) and on *Read v. Goater* (7), a decision on the wording of s. 12 (2) (iii) of the Act of 1920, which was in this respect somewhat similar to the latter part of s. 3 (3) of the Act of 1939. This argument, which impressed us at the time, seems on reflexion to rest on a misconception as to what, on the facts of this case, is the "dwelling-house" to which s. 3 (3) of the Act of 1939 has to be applied. This is not the house without the cottage, but the two combined. This composite dwelling-house is, *prima facie*, one to which s. 3 (1) applies the Acts, subject to the provisions of the section, *viz.*, s. 3 (3). Section 3 (3) does nothing to displace the application of the Acts if the word "dwelling-house," when it occurs in the sub-section, is read as the complex constituted by house *plus* cottage. If it be so read, this is a case where "land" (not premises) is "let together with a dwelling-house," and the sub-section provides that in that event the land (though considerably

exceeding the area of the site) is to be treated as part of the dwelling-house and shares any immunity conferred on the latter by s. 3 (1). The appeal will, therefore, be dismissed.

*Appeal dismissed with costs.*

Solicitors: *Fladgate & Co.*, agents for *Sir Robert Gower*, Tunbridge Wells (for the landlords); *Lee, Ockerby & Co.*, agents for *Buss, Bretherton & Murton-Neale*, Tunbridge Wells (for the tenant).

[Reported by C. ST.J. NICHOLSON, Esq., *Barrister-at-Law.*]

## KIRIL MISCHEFF, LTD. v. CONSTANT, SMITH & CO.

[KING'S BENCH DIVISION (Devlin, J.), March 15, 16, 1950.]

*Arbitration—Award—Remission—Error of law on face of award—Remission to arbitrators to cure apparent defect—Admission of evidence on question whether award should be remitted.*

A contract for the sale of goods provided: "Any dispute under this contract to be settled by arbitration in London. No claims entertained after goods taken from warehouse." On Dec. 5, 1949, the goods were landed at the port of London, and on Jan. 6, 1950, when some of them had still not been removed from the wharf, the buyers made a claim against the sellers in respect of the quality of the goods. The claim was disputed, and the arbitrators to whom it was referred stated in their award that "We have met and examined the facts, and, in our opinion, we consider the claim on quality was not made within a reasonable time from the final date of landing, and, thereby, we conclude that the buyers have no case." On a motion to set aside the award on the ground that it contained an error of law on the face of it, the sellers sought to refer to an affidavit and to correspondence between the parties leading up to the reference showing the existence of a common usage in the trade under which claims could not be made more than fourteen days after landing. It was not seriously disputed that there was an error of law on the face of the award.

**HELD:** (i) while the affidavit and correspondence could not be looked at to extract something therefrom to be read into the award as a term of it, it was proper to look at those documents to determine whether the court ought to exercise its discretion to send the case back to the arbitrators to clarify their award.

(ii) there was no reason why the award should not be remitted to enable the arbitrators to cure an apparent defect in the ground stated by them for their decision; it was suggested in the correspondence that one of the matters on which the arbitrators were asked to adjudicate was the existence of a custom as to time consistent with the contract, and it was possible that their conclusion was reached on the ground that there was such a custom; therefore, the arbitrators ought to make a specific award stating whether they found such a custom, and the matter would be remitted for that purpose.

[AS TO REMISSION OF AN AWARD OF AN ARBITRATOR, see HALSBURY, Hailsham Edn., Vol. 1, pp. 675-677, para. 1131; and FOR CASES, see DIGEST, Vol. 2, pp. 561-566, Nos. 1938-1969.]

Cases referred to:

- (1) *Re Marshall & Dresser*, (1843), 3 Q.B. 878; 3 Gal. & Dav. 253; 12 L.J.Q.B. 104; 114 E.R. 746; 2 Digest 490, 1319.
- (2) *Hodgkinson v. Fernie*, (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 140 E.R. 712; 2 Digest 562, 1943.

(3) *Odlum v. Vancouver City*, (1915), 85 L.J.P.C. 95; 113 L.T. 795; 16 Digest 159, 608.

MOTION by buyers to set aside an award on the ground that it contained an error of law on the face of it.

By a contract in writing dated Oct. 26, 1949, the buyers purchased from the sellers twenty tons of Turkish walnuts. A term of the contract provided:

A "Any dispute under this contract to be settled by arbitration in London.  
No claims after goods taken from warehouse."

The cargo was landed at the Port of London on Dec. 9, 1949. On Jan. 6, 1950, the buyers wrote to the sellers:

B "On cracking representative samples sent us from the wharf we have  
found approximately forty per cent. bad nuts, and, therefore, claim that  
the delivery is not as per contract."

On Jan. 9, 1950, the sellers replied:

C "We cannot accept any claim against these goods at such a late date.  
The final landing date of the s.s. Basis was Dec. 5, 1949, and in accordance  
with common usage of the trade, claims must be made within the ample  
time of fourteen days from the official date of landing."

On Jan. 10, 1950, the buyers answered:

"Our contract with you clearly stipulated 'no claim entertained after  
goods taken from warehouse' and as you know the total parcel has not been  
removed from the wharf where originally landed."

D The dispute was referred to arbitrators who, on Jan. 16, 1950, made an award  
in the following terms:

"We have met and examined the facts, and, in our opinion, we consider  
the claim on quality was not made within a reasonable time from the final  
date of landing, and, thereby, we conclude that the buyers have no case."

E On Feb. 20, 1950, when the motion was set down to be heard, the sellers were  
given liberty to file an affidavit, which was sworn on Mar. 8, 1950, by a Mr.  
Albert Henry Smith. It contained the following statement: "It is a custom in the  
city of London and of the edible nut trade that it is a condition precedent for  
the making of any claims in respect of goods purchased on f.o.b. cost and freight  
or c.i.f. terms that the same should be made within a reasonable time of landing,  
and it is a further custom that a reasonable time as aforesaid is in no instance  
to be longer than fourteen days from the final date of landing of the goods."

F The buyers contended that the award contained an error of law on the face  
of it in that the finding that the claim was not made within a reasonable time  
on which the award was based was incompatible with the express term of the  
contract that no claim would be entertained "after goods taken from  
warehouse," and, therefore, that the award must be set aside. The sellers  
submitted that, as there was an ambiguity in the award, the court could look  
at the affidavit and at the correspondence to resolve it.

G *E. W. Roskill and Michael Lee* for the buyers.  
*Ahern* for the sellers.

H **DEVLIN, J.:** This is a motion to set aside an award on the ground that  
there is an error of law on the face of it. The award was made on Jan. 16, 1950,  
by two arbitrators appointed by the parties (who were apparently so far agreed  
that they did not require the assistance of an umpire) and began in the following  
terms:

"We, the undersigned, having been called in to act as arbitrators in a  
dispute that has arisen on a contract between Messrs. Constant, Smith &  
Co. (sellers), and Messrs. Kiril Mischeff, Ltd. (buyers), in respect of contract



dated Oct. 26, 1949, for twenty tons Turkish natural walnuts, in fifty kilo bags . . .”

Two further provisions of the contract were summarised, and then the award provides:

“We have met and examined the facts, and, in our opinion, we consider the claim on quality was not made within a reasonable time from the final date of landing and, thereby, we conclude that the buyers have no case.”

It has not been contested that I am entitled to have regard to the contract, and that the contract contained the following terms:

“Any dispute under this contract to be settled by arbitration in London. No claims entertained after goods taken from warehouse.”

Counsel for the buyers contends that on the face of it this award contains a legal proposition, namely, that the buyer had no case in law because the claim was not made within a reasonable time from the date of landing, and he further contends that the reason the arbitrators give—that the claim was out of time—is the only reason by which they seek to justify their conclusion. That that reason, he says, is plainly unsound in law appears as soon as one looks at the contract, because the contract provides only that no claim shall be entertained once the goods have been taken from the warehouse. The fact that there is an error of law on the face of this document is not seriously challenged, but counsel for the sellers argues that, in considering whether the award contains an error of law, I am not limited to the award and the contract, but can look at certain other documents consisting of an affidavit and correspondence between the parties leading up to the reference. It is clear that such documents could not be looked at in order to impeach the award or to see if any erroneous conclusion of law was reached by the arbitrators, but the position may be different when documents are looked at in order to assist the award. The authorities do not seem to decide the point one way or the other. I have been referred to RUSSELL ON ARBITRATION, 14th ed., p. 187, where there is a reference to *Re Marshall & Dresser* (1), the only case that deals with the question of an affidavit. Counsel for the sellers also contended that, if I cannot look at the affidavit, I can look at the correspondence, on the ground that the letters contain the submission in the case. It is unnecessary for me to decide whether I can look at these documents to construe some provision in the award or resolve some ambiguity in it. It is clear that I cannot look at them to extract something from them and insert it as a term into the award. That is what counsel would like me to do, but I have no right to do it. Accordingly, I think that this motion succeeds to the extent that counsel for the buyers has satisfied me that the award is bad on the face of it.

I next have to consider what course I should take—whether to set the award aside or remit it to the arbitrators. There are numerous authorities in which awards have been sent back, and I have been referred to a number of them, but they are all cases in which the award itself has been ambiguous and uncertain, and where, by sending it back, the ambiguity can be cured. What is, I think, novel about this case is that there is nothing in the award itself which is uncertain. The conclusion is clear—the buyers have no case. But the arbitrators have done something which they were under no obligation to do. They have given a reason for their decision, and that reason is defective. The question is whether in these circumstances the award can properly be sent back to them. No authority has been cited to me directly on the point, and counsel for the buyers says that it would be unprecedented if it were remitted.

It seems to me that I ought to consider, first, what is the error of law which the arbitrators have made. One possible view is that the arbitrators have completely failed to understand a clear and simple contractual provision in the sort of document with which they spend the whole of their commercial lives.

Another possible view is that, in setting out their reason, they have omitted to put in some essential step in their reasoning. It is conceivable, for example, that the contract was varied and that the arbitrators omitted to state that fact. Or, again, it is possible that the parties had waived a provision of the contract and substituted "within a reasonable time" for "after goods taken from warehouse" and the arbitrators concentrated on the issue of what was reasonable and forgot to state the fact of waiver. I am unable to hold that, in those circumstances, should they exist, there is any rigid rule that, because there is an error of law on the face of an award, it should never go back. As a matter of general principle, if an award contains defective reasoning and the defect may be due, not to an error of law, but to an omission to set out some step in the arbitrators' reasoning, it would not be improper to send it back to cure that defect of reasoning. It is true that the arbitrators are not obliged to give any reason for their decision, but, if they have done so and it appears to be defective, I cannot see why they should not be given an opportunity of curing that defect. This is the view at which I have arrived after I have looked simply at the award itself.

I think that this view is consistent with the general principles that have been laid down in these matters. The Arbitration Act, 1889, s. 10, provides:

"(1) In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the re-consideration of the arbitrators or umpire. (2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order."

It is worth referring to *Hodgkinson v. Fernie* (2) where COCKBURN, C.J., after referring to the Common Law Procedure Act, 1854, s. 8, which contains the provisions now embodied in the Act of 1889, said (3 C.B.N.S. 201):

"I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts has been in the habit of acting in determining whether they would or would not set aside awards; but merely to give the court power to remit the matter to the arbitrator for re-consideration in all cases, though the submission should not contain that extremely useful clause giving them that power, where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference."

That, in all these matters, is the determining consideration with regard to the use of discretion by the court. The court should have in mind the fact that the parties have chosen this tribunal and the arbitrators, and, if it is avoidable, they are not to be put to the expense of starting *de novo*.

I should qualify the general statement that I have made, by saying that an award should go back only if that can be done with justice to the parties. This is a matter which requires a little consideration because of the rather unusual nature of the defect in this case. If the award were to be sent back for re-consideration generally, with complete liberty to amend, the arbitrators might simply strike out their reason, in which case the award could not be successfully attacked. The court cannot permit that to be done. The arbitrators having given a reason, I think that a party who desires to do so ought to be able to show the court, on the face of the award, what moved the arbitrators to reach their decision.

Although I have held that I am not entitled to look at the affidavit or correspondence to supplement the award, I think that I can and should do so to determine whether this is a proper case for the exercise of my discretion. *Odlum v. Vancouver City* (3) deals with this matter in a short passage which is worth quoting. LORD DUNEDIN, giving the opinion of the Privy Council, says (85 L.J.P.C. 98):

"There remains the question of whether it [the award] should be set aside or remitted for re-consideration. This seems to their Lordships a question of discretion for the judges in the whole circumstances of the case, and unless that discretion has been obviously misused they do not feel inclined to interfere with it."

I think, therefore, that I can properly look at these letters for this purpose, and it then becomes plain that two things were referred to the arbitrators. It is clear that the buyers made a complaint of quality, and equally clear that the answer to them appears to be that the claim was out of time. [His LORDSHIP read extracts from the letters of Jan. 6, 1950, from the buyers to the sellers, and the sellers' letter of Jan. 9, 1950, to the buyers.] It seems, therefore, clear that one of the matters which the arbitrators were asked to decide was whether there was a custom in those terms or not, and that suggests that they may have reached their conclusion on the ground that they found such a custom and that they consider such a custom consistent with the contract. In those circumstances I think it right, instead of sending the award back generally, to remit it to the arbitrators for further consideration of one of the matters which was referred to them, that matter being the question whether or not there was a custom in the terms contended for by the sellers.

I, therefore, make an order that this matter should be referred back to the arbitrators for further consideration, and that they should make a specific award, stating whether they find a custom, and, if so, what that custom is. When the arbitrators have done that, their finding can be added to the existing award, and it will then be possible for the court to give consideration to the motion to set aside. Clearly, even if the arbitrators do find such a custom, it is not necessarily the end of the matter. The question of law will then arise whether the custom is consistent with the contract, but it is desirable that this point should be argued on whatever custom the arbitrators find proved.

*Award remitted to arbitrators. Costs reserved.*

Solicitors: *William A. Crump & Son* (for the buyers); *Stannard, Bosanquet & Michaelson* (for the sellers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

## J. W. CAFÉS, LTD. v. BROWNLOW TRUST, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), March 21, 22, 1950.]

*Landlord and Tenant—Lease—Agreement to grant—Breach through defect of title—No lack of good faith—Measure of damages.*

The head lessee of land built shops thereon and sub-let them to tenants, each of the sub-leases containing restrictive covenants on his part not to permit the trade which the tenant of the shop intended to carry on to be carried on in any of the other shops owned by the head lessee in the immediate neighbourhood. In 1947 the head lessee assigned the head lease to the defendants, and in 1948 they entered into an agreement with the plaintiffs to grant to them a sub-lease of one of the shops for a term of eighty-four years, the sub-lease to be in the form annexed to the agreement. The form contained one restrictive covenant only, *viz.*, not to use the premises for the business of an estate agent, but previous leases of the shop which had been granted by the head lessee, in accordance with the scheme for the neighbourhood, contained a number of restrictive covenants, which ran with the land, in regard to the user of the premises. On a requisition of title whether there were any restrictive covenants affecting the land, the defendants answered that there were not. Later, on receiving advice from counsel that this answer was not correct, they informed the



plaintiffs that they could not grant the sub-lease in the scheduled form as they could not give a proper title, and they refused to grant the sub-lease unless they were given an indemnity by the plaintiffs in respect of any violations of the restrictive covenants. The plaintiffs refused to give the indemnity and brought an action for damages for breach of contract.

HELD: the failure of the defendants to complete was due to a defect of title, and as damages for breach of the agreement the plaintiffs were entitled merely to the return of the deposit which they had paid, with interest thereon, and to the expenses incurred by them in investigating the title.

*Bain v. Fothergill* (1874) (L.R. 7 H.L. 158), *followed*.

*Re Daniel* ([1917] 2 Ch. 405), *distinguished*.

[AS TO DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND, see HALSBURY, Hailsham Edn., Vol. 29, pp. 390-392, paras. 537, 538; and FOR CASES, see DIGEST, Vol. 40, pp. 262-268, Nos. 2273-2350.]

Cases referred to:

(1) *Bain v. Fothergill*, (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 40 Digest 265, 2306.

(2) *Flureau v. Thornhill*, (1776), 2 Wm. Bl. 1078; 96 E.R. 635; 40 Digest 262, 2273.

(3) *Re Daniel*, [1917] 2 Ch. 405; 87 L.J.Ch. 69; 117 L.T. 472; 40 Digest 264, 2287.

ACTION for damages for breach of contract to grant a lease.

The defendants, who had acquired the head lease of a shop, entered into an agreement with the plaintiffs to grant them a long lease thereof, the lease to be in the form annexed to the agreement. Only one restrictive covenant was inserted in the form, but previous leases of the property by the defendants' predecessor in title had contained several restrictive covenants, which ran with the land, regarding the user of the property. After taking counsel's advice, the defendants refused to execute the lease in the agreed form unless they were given an indemnity by the plaintiffs in respect of any violation of the restrictive covenants affecting the property. The plaintiffs refused to execute the indemnity and brought the action. It was contended by the plaintiffs that the defendants could make title, but had refused to do so. The facts appear in the judgment.

*Beyfus, K.C.*, and *Astell Burt* for the plaintiffs.

*Percy Lamb, K.C.*, and *Denys Buckley* for the defendants.

LORD GODDARD, C.J.: In 1947 the defendants acquired from a Mr. H. Frost, the head leases of certain property in Holloway Road, London. In 1948 they entered into an agreement to grant to the plaintiffs a lease of No. 355 Holloway Road, which was part of that property. The agreement, which was executed on Oct. 15, 1948, provided that the defendants should grant

"... and the lessees [the plaintiffs] accept the lease of the premises described in the form of lease annexed hereto at the premium for the term at the rent and subject to the covenants and provisions in the said form of lease set forth."

The agreement also recited that the plaintiffs had already paid to Messrs. Drivers & Norris, as a deposit, the sum of £519 15s., being part of the premium of £4,750. The form of lease which was annexed to the agreement was of a lease to be granted in consideration of this payment of £4,750, for a term of eighty-four and a half years at a rent of £65 a year, and it contained one restrictive covenant only, *viz.*, not to use the premises or any part thereof for the business of an auctioneer, surveyor, valuer or estate agent, or for any kindred business. Before the time fixed for completion had arrived, the parties had agreed that this restrictive covenant was to be supplemented by the insertion of the words "or as a factory." Mr. Frost, the original lessee under the head leases, was the builder of the shops comprising the property contained in the head leases, and in leases

which he had granted in respect of No. 355 Holloway Road certain restrictive covenants running with the land and affecting the user of the premises had been inserted. This was in accordance with the usual practice where shop property is let by a builder to different lessees. The lessor covenants in each case not to permit the trade which the lessee in question intends to carry on to be conducted in any of the other shops which the lessor owns in the immediate neighbourhood, thus enabling each lessee to enjoy a quasi-monopoly in his trade for the duration of his lease. The plaintiffs intended to carry on the business of a milk bar, which includes the sale of sandwiches and other refreshments. The business of a restaurant keeper was already being carried on at No. 359 Holloway Road, and was protected by restrictive covenants. The question whether permitting the plaintiffs to carry on the business of a milk bar would have been a breach of this restrictive covenant does not arise in this case, but it was certainly an arguable point and would have depended very much on the nature of the business ultimately carried on by the plaintiffs, had they gone into occupation. During the course of the negotiations, requisitions of title were made, one of them being whether there were any restrictive covenants affecting the land. The defendants answered that there were none, but afterwards they consulted counsel who advised them that that answer was not correct and that the existence of the restrictive covenants affecting the user of the land must be disclosed to a lessee, as, if he wished to assign the property later on, his market would be severely restricted, because he would not be able to assign it to anyone who wished to carry on a trade which was already being carried on in one of the neighbouring shops, the lessees of which had the right to enforce these covenants. After receiving counsel's advice, the defendants at once told the plaintiffs that they could not give a proper title and were unwilling to execute the lease in the form scheduled to the contract since, not only could the lessees of the premises in question be restrained from carrying on a business of the nature described in the covenants in the leases of the other shops, but the defendants themselves would be liable to an action for breach of covenant if they let the premises for a purpose which violated one of the covenants. Therefore, they refused to grant the lease unless they were given an indemnity by the plaintiffs. I think that that was an honest offer to make a new contract between the parties. The defendants had refused to carry out the contract which they had made, but they were willing to make a new contract if they were properly protected. The plaintiffs, however, were not willing to give the indemnity, and they have now brought this action for damages for breach of contract, the breach being the refusal of the defendants to execute the lease. The defendants admit the breach.

There is no question in this case of any deceit or lack of good faith, the action being solely for breach of contract and not for damages for deceit or fraud. The measure of damages for breach of contract in actions in respect of real property is in many material respects different from that in actions in respect of personal property, as the complications of the law of real property are so great that it is assumed that the parties are bargaining on the footing that it may be impossible for the proposed vendor—and for this purpose I see no difference between a proposed vendor and a proposed lessor—to implement his contract because of some defect in his title. In *Bain v. Fothergill* (1) LORD CHELMSFORD said (L.R. 7 H.L. 207):

“... I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit.”

That is putting the matter very high, because the noble and learned lord gives the instance of a person entering into a contract for sale of real estate, knowing that there was no title. Yet he says that the law is settled beyond dispute that in an action for the breach of the contract the only damages recoverable are the expenses incurred by the purchaser, *viz.*, the return of the deposit, with interest, and the costs and expenses to which the purchaser has been put in investigating the title and so forth. If, however, there is evidence of bad faith

A

on the part of the vendor, the purchaser can recover damages on that account, but in that case he must bring an action for fraud or deceit, which would probably lie in a case, such as LORD CHELMSFORD gave, of a vendor entering into a contract knowing that he had no title, even though he would not warrant that it would be a good one.

B

There is no suggestion in the present case that there was any mistake of law or misunderstanding which led the defendants to say that there were no restrictive covenants when, in fact, there were and induced them to enter into an open contract except for the inclusion of the restrictive covenant against user of the premises for the business of an estate agent. Counsel for the plaintiffs suggests that there is no question but that the defendants can make title. I cannot, however, agree to that. The statement of claim shows that the plaintiffs are

C

complaining that a title could not be made, and that is one of the reasons why the action is brought. If a landowner, or the lessee under a head lease, enters into a contract to grant a lease in a particular form and it turns out that he cannot grant the lease in that form because of covenants restricting the user of the land which ought to have been inserted in the contract, it seems to me that he

D

cannot give that which he has contracted to give because he has not the title or right to give it. In this case, owing to the existence of the covenants affecting the user of the land, the defendants had no right to grant the lease in the form agreed by them. There was, therefore, a defect of title, and the defendants did not complete because they could not give to the plaintiffs that which they had contracted to give.

E

The measure of damages in a case of this kind has been settled for two hundred years, the rule having been laid down in *Flureau v. Thornhill* (2), which is discussed at length in *Bain v. Fothergill* (1). The plaintiffs are entitled to the return of the deposit, to interest on the deposit, and to the expenses incurred by them in investigating the title. On the authorities, in my opinion, that is all that the law allows them. *Re Daniel* (3), which was among the authorities relied

F

on by counsel for the plaintiffs, seems to me to deal with an entirely different matter. If the difficulty is one which can be removed by the payment of money, it is the vendor's duty to remove it, *e.g.*, if the defect or blot on the title is caused by the existence of a mortgage which the vendor can pay off, it is his duty to pay it off, so that he then has a clear title which he can convey. In the present case, however, the defendants cannot remove the covenants by making a pay-

G

ment. The lessees of the neighbouring properties are in possession under leases, granted by the defendants' predecessor in title, which give them the protection of the restrictive covenants. These covenants run with the land and the only way to get rid of them, I suppose, would be for all the lessees to enter into an agreement to release them. This is not a matter which is a fraud on the title or which can be removed in the way in which the difficulty in *Re Daniel* (3) was removed. For these reasons, I am of opinion that *Bain v. Fothergill* (1) applies, and damages must be calculated in the way indicated.

H

*Judgment for the plaintiffs with costs. Interest at four per cent. on the deposit from the date of payment to the hearing of the action.*

Solicitors: H. B. Wedlake, Saint & Co. (for the plaintiffs); Carleton-Holmes & Co. (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]



## HARLOW v. MINISTRY OF TRANSPORT AND ANOTHER.

[KING'S BENCH DIVISION (Birkett, J.), March 7, 8, 1950.]

*Town and Country Planning—Highway—Stopping up—Power of Minister of Transport to override statute giving inhabitants right to use highway—“Development”—Town and Country Planning Act, 1947 (c. 51), s. 49 (1), s. 118 (1).*

By the Town and Country Planning Act, 1947, s. 118 : “(1) For the avoidance of doubt it is hereby declared that the provisions of this Act, and any restrictions or powers thereby imposed or conferred in relation to land, apply and may be exercised in relation to any land notwithstanding that provision is made by any enactment in force at the passing of this Act, or by any local Act passed at any time during the present session of Parliament, for authorising or regulating any development of the land.” The Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886, provided that “with a view to the benefit of the neighbourhood . . . so far as may be practicable, the ancient roads or tracks respectively known as ‘the Drovers Way’ and ‘the Icknield Way’ be preserved in their present condition,” and that “there be reserved to the inhabitants of Totternhoe, and of the neighbouring towns and villages, and the public generally, at all times, a right of walking over all that part of the . . . common . . . to be regulated,” which included certain highways known as the Wheelbarrow Green Highway and the Quarry Green Highway. On Nov. 18, 1949, the Minister of Transport, purporting to be acting under the Town and Country Planning Act, 1947, s. 49, made an Order—the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949—under which it was ordered, *inter alia*, that parts of the Drovers Way, the Wheelbarrow Green highway and the Quarry Green highway should be stopped up. The applicant sought to have the Minister’s Order quashed.

**HELD :** the Act of 1886 did not authorise or regulate any “development” of land as defined in s. 12 (1) of the Act of 1947, but merely maintained and confirmed the existing use, and, therefore, s. 118 (1) did not empower the Minister to override the Act of 1886, and the Order must be quashed.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 118 (1), see HALSBURY’S STATUTES, Vol. 40, p. 854.]

Cases referred to :

- (1) *Seward v. Vera Cruz, The Vera Cruz*, (1884). 10 App. Cas. 59; 54 L.J.P. 9; 52 L.T. 474; 49 J.P. 324; 42 Digest 769, 1959.
- (2) *R. v. Minister of Health, Ex parte Villiers*, [1936] 1 All E.R. 817; [1936] 2 K.B. 29; 105 L.J.K.B. 792; 154 L.T. 630; 100 J.P. 212; Digest Supp.
- (3) *Re Smith’s Estate*, (1887), 35 Ch.D. 589; 56 L.J.Ch. 726; 56 L.T. 850; 51 J.P. 692; 42 Digest 769, 1963.
- (4) *Blackpool Corpn. v. Starr Estate Co.*, [1922] 1 A.C. 27; 91 L.J.K.B. 202; 126 L.T. 258; 86 J.P. 25; 42 Digest 770, 1974.
- (5) *Garnett v. Bradley*, (1878), 3 App. Cas. 944; 48 L.J.Q.B. 186; 39 L.T. 261; 43 J.P. 20; 42 Digest 770, 1968.

MOTION by Arthur John Harlow to quash the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949, (S.I. 1949, No. 2130), made by the Minister of Transport under the Town and Country Planning Act, 1947, s. 49, on the ground that the Order was *ultra vires* the Minister. The facts appear in the judgment.

*Simes, K.C.*, and *Steer* for the applicant.

*Rowe, K.C.*, and *H. L. Parker* for the Ministry of Transport.

*H. B. Williams, K.C.*, and *W. B. Harris* for the Rugby Portland Cement Co., Ltd., which was authorised under the Minister’s Order to provide new highways in place of those stopped up.

**BIRKETT, J. :** This application is made by Mr. Arthur John Harlow, and the respondents are the Ministry of Transport and the Rugby Portland Cement Co., Ltd. Mr. Harlow applies for an order to quash a highway Order made by the Minister of Transport on Nov. 18, 1949—the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949. He says that the Town and Country Planning Act, 1947, does not give power to the Minister to make this highway Order; that it is bad in law because it is contrary to the provisions of the Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886, and the award made thereunder; and, in short, that the Minister has no power under the Act of 1947 to override the provisions of the Act of 1886. He says, moreover, that he is a person aggrieved because he is deprived of his right to walk over these specified highways which are set out in Part I of the schedule to the Act of 1886.

On Oct. 6, 1948, on the application of the Rugby Portland Cement Co., Ltd., the Ministry of Transport, published a draft Order under the Town and Country Planning Act, 1947, s. 49, for stopping up certain highways in the parish of Totternhoe in the county of Bedford. These highways included parts of the highways which were known as the Drovers Way, the Wheelbarrow Green Highway and the Quarry Green Highway. After that draft Order had been published, objections were made to it. In consequence of those objections the Minister, in accordance with sched. VI to the Act of 1947, caused a local inquiry to be held at Dunstable on Apr. 8 and 28, 1949. The objectors, who were represented by counsel, were fully heard, and they submitted, as I understand it, pretty well the case which counsel for the applicant has presented here today. They said that the Order should not have been made because, among other things, it was not necessary and was not reasonable, and so on, but one point taken was the main point taken here before me, that the Minister was without power to make the Order by reason of the provisions of the Act of 1886 and the award made thereunder on Jan. 14, 1891, which was confirmed on Feb. 19, 1891.

After the local inquiry and the report made to the Minister by the person appointed, Mr. Tudor Davies, on Nov. 18, 1949, the Minister made the Order which is now before me, the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949. After reciting various sections of the Act, it provides that the Minister

“may, if he is satisfied that it is necessary so to do in order to enable development to be carried out in accordance with planning permission granted under Part III of the Act, by Order made in accordance with the provisions of sched. VI to the Act authorise the stopping up of any highway; And Whereas the Minister is so satisfied as regards the highways consisting of the greenways and footpaths in the rural district of Luton in the county of Bedford . . . specified in Part I of the schedule to this Order . . . Now, therefore, the Minister in exercise of the powers conferred upon him . . . makes the following Order: 1. The stopping up of the old highways is hereby authorised and the new highways shall be provided by the Rugby Portland Cement Co., Ltd. . . . 2. The cost of providing the new highways shall be paid by the Rugby Portland Cement Co., Ltd.”

In Part I of the schedule it is provided:

“Highways to be stopped up. 1. That part of the greenway known as the Drovers Way (or Green Lane) which extends from a point approximately 255 yards north-east of its junction with the Banbury Knap and Combe Green highway in an easterly direction to a point approximately forty yards west of its junction with the Sewell Footway; 2. That part of the greenway known as the Wheelbarrow Green highway which extends from a point approximately 225 yards south-east of its junction with the Sewell Green highway in a general south-easterly direction to its junction with the

Drovers Way; 3. That part of the greenway known as the Quarry Green highway which extends from its junction with the Drovers Way in a southerly direction for a distance of approximately 355 yards."

The Act of 1886 and the award have both been before me. In the schedule to the Act the provisional Order for the regulation of the commons in the parish of Totternhoe is set out. The material passages are:

"Now, therefore, in pursuance of the powers given to us by the said Acts, we, the Land Commissioners for England, being satisfied that, having regard to the benefit of the neighbourhood as well as to private interests, the regulation of part of the said common is desirable, have framed, for the consideration of the persons interested, this our draft provisional Order, specifying the provisions for 'adjustment of rights' and for 'improvement' which are to be put in force, and the terms and conditions on which, provided the necessary consents are given thereto, we are prepared to certify that it is expedient the provisional Order should be confirmed by Parliament; that is to say: That the part of the said common to be regulated be the tracts known as the Dunstable Downs, Whipsnade Heath (so far as the same lies within the said parish), the cow common (except as hereinafter mentioned), and the Castle Hill, all of which are coloured light green on the map hereinbefore referred to and also the several pieces of land, baulks, and driftways which are coloured dark green in the said map, and also, as part of the cow common, the three pieces of common field land . . ."

It is said that those pieces of land, baulks and driftways coloured dark green on the map there referred to include the Wheelbarrow Green highway and the Quarry Green highway referred to in the Order of the Minister, and (less certainly) the Drovers Way. So far as the Drovers Way is concerned, the provisional Order provides:

"That, with a view to the benefit of the neighbourhood, the following provisions be made part of the terms and conditions of this Order . . ."

Then it deals with the Totternhoe Castle and tumuli on the Dunstable Downs, and provides:

"That, so far as may be practicable, the ancient roads or tracks respectively known as 'The Drovers Way' and 'The Icknield Way' be preserved in their present condition . . ."

So the Drovers Way, whether or not it comes within "baulks and driftways" in the earlier passage, is there specifically referred to. The provisional Order continues:

"That there be reserved to the inhabitants of Totternhoe, and of the neighbouring towns and villages, and the public generally, at all times, a right of walking over all that part of the said common which is to be regulated, with the exception of the cow common, and that, in addition, there be reserved as aforesaid a right of playing games and enjoying other reasonable recreation on the Castle Hill and the surrounding land, on the Dunstable Downs, and on Whipsnade Heath aforesaid, subject to the byelaws . . ."

It was part of the argument of counsel for the applicant that these highways to be stopped up, Nos. 1, 2 and 3 which were specified, were in fact the subject of the provisional Order and, indeed, the award of 1886.

On those facts counsel for the applicant submitted that there were no provisions in the Act of 1947 which permitted the Minister to make this Order in view of the provisions of the Act of 1886. Counsel for the Ministry of Transport and counsel for the Rugby Portland Cement Co., Ltd., submitted that the Minister had the power and had, in fact, in his Order, exercised it properly. Some authorities were referred to, but the principle contended for by counsel for the



applicant is really not challenged. He relied on *Seward v. Vera Cruz* (1) and the passage in the speech of the EARL OF SELBORNE, L.C., where he says (10 App. Cas. 68):

“Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.”

He also cited *R. v. Minister of Health, Ex p. Villiers* (2) for the reason that the Divisional Court, consisting of the late LORD HEWART, C.J., DU PARCQ, J., and GODDARD, J., in a considered judgment said that the maxim *generalia specialibus non derogant* also applied to prevent the Housing Act, 1925, overriding the special provisions of the London Open Spaces Act, 1893, with regard to Hackney Marshes. The passage in the judgment of the court which was relied on is ([1936] 1 All E.R. 823):

“In our judgment, the true grounds are stated by STIRLING, J., in *Re Smith's Estate* (3) where he says (35 Ch.D. 595): ‘Where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act which deals in a general way with the subject-matter of the previous legislation, the court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation.’ If express words are absent, there must at least be necessary implication. To the same effect is the speech of LORD HALDANE in *Blackpool Corpn. v. Starr Estate Co.* (4). Here we have a special subject-matter, and one, moreover, of a peculiar kind, namely, Lammas lands. To these lands the various Open Spaces Acts do not apply, and it is at least doubtful whether the Metropolitan Commons Act, 1866, applies to them. If it does apply, the procedure under that Act entails the passing of a special confirming Act. The subject-matter is also dealt with, not in a special but in a quite peculiar way. Under s. 12 the right to exchange for ‘adjoining’ land is given and the lands taken in exchange are to be deemed part of Hackney Marshes, and are so to be held by the council. We can find nothing in the Act of 1925 that indicates any intention on the part of Parliament to effect so radical a change in the Act of 1893 as to permit the council to build on a part of Hackney Marshes in exchange for lands so far as seven miles away, at Chigwell, and to deprive Hackney of an open space while providing one for a part of the population entirely different from that which now enjoys the advantages of Hackney Marshes.”

Again counsel for the applicant says that that case is analogous to the present one.

Counsel for the Ministry cited *Garnett v. Bradley* (5). In that case, LORD BLACKBURN says (3 App. Cas. 968):

“In all these cases, however, the particular statute relied upon was a statute in favour of a particular class of persons or the property of a particular class of persons. I do not take upon myself to say that all cases in which that rule has been applied have been such, although I am not aware of any case in which it has been applied to which that remark would not be applicable. But where that is the case, where the particular enactment is particular in the sense that it protects the rights, the property, the privileges of particular persons or a class of persons, the reason for the rule which has been acted upon is exceedingly plain and strong.”

He states the rule, and proceeds (*ibid.*, 969):

"Therefore, I think that where only general words are used there is a strong presumption that the legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to shew that."

As I have said, the general principle of that matter was not really disputed, but what was said in this case by counsel for the applicant was that he relied on that doctrine because there is nothing in this case to prevent its application, whereas counsel for both the respondents said: "Indeed, there is. This is a special case inasmuch as special powers are given in the Act of 1947." I, therefore, refer to some of the provisions of that Act.

Section 49 of the Act provides:

"(1) Without prejudice to the provisions of s. 23 of the Act of 1944, as incorporated with this Act, or s. 3 of the Acquisition of Land (Authorisation Procedure) Act, 1946, the Minister of Transport may, if he is satisfied that it is necessary so to do in order to enable development to be carried out in accordance with planning permission granted under Part III of this Act or to be carried out by a government department, by Order made in accordance with the provisions of sched. VI to this Act authorise the stopping up or diversion of any highway."

That is what he has done. Being satisfied as I have recited, the Minister has acted under s. 49. Counsel for the Ministry says that that sub-section conferred a general power on the Minister to authorise the stopping up or diversion of any highway, but for my own part I do not think s. 49 can possibly be read by itself. All sorts of other considerations would have to be applied.

I rather thought that counsel for the Ministry laid his greatest emphasis on the fact that there is a general power under s. 49 to stop up a highway, but if s. 118 is read in conjunction with it the power of the Minister is made plain. Section 118 provides:

"(1) For the avoidance of doubt it is hereby declared that the provisions of this Act, and any restrictions or powers thereby imposed or conferred in relation to land, apply and may be exercised in relation to any land notwithstanding that provision is made by any enactment in force at the passing of this Act, or by any local Act passed at any time during the present session of Parliament, for authorising or regulating any development of the land."

That, manifestly, was a power taken by the Minister because of the kind of difficulty which, it was foreseen, must inevitably arise in many cases, and the fear that where there was a desire for development and all the other Acts of Parliament had been complied with, nevertheless the Minister might be frustrated in his purpose by the existence of some enactment (which is defined in the schedule to the Act as including not merely an Act of Parliament itself but also the Orders made thereunder), dealing with the development of the particular land in question. I think it has always to be remembered, too, that in 1947 conditions were very different from those which existed in 1886, and clearly the Minister in s. 118 has taken the power, in the special circumstances there set out, to get rid of that frustrating element, a prior enactment which stood in his way, by the use of the words:

"... notwithstanding that provision is made by any enactment in force at the passing of this Act, or by any local Act passed at any time during the present session of Parliament, for authorising or regulating any development of the land."

The word "development" there, of course, is the important word, and the Act of 1947 itself defines "development" in s. 12 (2):

"In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land . . ."

A With that definition in mind s. 118 would read: "... any ... powers ... conferred in relation to land ... may be exercised in relation to any land notwithstanding that provision is made by any enactment in force at the passing of this Act for authorising or regulating any carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

B Section 13, which also deals with the development of land, was brought to my notice by counsel for the applicant. As I said in the course of the argument, and as I still think, I am not sure that that section really helps very much in this matter. Section 13 provides:

C "(1) The Minister shall by Order provide for the grant of permission for the development of land under this Part of this Act, and such permission may be granted [in certain cases] ... (4) For the purpose of enabling development to be carried out in accordance with permission granted under this Part of this Act, or otherwise for the purpose of promoting proper development in accordance with the development plan, a development Order may direct that any enactment passed before the passing of this Act, or any regulations, orders or byelaws made (whether before or after the passing of this Act) under any such enactment, shall not apply to any development specified in the Order, or shall apply thereto subject to such modifications as may be so specified."

D So far as concerns that section, which is dealing with development as there set out and development orders, the express power is reserved and given to direct, in the Order, that any enactment in existence before the passing of the Act of 1947 shall not apply. Clearly s. 13 (4) contemplated: "In the case of these development orders referred to in this section, there may be enactments in force which would impede the proper development which we desire under the development Order. Power is therefore reserved and given to get rid of that difficulty in the development Order." I cannot think that it helps me much more than that, because I really have to deal with s. 118. There is no Order of the Minister here wiping out the previous enactment at all. Section 119 was also referred to, but I think only for the definition of "development," and later

E F for the definition of the word "enactment."

G Counsel for the applicant submitted that this Act of 1886 cannot be overruled by virtue of s. 118 of the Act of 1947, because, on the facts of this case, the provisional Order of 1886 (and, indeed, the award made thereunder), did not authorise or regulate any development of the land within the meaning of s. 12, and, therefore, there is no power on the part of the Minister to do these things. Counsel for the Ministry and counsel for the company, who made common cause, said that the Act of 1886 authorised and regulated development within the meaning of s. 118. The Commons Act, 1876, was cited to me in support of that contention, and, further, counsel for the Ministry said that s. 49 of the Act of 1947 was a general section which did give the Minister of Transport power because it referred to "any highway," and that the Act of 1886 was for

H the regulation and development of the land. He submitted, further, that it was not the Act which had made this change but the Order made thereunder, a point which I said at the time and still feel is not of any substance. I think it was generally agreed that the real question was whether this was a development within the meaning of s. 118.

I have come to the conclusion that the Order of the Minister ought not to have been made in respect of these matters. I am satisfied that "development" in s. 118, as defined by s. 12, must be strictly construed, and I cannot think



that in this Act of 1886 the "development" was in any sense the "carrying out of building, engineering, mining or other operations in, on, over or under land"—which is the first head of the matter, or "the making of any material change in the use of any land"—which is the second head, and the head with which I am concerned. On the evidence before me, it would not appear that any material change had been made, or, indeed, any change at all, but that, so far as the Drovers Way, the Wheelbarrow Green highway, and the Quarry Green highway, the three highways specified in the Minister's Order, are concerned, it would appear, not that there had been any development within the meaning of s. 12, but that there has merely been a maintenance of the existing use. In those circumstances, I think that this notice of motion, which asks that the Order should be quashed in that it is not within the powers of the Act of 1947, must succeed.

*Order accordingly. Costs were awarded to the applicant.*

Solicitors: *Dixon, Martell & Co.*, Luton (for the applicant); *Treasury Solicitor*; *Braby & Waller*, agents for *M. K. Smith*, Rugby (for the Rugby Portland Cement Co., Ltd.).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

## CARTER v. MINISTER OF HEALTH.

[KING'S BENCH DIVISION (Devlin, J.), March 23, April 5, 1950.]

*National Health Service—Medical practitioner—Compensation for loss of right to sell practice—Assessment—"Calculated by reference to the last two accounting years immediately preceding the appointed day"—Powers of arbitrator—National Health Service Act, 1946 (c. 81), s. 36 (1)—National Health Service (Medical Practices Compensation) Regulations, 1948 (S.I. 1948, No. 1506), reg. 7 (2) (a).*

By the National Health Service (Medical Practice Compensation) Regulations, 1948, reg. 7, compensation, to which a medical practitioner became entitled by virtue of the National Health Service Act, 1946, s. 36 (1), for the loss of the right to sell his practice, is determined by reference to the annual value (referred to in the regulations as the "annual loss") of the goodwill of a practice. Regulation 7 (2) (a) defines "annual loss" as "the average gross yearly receipts of that practice, as certified by a qualified accountant, calculated by reference to the last two accounting years immediately preceding the appointed day" (July 5, 1948). By reg. 11 a claimant aggrieved by the Minister's decision may have the annual loss determined by an arbitrator.

The accounting year of a claimant ended on July 9, and, accordingly, his two accounting years immediately preceding the appointed day were those ending July 9, 1947. The claimant's average receipts for those years were £2,600, but, owing to an improvement in the practice, the average receipts for the two years ending July 9, 1948 (four days after the appointed day) were more than £3,000. The Minister determined that the "annual loss" was £2,600. The claimant applied for arbitration and the arbitrator, holding that he was entitled to refer not merely to the accounts of the last two accounting years, but to all the circumstances of the case, assessed the annual loss at £2,950.

HELD: the duty of the arbitrator was to calculate the average gross yearly receipts (as certified under the regulation) and so ascertain the

yearly loss, and, in so doing, he was entitled to refer only to the two accounting years specified in the regulation and not to arrive at a figure which he thought just in all the circumstances of the case.

[FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 36 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 371.]

SPECIAL CASE stated by arbitrator.

- A The claimant was a medical practitioner entitled to compensation under s. 36 (1) of the National Health Service Act, 1946, in respect of the loss suffered by him by reason of his inability to sell the goodwill of his practice by virtue of s. 35 (1) of the Act. The compensation determined by the Minister of Health was £2,600. The claimant, being aggrieved by the Minister's determination, applied for his claim to be referred to an arbitrator, who assessed the compensation at £2,950. For the claimant it was contended in support of this award that,
- B on a true construction of reg. 7 (2) (a) of the National Health Service (Medical Practices Compensation) Regulations, 1948, in calculating the average receipts of the practice, the words "by reference to the last two accounting years" did not preclude the arbitrator from taking into consideration the receipts up to the appointed day under the National Health Service Act, 1946, provided that the
- C period under consideration included the last two accounting years.

*The Attorney-General (Sir Hartley Shawcross, K.C.) and J. P. Ashworth for the Minister.*

*Havers, K.C., and Cumming-Bruce for the claimant.*

*Cur. adv. vult.*

- D Apr. 5. **DEVLIN, J.**, read the following judgment. The National Health Service Act, 1946, s. 35 (1), prohibits certain medical practitioners from selling the goodwill of their practices, and under s. 36 Parliament provided £66,000,000 as compensation for those who suffered loss through this prohibition. This case concerns the interpretation of the National Health Service (Medical Practices Compensation) Regulations, 1948, made under the Act to provide for the distribution of the compensation. The scheme of the regulations is that
- E there shall be ascertained for each practitioner what is called "the annual loss," that is, the annual value of his practice. He will then receive that proportion of the £66,000,000 which his annual loss bears to the total of all annual losses. The annual loss is defined by reg. 7 (2) to be (subject to two exceptions)

- F "the average gross yearly receipts of [the] practice, as certified by a qualified accountant calculated by reference to the last two accounting years immediately preceding the appointed day [July 5, 1948]."

With the first exception I am not concerned. The second is contained in the proviso (ii) to reg. 7 (2) and seems designed to provide for exceptional practices which cannot fairly be valued by the general measure. The effect of this proviso is that the Minister has a discretion to refer any claim to a committee, which

- G "shall fix as the annual loss ... such sum as they estimate fairly to represent the average gross yearly receipts of the practice."

The committee then report their findings to the Minister. Under reg. 10 the Minister must then determine the loss, whether by application of the general definition or with the aid of the committee's report. Under reg. 11 any claimant

H aggrieved by the Minister's decision may have the annual loss determined by an arbitrator sitting with two assessors.

The accounting year of the claimant, Dr. Carter, ends on July 9. Accordingly, the two accounting years specified in reg. 7 (2) ended in his case on July 9, 1947, and the annual loss calculated by reference to them is £2,600. The receipts of the practice, however, were rapidly rising, and if only the claimant had fixed the end of his accounting year four days earlier, or if it were possible to treat the last 361 days as a full year, the annual loss would be over £3,000. The claim

was not referred to the committee under the second proviso. The Minister determined that the annual loss was £2,600. The claimant applied for arbitration, and the arbitrator, holding that, on the true interpretation of reg. 7 (2), he was entitled to refer, not merely to the two accounting years, but also to all the circumstances which he considered material and which are set out in the Special Case, assessed the annual loss at £2,950. The question of law in the Special Case is confined to the true interpretation of reg. 7 (2). It is not suggested that either the Minister or the arbitrator has any discretion in the application of the regulation, and I think it is right that their only function is to determine the annual loss as defined therein. A

My first impression of the regulation is that the Minister's interpretation of it is right. Two criticisms of this interpretation have been advanced. The first is that it gives no effect to the words "calculated by reference to." It treats the regulation as if it defined the annual loss as the average yearly receipts of the last two years. There seems to me to be no doubt that, on the Minister's construction, the words "calculated by reference to" are unnecessary, but I do not myself attach great importance to their presence. They are the sort of conventional bit of statutory phraseology which flows easily from the pen and sometimes escapes subsequent pruning. It is almost as conventional to provide for a "calculation" as it is to provide for "an appointed day." Since in this case the day was already appointed as July 5, 1948, it might have been shorter and simpler to have referred to the date itself. I say this intending no disrespect, but because every draftsman inevitably falls into habits of language, and it is not always a fair criterion, whether as criticism or used as an aid to interpretation, that the simplest and most direct form of words has not been used. B C D

The second criticism, which I think to be the more formidable, is that it is absurd to suppose that an arbitrator and two assessors are to be gathered together to add two figures and halve the total (or rather, since the Minister will already have done the arithmetic, to make sure that he has done it correctly) which on the Minister's construction would be their sole function. The Attorney-General has met this criticism to some extent by pointing out that, although the figures are to be taken as certified, questions might arise, particularly having regard to reg. 7 (4), which excludes remuneration received in respect of the holding of any appointment, as to what fees should be included in the receipts. I suppose that it is also conceivable that a question might arise as to when the accounting year began and ended. Counsel for the claimant says that cases of this sort would be a very small proportion of the whole, but it is nevertheless true that, whether they be one per cent. or ninety-nine per cent. of the whole, arbitration machinery would still be required and might conveniently be expressed in the same terms. Regulations 10 and 11 apply to all cases whether they come, so to speak, direct or through the committee. The latter class obviously offers scope for arbitration, and it may have been thought simpler to cover both classes by the same arbitration clause, even though the number of cases in the former class which would be suitable for arbitration would be very limited. E F G

These criticisms certainly should command attention, but they will not help the claimant unless he can advance some alternative construction of reg. 7 (2) which the words are capable of bearing. One thing about the language is quite clear. That is that the annual loss *means* average gross yearly receipts. What has to be calculated is, not the annual loss itself, but the average gross yearly receipts. The learned arbitrator, in assessing the loss at £2,950, does not appear to have calculated average gross yearly receipts at all. If he has, the method of calculation is not shown in the Special Case. It looks as if he had arrived at his figure as one which in all the circumstances he thought just. It is clear from para. 7 (5) of the Special Case that he regarded himself as having the same latitude as the committee. I do not, with respect, share the arbitrator's view H



that the latitude given to the committee under the proviso is a reason for supposing that a similar latitude was intended to be granted under the main rule. On the contrary, I think that the insertion of the proviso and its terms strongly support the Minister's construction. The duty of estimating is to be contrasted with that of calculating, and the apparent object of the proviso is to provide relief in appropriate cases from the rigidity of the general rule.

- A Counsel for the claimant puts his argument rather more narrowly. He concedes that the result must be an average over some period, but he contends that the period is at large provided that it includes at least the last two accounting years. This is substantially the view expressed in para. 7 of the Case. It raises a short point of construction which is very much a matter of first impression. I mean, therefore, no disrespect to the argument or to the arbitrator's view when I say that I am not myself able to see how anyone could say "calculated by reference to the last two years" if what he means is "calculated by reference to such period as the Minister may think proper, provided it includes the last two years." Counsel for the claimant relied on the injustices which are said to arise from the Minister's interpretation of the regulation. That is a consideration which might be relevant if the regulation were ambiguous. In my opinion, it is not.
- C The fact that on the Minister's construction it admittedly contains more words than are strictly necessary is not enough. Circumlocution and ambiguity are not the same, but, in any event, I do not think that there is disclosed in the Case anything which reveals injustice in any sense that is material to the construction of the regulation. Injustice is not to be confused with hard cases. Any clearly drawn line is bound to be hard on those who are just the wrong side of it.
- D In the administration of justice, the choice always lies between the application of the fixed rule that is designed to be generally fair and to ensure uniformity of treatment and the investigation of each case on its merits, leaving the result to the length of the judge's foot. If in these regulations the legislature had intended the latter, it would have had to provide some method of investigation which would expose the bad points in a claimant's case as well as the good. In the absence of any such machinery, the construction which the arbitrator has adopted would, I venture to think, create as many hard cases as it relieves. Those who benefit by the formula (as, for example, the claimant would have if his practice had been declining instead of growing) would be unlikely to volunteer information which would lower their average, and those who lose by it would succeed in having their averages raised. Both classes would thus profit at the expense of the ordinary person for whose case the rule was primarily designed.
- F It is in relation to the normal case and not the abnormal that the justice of the regulation must be judged, for injustice is a relevant consideration only because it is to be supposed that the legislature would not have made a regulation which in its normal operation would cause injustice. I see no reason to suppose that the two years average, particularly when it is subject to a proviso that the Minister (who is in this matter a disinterested person, for it is immaterial to him how the fund is distributed) may refer special cases to the committee, is likely to cause injustice among the body of practitioners as a whole.
- G

I answer in the negative the question stated in the Special Case—whether the award of £2,950 is right in law—with the result that the alternative award of £2,600 is upheld.

H

*Alternative award upheld. No order as to costs.*  
Solicitors: *The Solicitor, Ministry of Health* (for the Minister); *Hempsons* (for the claimant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

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## HENLEY v. MURRAY (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.J.J.), March 13, 14, 1950.]

*Income Tax—Compensation for loss of office—Abrogation of service agreement—Separate agreement for payment of compensation—Income Tax Act, 1918 (c. 40), sched. E, r. 1.*

The taxpayer was employed as managing director of the G. Property Co. under a service agreement determinable at the earliest on Mar. 31, 1944. The G. Development Co., which was a subsidiary of the property company and of which also the taxpayer was a director, requested the trustees for its debenture holders, an assurance society, to assist it in the disposal of certain property. The trustees were unwilling to give such assistance except on certain conditions, one of which was that the taxpayer should leave the service of both companies. This he did on July 6, 1943, it being then agreed that he should be paid some £2,000, being an amount equal to that to which he would have been entitled under his service agreement had his employment continued until Mar. 31, 1944.

HELD: the sum, being payable in consideration of the abrogation of the taxpayer's contract of employment, and not under his contract of service, was not a profit from the taxpayer's employment in respect of which he was assessable to income tax under sched. E, r. 1.

*Dictum of LORD GREENE, M.R., in Wales v. Tilley* ([1942] 2 All E.R. 24), considered.

[AS TO LIABILITY TO TAX OF COMPENSATION FOR LOSS OF OFFICE, see HALSBURY, Hailsham Edn., Vol. 17, p. 217, para. 438; and FOR CASES, see DIGEST Supp.]

Cases referred to:

- (1) *Cameron v. Prendergast*, [1940] 2 All E.R. 35; [1940] A.C. 549; 109 L.J.K.B. 486; 162 L.T. 348; *sub nom.*, *Prendergast v. Cameron*, 23 Tax Cas. 122; 2nd Digest Supp.
- (2) *Wales v. Tilley*, [1942] 2 All E.R. 22; [1942] 2 K.B. 169; 111 L.J.K.B. 558; 167 L.T. 54; *sub nom.*, *Tilley v. Wales*, [1943] 1 All E.R. 280; [1943] A.C. 386; 112 L.J.K.B. 186; 169 L.T. 49; *sub nom.*, *Wales v. Tilley*, 25 Tax Cas. 136; 2nd Digest Supp.
- (3) *Hofman v. Wadman*, (1946), 27 Tax Cas. 192; 2nd Digest Supp.
- (4) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; *sub nom.*, *Westminster (Duke) v. Inland Revenue Comrs.*, 19 Tax Cas. 490; Digest Supp.
- (5) *Henry v. Foster (A)*, *Henry v. Foster (J)*, *Hunter v. Dewhurst*, (1932), 145 L.T. 225; 16 Tax Cas. 605; *sub nom.*, *Dewhurst v. Hunter*, 146 L.T. 510; Digest Supp.

APPEAL by the taxpayer from an order of CROOM-JOHNSON, J., dated Oct. 26, 1949, whereby he held that a sum of £2,202 14s. 4d. paid to the taxpayer, a director of two companies, in consideration of the abandonment by the taxpayer of his contractual rights under his contract of service with the companies, constituted profits from his office or employment and was assessable to income tax under sched. E. The facts appear in the headnote.

*Cyril King, K.C.*, and *Honeyman* for the taxpayer.

*Selwyn Lloyd, K.C.*, and *R. P. Hills* for the Crown.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued: It is clear that a man who has a contract in respect of which he is entitled to periodic remuneration may say: "Well, I will take a lump sum now instead of the periodic remuneration in the future, and, though I will continue to serve under my contract, I shall not be expected to do quite as much work," or he

may even say: "I shall not be expected to do any work at all." If that were the form of the arrangement in this case, I think it would be true to say that the lump sum which was paid was profits which became payable under the taxpayer's contract of service and that it was paid to him by virtue of his office or employment of profit within the meaning of sched. E. Many of the cases cited were examples of that type of arrangement, for instance, *Cameron v. Prendergast* (1), *Wales v. Tilley* (2), and, lastly, the case which was relied on by the learned judge in the court below, *Hofman v. Wadman* (3). In the last-named case, the question was what was the construction of a certain document and MACNAGHTEN, J., said (27 Tax Cas. 197):

"There is no reason for construing it in any other way. The words are quite plain: 'That the existing service agreements dated May 2, 1940 . . . shall be cancelled forthwith, subject to the continuance of the fixed remuneration provided for in cl. 4.' I cannot read that as meaning anything else than the obligation of Parnall Components, Ltd., to pay that salary, and at the same time the waiver of its right to call upon Mr. Hofman to perform the duties of a works manager. It is said that he ceased to hold the office of works manager, and no doubt he did; but the continuance in the office of works manager does not affect the question of his liability to income tax . . ."

I should feel a little difficulty, as at present advised, in accepting the whole of the language that I have read. It is plain, however, that the real basis of the decision was (in the earlier of the sentences I quoted) that the bargain there was that the employers should remain liable under the contract for the remuneration they had contracted to pay though they gave up their right to call on Mr. Hofman, their works manager, to perform the duties under the contract which he was bound to perform. If that is a correct analysis, it seems to me that the case is clearly one of the first kind which I have stated—a case in which the contract persists. Though the right of one party to call on the other for performance of its terms may be modified, or, indeed, wholly given up, still the corresponding right to require payment either of the whole remuneration or of some less figure is preserved and is still payable under the contract.

There is another class of case where the bargain is of an essentially different character, *viz.*, where the contract itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract. In the course of the argument an extreme case was put to counsel for the Crown of an employer who wrongfully breaks a contract of service and discharges a servant wholly therefrom and the servant then sues for damages for wrongful dismissal. Although, of course, it is true to say that the sum awarded as damages arises from the contract in the sense that if there had never been a contract the sum of damages could never have been awarded, counsel admitted that, in a case of that sort, it would be impossible to suggest that the sum awarded to the servant for damages was taxable under sched. E.

In the circumstances of the present case also it is not open to the Crown to say that this sum of £2,000 odd constituted profits from the office or employment, since, on its true analysis, it constituted the consideration payable to the taxpayer for the total abrogation imposed on him of his contract of employment, so that from July 6, 1943, no contract existed under which that figure or any other sum could be paid. I, therefore, come to the conclusion on the facts that this case is of the second class, namely, one in which the agreement itself ceased altogether to exist for all purposes on July 6, 1943.

Counsel for the Crown referred me to a passage from the judgment of LORD GREENE, M.R., in *Wales v. Tilley* (2) which illustrates the basis on which I think the decision in the present case ought to rest. LORD GREENE said ([1942] 2 All E.R. 24):



"If a man agrees to serve in consideration of a lump sum and no periodical salary or a small periodical salary, that lump sum is just as much remuneration and taxable as such as a periodical salary or a larger periodical salary would have been—*Prendergast v. Cameron* (1). Indeed, the only real argument that was presented on behalf of the appellant on this aspect of the case consisted of an endeavour to draw a distinction between a lump sum paid at the beginning of the service and a sum paid, as in the present case, in consideration of an agreement to continue to serve for a reduced salary. There is no substance in this distinction. If a man who is serving at a salary of £1,000 a year agrees to serve for a reduced salary in consideration of a lump sum, he is merely commuting his salary and a sum so accepted in commutation of salary can in its nature be nothing but salary. The commutation merely substitutes one form of remuneration for another. It is in effect remuneration payable in advance and it is quite fallacious to speak of it as a capital payment. Indeed, I am unable to understand how a sum paid as remuneration can ever be capital in the sense that it escapes taxation, since remuneration as such is the subject-matter of tax under sched. E, whatever form it takes."

I accept every word of that passage, but there the whole of the language used relates to the first class of case which I have attempted to formulate earlier, *i.e.*, where essentially the contract of service remains in one form or another. As the learned Master of the Rolls there pointed out, the essential question is not the form in which the salary is paid, but the fact that it is remuneration—that it is reward for services under a subsisting agreement. None of that language seems to me to have any application once the essential fact is accepted that in the present case there ceased to be any contract of service, and, therefore, from that date onwards there was no remuneration. This was not a sum paid in advance because there was no future claim which the taxpayer could ever assert, nor was it reward for his past service. It was a cash consideration paid for his agreeing to submit to the terms which the assurance society sought fit to impose.

Counsel for the Crown further said—I think rightly—that the use of formulae like "compensation for loss of office" is not a kind of magic abracadabra which provides the solution to the case. There was some suggestion in the earlier part of the argument of counsel for the Crown that we must look at the substance and not the form, and that the substance was something quite different from the legal conclusion which I think properly emerges from the evidence. On this question of substance, I would like to refer to, though I shall not quote, the passage in LORD TOMLIN'S speech ([1936] A.C. 19) in *Inland Revenue Comrs. v. Duke of Westminster* (4). I quite agree that language which the parties may use, such as "compensation for loss of office," is not the determining factor when one has to decide what in truth was the bargain, and that the duty of the court is to see what in substance, and in truth, the bargain was and not to be blinded by some formula which the parties may have used. That proposition is not peculiar to tax cases, though there is perhaps a tendency for the subject to try to disguise the real nature of a transaction by forms of words if he thinks the result would be profitable. To take other examples, in the well-known type of case in which the question is whether a transaction is a lease or a licence the court is never bound or concluded by language which may be appropriate to the one form of transaction rather than the other. In cases under the Rent Restrictions Acts, the mere statement that the premises are furnished is not conclusive on the question whether the premises are in fact outside the Acts, but that, as I conceive it, is all that should be said as regards looking at the substance. The court is not entitled, having found what legal result the parties have in truth produced, to disregard that truth because the court thinks that the result which has been achieved could have been achieved in some other

way and that other way would have been less convenient to the subject in the matter of taxes. The court is bound, having arrived at a conclusion what in truth the legal result was, to apply to that result the taxing statutes as they are found to be. It is not concerned to say whether the subject has been fortunate or unfortunate or to express any view whether the case is one which Parliament might have thought, if it had expressed its taxing statutes differently, would have been a proper case for taxation. Having arrived at the conclusion which I have stated, that the agreement here ceased altogether on July 6, 1943, it is impossible to say that the sum of £2,000 odd was profits which arose from the contract so determined.

I have forborne from referring to *Hunter v. Dewhurst* (5) and *Henry v. Foster* (5), I think, in working out a case such as the present, the examination which we have given to those cases has been useful because it has shown the way in which, in arriving at a conclusion, the main principles are applied according to the special facts of the case, but I think it is clear from later decisions that the decision of the House of Lords in *Hunter v. Dewhurst* (5) depended on very special circumstances, particularly the existence of a special article giving very unusual rights. Having regard to the care which judges in later cases have taken to distinguish *Hunter v. Dewhurst* (5), I do not think it would be useful for me in the present case to add to the many observations which have already been made on that case.

For the reasons which I have attempted to state I have felt compelled to a view different from that taken by CROOM-JOHNSON, J., for I think that this sum of £2,202 14s. 4d. does not fairly fall within the ambit of r. 1 of the Rules Applicable to sched. E.

**SOMERVELL, L.J.:** I agree. It is conceded by the Crown that in a case where damages for wrongful dismissal are sued for, the sum awarded as damages is not only not within sched. E but, also, is not taxable as income under any other schedule.

If in the case of dismissal where the employee says: "I am wrongfully dismissed," and sues for damages, he is admittedly outside sched. E and untaxable, it seems to me to follow from that, if one goes by stages, that if one takes a case where equally the employer dismisses his employee and the damages are agreed without litigation, the fact that they are agreed instead of being awarded by a judge or jury cannot affect their legal position in regard to the income tax code. It seems to me on the evidence that that is what happened here. The employers said: "You must go." The appellant was forced into going at their request. The sum which he stipulated for must legally be in precisely the same position as would have been a sum for damages for wrongful dismissal.

I am dealing with the facts of this case only, and it is clear that, although there was not any abrupt or dictatorial act by the employer, the initiative and the request for the determination came from the employer. What would be the position if there were a mutual agreement between the employer and the employed that the service should be ended abruptly and a sum paid is a matter which can be dealt with when it arises. For these reasons I think that the learned judge was wrong, and that this appeal in respect of this sum must be allowed.

**JENKINS, L.J.:** I agree. As the many cases on this topic show, it is often very difficult to determine the character of a payment made to the holder of an office when his tenure of the office is determined, or the terms on which he holds it are altered, and the question in each case is whether, on the facts of the case, the lump sum paid is in the nature of remuneration or profits in respect of the office, or is in the nature of a sum paid in consideration of the surrender by the recipient of his rights in respect of the office.

The only possible conclusion of law in the present case seems to me to be that the payment in question was not a payment of remuneration, but was one made

in consideration of the taxpayer, at the request of the company, giving up his right to continue to be employed by the company down to Mar. 31, 1944, and to earn and receive his contractual remuneration down to that date. It is not suggested that the payment was a mere gratuity, nor is it suggested that the payment was in the nature of additional remuneration for the services which the taxpayer had already performed in the past for the stipulated reward, nor is it suggested that there was an arrangement of the nature sometimes met with under which, in effect, the holder of the office is given the equivalent of leave of absence on full pay for the residue of the contractual term. There is no evidence of any such arrangement. It was a simple case of resignation under which the office was to be immediately vacated, and no further services were to be performed. Accordingly, by a process of elimination, I arrive at the conclusion that this sum can only be regarded on the facts of this case as paid to the taxpayer in consideration of his surrendering his right to serve, and receive remuneration, to the end of his contractual engagement. For these reasons, I agree that the appeal should be allowed.

*Appeal allowed with costs.*

Solicitors: *Capel Cure, Glynn Barton & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

*Affirmed.* C.A. [1950] 2 All E.R. 460.

### DALE v. DE SOISSONS.

[CHANCERY DIVISION (Roxburgh, J.), March 27, April 3, 1950.]

*Income Tax—Compensation for loss of office—Term in service agreement for payment on termination of service agreement—Income Tax Act, 1918 (c. 40), sched. E, r. 1.*

By the terms of a service agreement the taxpayer, who was employed by a company, was entitled to a salary and commission, and it was provided that the company should be entitled to terminate the taxpayer's appointment at the end of the first or second year of the three years covered by the agreement by three months' notice, whereupon a lump sum would become payable to the taxpayer by way of compensation for loss of office. The company terminated the agreement at the end of the first year, and paid the agreed sum of compensation to the taxpayer.

HELD: the payment of compensation was one to which the taxpayer was entitled under the service agreement in the event, which happened, of the company electing to terminate the agreement, and, accordingly, the compensation was a profit from his employment in respect of which he was assessable to income tax under sched. E, r. 1.

*Dictum of LORD HANWORTH, M.R., in Henry v. Foster (A), Henry v. Foster (J), Hunter v. Dewhurst (1932) (145 L.T. 232), applied.*

[AS TO LIABILITY TO TAX OF COMPENSATION FOR LOSS OF OFFICE, see HALSBURY, Hailsham Edn., Vol. 17, p. 217, para. 438; and FOR CASES, see DIGEST Supp.]

Cases referred to:

- (1) *Henry v. Foster (A), Henry v. Foster (J), Hunter v. Dewhurst*, (1932), 145 L.T. 225; 16 Tax Cas. 605; *sub nom.*, *Dewhurst v. Hunter*, 146 L.T. 510; Digest Supp.
- (2) *Cowan v. Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 7 Tax Cas. 372; 28 Digest 85, 490.
- (3) *Henley v. Murray*, *ante* 908.



CASE STATED by the Special Commissioners of Income Tax.

The Special Commissioners found that a sum of £10,000 paid, in accordance with the terms of his service agreement, to the taxpayer as compensation for loss of office on the termination of his appointment as assistant to the managing director of a company arose by reason of the premature determination of his employment and, therefore, was not assessable as a profit arising from his office or employment. The Crown appealed.

*Donovan, K.C.*, and *R. P. Hills* for the Crown.

*Grant, K.C.*, and *Senter* for the taxpayer.

*Cur. adv. vult.*

Apr. 3. **ROXBURGH, J.**, read the following judgment. The taxpayer, Mr. Pierre de Soissons, appealed to the Special Commissioners against an assessment raised on him for the year 1945/46 under sched. E to the Income Tax Act, 1918, in respect of a sum of £10,000 paid to him by his employers, Gallaher Ltd., when he left their employment on Dec. 31, 1945. The taxpayer had, since 1929, assisted the managing director in the administration of the company. His remuneration and the terms of his employment had been governed by a number of service agreements. The last but one of these expired on Dec. 31, 1944, by effluxion of time, and, although the last agreement, which took effect on Jan. 1, 1945, had been made on July 5, 1944, it in no way modified or affected the previous agreement. The position, therefore, was that his employment was continued to the extent and in the manner provided by the last agreement.

By cl. 1 of that agreement it was agreed that the company

"hereby continues the appointment of Mr. de Soissons as assistant to the managing director of the company and Mr. de Soissons agrees to continue in such office for the period of three years from Jan. 1, 1945."

Clause 2 provides that the company

"shall pay to Mr. de Soissons as remuneration for such services (a) an annual salary at the rate of £3,000 per annum."

By cl. 2 (b) there was a commission payable by the company for each calendar year during the currency of this agreement at a rate specified in the clause. By cl. 3 it is provided:

"Mr. de Soissons shall unless prevented by ill health during the said term devote the whole of his time attention and abilities to the due management and conduct of the business and affairs of the company entrusted to his charge and shall in all respects conform to and comply with the directions and instructions to be given and made by the board of directors of the company and shall well and faithfully serve the company and use his utmost endeavours to promote the interests thereof."

Clause 4 provides:

"If Mr. de Soissons shall be prevented by ill-health from attending to his duties for a consecutive period of six calendar months the company shall be at liberty immediately to determine this agreement on paying to Mr. de Soissons a sum equal to one year's salary in lieu of notice. In the event of the agreement being determined under the provisions of this clause Mr. de Soissons shall be entitled to receive a proper proportion of the commission which would otherwise have been payable to him in respect of the year in which such termination takes place calculated down to the actual date of termination such proportion being payable to Mr. de Soissons in accordance with the provisions of cl. 2 (b) hereof."

Clause 5 says:

"If in the opinion of the board of directors of the company it is desirable for the better or more economical working of the company and conducive

to the interests of the company so to do the company shall be entitled to terminate Mr. de Soissons' appointment hereunder as assistant to the managing director on Dec. 31, 1945, or on Dec. 31, 1946, on giving to him three months' previous notice in writing and on such termination of the said appointment becoming effective Mr. de Soissons' appointment hereunder shall be forthwith terminated and in the event of Mr. de Soissons' appointment hereunder being so terminated there shall be paid to Mr. de Soissons by way of compensation for loss of office the amounts following. If the agreement is terminated on Dec. 31, 1945, £10,000; and if terminated on Dec. 31, 1946, £6,000."

The company exercised its option to end the taxpayer's employment on Dec. 31, 1945, and paid the said sum of £10,000 accordingly. The circumstances in which the last agreement was made are set out by the Special Commissioners in the Case stated by them, but, in my judgment, the answer to the problem must be found by applying r. 1 of the Rules Applicable to sched. E to the written terms of this last service agreement, and it must be remembered that after Dec. 31, 1944, the taxpayer held his office or employment by virtue of the last agreement alone and only on the terms of that agreement, and that it was under that agreement that the £10,000 was paid to him. Rule 1 provides:

"Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom . . ."

Counsel for the taxpayer submits that, although the £10,000 was paid under the agreement constituting the office or employment, it was not a profit arising from the office or employment, but was compensation for the loss of those profits by reason of the premature termination of the employment. This submission found favour with the Special Commissioners, who held that the £10,000 was paid to the taxpayer "as compensation for being deprived of the profits of his office or employment." It involves splitting the agreement into two parts. Clause 1, according to counsel's argument, creates a three-years tenure of office. Clause 5 provides for its premature determination. But, in my judgment, the agreement must be read as a whole. So read, it provides that the taxpayer's employment is to be for three more years unless curtailed under cl. 4 or cl. 5, and that he is to receive as the profits of his employment the payments provided by the agreement including (if the case requires) the payment provided by cl. 5. So regarded, the agreement is *intra vires* the company, but it would be *ultra vires* if construed as counsel for the taxpayer would have me construe it. Clause 5 is as much a part of the agreement as cl. 1. Therefore, the taxpayer never had any right to be employed for three more years. Therefore, he had no legal claim which would justify compensation.

There is no case directly in point. *Henry v. Foster (A)* and *Henry v. Foster (J)* (1) differ in that the sum was payable on voluntary retirement as well as retirement at the instance of the employer, and this is an important difference, but those cases do show that the parties cannot conclude the matter in favour of the taxpayer by using the phrase "compensation for loss of office" and do contain statements of the principles which I have adopted for the solution of the present case. LORD HANWORTH, M.R., said (145 L.T. 232):

" . . . if he is entitled to [payment] . . . it must be for services rendered. That is the consideration which he gives to the company and which moves the company to pay him. In the alternative, if his office had ceased . . . if we are not to take into account services rendered, for which a deferred payment is to be made, what right or power would the company have of making a present to his executors . . . inasmuch as the company, to my mind, would have no power to dispose of its funds in the same way as was

done in *Cowan v. Seymour* (2), this payment must be related to the services rendered, and if related to the services rendered, it comes back to being a sum which is a profit which can be asked for and demanded as a profit arising from the office or employment of profit which had up to that time been enjoyed by the director."

A Moreover, in that same case ROMER, L.J., gives a definition of "compensation for loss of office" as follows (145 L.T. 234):

"... it means a payment to the holder of an office as compensation for being deprived of profits to which as between himself and his employer he would, but for an act of deprivation by his employer or some third party such as the legislature, have been entitled."

B I do not know in what sense the Special Commissioners used the term in the present case, but they cannot have used it in the sense indicated by ROMER, L.J., because the due exercise of an option reserved by the contract of employment itself could not be called "an act of deprivation," and it would generally be *ultra vires* a company to pay compensation for loss of office where the rights of the employee were not being injuriously affected. Nor is *Hunter v. Dewhurst* (1) in point. There was a very special bargain there which formed no part of the original terms of employment, and nothing was said in that case to suggest that compensation for loss of office can be stipulated for in the very instrument which creates the office.

C *Henley v. Murray* (3) is again a very different case, but I note the ground on which SIR RAYMOND EVERSLED, M.R., rejected the Crown's contention in that case that the £2,000 constituted profits from the office or employment. He said (ante, 909):

"... it constituted the consideration payable to the taxpayer for the total abrogation imposed on him of his contract of employment, so that from July 6, 1943, no contract existed under which that figure or any other sum could be paid."

E No such argument is available in the present case. Moreover, the judgment of JENKINS, L.J., contains a passage of general application to this class of case which I respectfully adopt. He says (ante, 911):

F "... the question in each case is whether, on the facts of the case, the lump sum paid is in the nature of remuneration or profits in respect of the office, or is in the nature of a sum paid in consideration of the surrender by the recipient of his rights in respect of the office."

In the present case the taxpayer surrendered no rights. He got exactly what he was entitled to get under his contract of employment. Accordingly, the payment, in my judgment, falls within the taxable class, and the determination of the Special Commissioners must be reversed.

G Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Herbert Smith & Co.* (for the taxpayer).

*Appeal allowed, with costs.*

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]



R. v. MIDDLESEX QUARTER SESSIONS AND ANOTHER.  
*Ex parte* DIRECTOR OF PUBLIC PROSECUTIONS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.), April 4, 1950.]

*Criminal Law—Sentence—Conviction by court of summary jurisdiction of indictable offence—Committal to quarter sessions for sentence—Offence not triable on indictment at quarter sessions—No power to sentence at quarter sessions—Prevention of Corruption Act, 1906 (c. 34), s. 1, s. 2—Criminal Justice Act, 1948 (c. 58), s. 29 (3) (a).*

By the Criminal Justice Act, 1948, s. 29 (1), a court of summary jurisdiction which has convicted a person of an indictable offence triable summarily may commit him for sentence to quarter sessions, which, by s. 29 (3) (a), "shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment." By the Prevention of Corruption Act, 1906, s. 2 (5) "... quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act."

A court of summary jurisdiction convicted a man of an offence under the Prevention of Corruption Act, 1906, s. 1, and, in view of his bad record, committed him for sentence to quarter sessions under the Criminal Justice Act, 1948, s. 29 (1).

HELD: as quarter sessions could not have convicted the offender of the offence on indictment they had no power to sentence him under the Criminal Justice Act, 1948, s. 29 (3), and, therefore, an application by the prosecution for an order of *mandamus* to quarter sessions to hear and determine the case must be dismissed.

PER LORD GODDARD, C.J.: Indictable offences of a grave nature should not be tried by justices summarily merely because they have that power, even though they can be sent to quarter sessions for sentence. They should be sent for trial to quarter sessions or the assizes.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 29 (1), (3), (5), (6), see HALSBURY'S STATUTES, Second Edn., Vol. 14, pp. 1013, 1014.]

Cases referred to:

- (1) *R. v. Sheridan*, [1936] 2 All E.R. 883; [1937] 1 K.B. 223; 106 L.J.K.B. 6; 155 L.T. 207; 100 J.P. 319; Digest Supp.
- (2) *R. v. Grant*, [1936] 2 All E.R. 1156; 106 L.J.K.B. 9; 155 L.T. 209; 100 J.P. 324; Digest Supp.

MOTION by the Director of Public Prosecutions for an order of *mandamus* to be addressed to justices of Middlesex directing them to hear and determine a case brought before them under the Criminal Justice Act, 1948, s. 29.

On Feb. 17, 1950, a court of summary jurisdiction sitting at Wealdstone, convicted the respondent, Samuel Goldman, of an offence under the Prevention of Corruption Act, 1906, and on Feb. 24 committed him for sentence to quarter sessions under the Criminal Justice Act, 1948, s. 29. Quarter sessions held that, being expressly debarred from trying charges on indictment under the Act of 1906, they had no power to sentence the offender under the Act of 1948.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), *Christmas Humphreys* and *F. H. Lawton* for the applicant.

*T. F. Southall* for the justices.

*James Burge* for Samuel Goldman.

LORD GODDARD, C.J.: In this case the Attorney-General has moved for an order of *mandamus* directed to the justices of Middlesex to hear and

determine a case brought before them under the Criminal Justice Act, 1948, s. 29. The history of this section is now pretty well known. Before the passing of the Criminal Justice Act, 1948, two cases were heard in the Court of Criminal Appeal—*R. v. Sheridan* (1) and *R. v. Grant* (2). In each a man charged before justices had elected to be dealt with summarily for an indictable offence, and the justices had consented to deal with him summarily, had heard the evidence, and had convicted him. They then heard that his record was very bad, and, considering that the maximum of six months' imprisonment which they could impose under the Summary Jurisdiction Acts was not a sufficient punishment, they committed him for trial at quarter sessions. At quarter sessions the plea of *autrefois convict* was put in, and it was held by the Court of Criminal Appeal that that was a good plea, because there had been a conviction by the court of summary jurisdiction although that court had not proceeded to pass sentence. Accordingly, by the Criminal Justice Act, 1948, an entirely new procedure was set up, providing, generally speaking, that where an indictable offence could be dealt with summarily, the justices could deal with it summarily so far as the conviction was concerned, and, if they then heard that the prisoner's record was such that they did not consider that their powers were adequate to give proper punishment, they could send him to quarter sessions for sentence. Section 29 (1) of the Act provides:

"... the court may, in lieu of dealing with [the prisoner] in any manner in which the court has power to deal with him, commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section."

Sub-section 2 provides for the court to which the prisoner is to be sent, and sub-s. (3) provides:

"Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) The appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment..."

The respondent, Samuel Goldman, was charged before justices sitting as a court of summary jurisdiction with an offence under the Prevention of Corruption Act, 1906, s. 1, under which a person guilty of the offences therein described is

"guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment... for a term not exceeding two years, or to a fine not exceeding £500, or to both such imprisonment and such fine, or on summary conviction to imprisonment... for a term not exceeding four months, or to a fine not exceeding £50 or to both such imprisonment and such fine."

In other words, offences under that Act may be dealt with either on indictment or summarily, and there are two different penalties prescribed. It is not a case of an offence being dealt with either on indictment or, on the election of the prisoner, summarily, like, for instance, larceny or false pretences. There are the two separate provisions—the prisoner may be dealt with either on indictment or in a court of summary jurisdiction.

Section 2 (1) of the Act of 1906 provides that a prosecution for an offence under the Act can only be instituted with the consent of the Attorney-General, and under sub-ss. (5) and (6):

"(5) A court of quarter sessions shall not have jurisdiction to inquire of, hear, and determine prosecutions on indictments for offences under this Act. (6) Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions."

It is curious that an offence created by statute can be dealt with by a court of summary jurisdiction, but, if the offender is committed for trial, the case cannot be heard by quarter sessions who yet have power to hear an appeal from the court of summary jurisdiction. In the present case the justices, having heard of the respondent's record, purported to act under s. 29 and sent him to quarter sessions for sentence, but quarter sessions took the view that they had got no power to sentence him.

In the opinion of the court, quarter sessions were right. No doubt, it is a *casus omissus* in the Act. The Act says that quarter sessions

"... shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment."

This offender could not be dealt with by quarter sessions under that section because he could not have been tried and convicted on indictment before them. It may be that Parliament intended that any case which could be dealt with summarily could be dealt with by quarter sessions under this section, but they have not said so. They have expressly limited the case in the way described by the words used, and, as this is an entirely statutory procedure, it is obviously necessary that the provisions of the statute should be complied with strictly. We have been given an interesting list by the Attorney-General of other cases in which this same point may arise. It may be, therefore, that, if attention is called to this difficulty, the legislature may see fit to put the matter right, but, as it is, we think that the point which has been taken is a good one.

I would like to direct attention to one other matter. When giving addresses to justices, I have over and over again called their attention to the fact that because they have power to deal with a case summarily, that is by no means a reason why they necessarily should do so. It is not only a question of sentence. Many cases brought before justices, which they can deal with, are of a very grave character and ought to be sent for trial. There may be matters of mitigation in the case, so that the justices may think (and it may turn out) that the court before whom the case is brought in the end may only pass a nominal sentence or even bind the prisoner over. That, however, is not the point. Serious cases ought to be dealt with by the superior courts, and I hope, because Parliament has introduced this new method, prosecutors will not consider it sufficient to get justices to deal with cases and commit offenders for sentence only. Grave cases ought to be dealt with by a court of assize or a court of quarter sessions. Here a man was found guilty by justices of what appears to be a very serious offence—offering a food enforcement officer a bribe of £80—and other convictions are recorded against him. Why the Director of Public Prosecutions or his representative agreed to have the case dealt with summarily, I do not know. It is a case which ought to have gone for trial. I hope notice will be taken by justices of the fact that, when serious cases are brought before them, it is not enough to say: "We have got power to deal with the case, and, therefore, we will deal with it." They ought to consider whether it is not a case which should go forward to a court of assize or a court of quarter sessions as being the proper court to deal with serious cases. This application fails and will be dismissed.

**HUMPHREYS, J.:** As far as I am concerned, that is the judgment of the court.

**JONES, J.:** I agree.

*Application dismissed. Costs awarded to respondent Goldman.*

Solicitors: *Director of Public Prosecutions* (for the applicant); *C. W. Radcliffe* (for the Middlesex justices); *Lucien Fior* (for the respondent, Goldman).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]



## DENNIS REED, LTD. v. GOODY AND ANOTHER.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Hodson, J.), March 24, 27, 28, April 4, 1950.]

*Agent—Estate agent—Commission—Contract to pay commission on introduction of person “ready, able and willing to purchase”—Introduction of potential purchaser—Withdrawal by purchaser before completion.*

The defendants, a husband and wife, instructed a firm of estate agents to find a purchaser for their house, and on May 11, 1949, the wife signed a printed form, prepared by the estate agents, which contained the following clause: “I hereby instruct you to find a person ready, able and willing to purchase the ... property for the sum of £2,825 or such other price to which I shall assent. Upon your introducing such a person I will pay you commission in accordance with the Incorporated Society’s scale ... I further authorise that, should you consider it desirable so to do, you shall be at liberty to obtain and execute a contract on my behalf.” The form also contained a statement that no road charges were outstanding. On May 17, 1949, the agents introduced H. as a potential purchaser, and on May 20 H. signed an agreement to buy the house for £2,750. The agreement contained a clause that, if any road charges were outstanding, the vendor would indemnify the purchaser. The defendants agreed to the price of £2,750, but wished to consult their solicitors before accepting the offer. The defendants’ solicitors thereupon drew up a draft agreement which contained no clause about road charges. The draft was approved by H.’s solicitors, but H. refused to sign it and withdrew his offer. The agents claimed the full commission from the defendants on the ground that, under the terms of the agreement contained in the form signed by the wife on May 11, commission became payable on the introduction by the plaintiffs of a person who made an offer to buy and was ready, able and willing to purchase at the time of the offer.

**HELD :** the words “upon your introducing” signified merely the services to be rendered by the agents, and not the time when the agents became entitled to commission, and, under the terms of the contract, the agents became entitled to commission, not when they had introduced a person willing to make an offer or even willing to enter into a contract, but when they had introduced a person who was ready, able and willing to complete the purchase; on the facts of the case, the agents had not introduced a purchaser who was “ready, able and willing to purchase,” because (a) H., the prospective purchaser, was not willing at the material time, having refused to complete the contract, and (b) the qualification in respect of road charges took him out of the category of a willing purchaser and, therefore, the agents were not entitled to commission.

*Graham and Scott (Southgate), Ltd. v. Oxlade* ([1950] 1 All E.R. 856), applied.

*E. P. Nelson & Co. v. Rolfe* ([1949] 2 All E.R. 584), distinguished.

**Per DENNING, L.J.:** “If estate agents desire to get full commission, not only on sales, but also on offers, they must use ‘clear and unequivocal language’: see *Luxor (Eastbourne), Ltd. v. Cooper*, per LORD RUSSELL OF KILLOWEN ([1941] 1 All E.R. 47). Such a claim is, indeed, so contrary to the ordinary understanding on these matters, that I think that the estate agent who desires it should bring it specifically to the notice of the house owner and get his specific agreement to it.”

[AS TO REMUNERATION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436; and FOR CASES, see DIGEST, Vol. 1, pp. 488-493, Nos. 1664-1692, and pp. 512-514, Nos. 1770-1776.]

Cases referred to:

- (1) *Simpson v. Lamb*, (1856), 17 C.B. 603; 25 L.J.C.P. 113; 26 L.T.O.S. 203; 139 E.R. 1213; 1 Digest 494, 1697.
- (2) *Prickett v. Badger*, (1856), 1 C.B.N.S. 296; 26 L.J.C.P. 33; 140 E.R. 123; 1 Digest 509, 1754.
- (3) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (4) *Nightingale v. Parsons*, [1914] 2 K.B. 621; 83 L.J.K.B. 742; 110 L.T. 806; 1 Digest 505, 1741. A
- (5) *James v. Smith*, (1921), [1931] 2 K.B. 317, n.; 100 L.J.K.B. 585, n.; 145 L.T. 457, n.; Digest Supp.
- (6) *Martin v. Perry & Daw*, [1931] 2 K.B. 310; 100 L.J.K.B. 582; 145 L.T. 455; Digest Supp. B
- (7) *McCallum v. Hicks* (ante, p. 864).
- (8) *Roberts v. Bury Improvement Comrs.*, (1870), L.R. 5 C.P. 310; 39 L.J.C.P. 129; 22 L.T. 132; 34 J.P. 821; 7 Digest 346, 59.
- (9) *British & Beningtons v. North Western Cachar Tea Co., etc.*, [1923] A.C. 48; 92 L.J.K.B. 62; 128 L.T. 422; 12 Digest 355, 2958.
- (10) *Nelson (E.P.) & Co. v. Rolfe*, [1949] 2 All E.R. 584; [1950] 1 K.B. 139.
- (11) *Lee (John) & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 581. C
- (12) *Graham & Scott (Southgate), Ltd. v. Oxlade*, [1950] 1 All E.R. 856.
- (13) *Giddys v. Horsfall*, [1947] 1 All E.R. 460; 2nd Digest Supp.
- (14) *Bennett (E.H.) and Partners v. Millett*, [1948] 2 All E.R. 929; [1949] 1 K.B. 362; [1949] L.J.R. 1050; 2nd Digest Supp.
- (15) *Dennis Reed, Ltd. v. Nicholls*, [1948] 2 All E.R. 914; 2nd Digest Supp. D

APPEAL by the plaintiffs from an order of His Honour JUDGE NEAL, made at Maidstone County Court, and dated Jan. 30, 1950, whereby he dismissed the plaintiffs' claim to commission on the introduction by them to the defendants of a prospective purchaser of the defendants' house.

The plaintiffs based their claim on a written contract contained in a form which was prepared by them and signed by Mrs. Goody, the second defendant, on May 11, 1949. The form contained the details of the house and a statement that there were no road charges outstanding, and at the end of the form was the following clause: "I hereby instruct you to find a person ready, able and willing to purchase the above property for the sum of £2,825 or such other price to which I shall assent. Upon your introducing such a person I will pay you commission in accordance with the Incorporated Society's scale . . . I further authorise that, should you consider it desirable so to do, you shall be at liberty to obtain and execute a contract on my behalf." On May 17 the plaintiffs introduced a Mr. Himsley as a potential purchaser. Mr. Himsley offered to purchase the house for £2,750, and the defendants agreed to that price. On May 20 Mr. Himsley signed an agreement to buy the house from the defendants for £2,750 and paid a deposit of £275 to the plaintiffs as agents for the defendants. By the terms of the agreement the purchase was to be completed and vacant possession given to the purchaser on or before July 8, 1949, and there was a clause at the end of the agreement, inserted at Mr. Himsley's request, that the vendor would indemnify the purchaser against any road charges which might be outstanding. The defendants refused to sign the agreement until they had consulted their solicitors, and it was eventually agreed that the defendants' solicitors should prepare a draft agreement for the sale of the house. The defendants' solicitors prepared a draft contract which contained no reference to road charges. This draft was approved, with some slight alterations, by the solicitors who were acting for Mr. Himsley in the matter. The defendants signed their part of the contract, but Mr. Himsley, on finding that there was no clause relating to road charges, informed his solicitors that such a clause must be E  
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inserted before he would sign the draft. As a result of a telephone conversation between Mr. Himsley's solicitors and the defendants' solicitors, the defendants agreed to the insertion of such a clause, but in the meanwhile, on June 21, Mr. Himsley wrote to his solicitors refusing to proceed with the purchase. The plaintiffs contended that they had introduced a purchaser who was ready, able and willing to purchase the property for a sum to which the defendants had assented, and, therefore, under the contract of May 11, 1949, they were entitled to the commission. The county court judge found that the negotiations broke down through the fault of Mr. Himsley and not through the fault of the defendants, and he held that the plaintiffs were not entitled to commission under the contract of May 11, 1949, as there was not at the material time a person willing to purchase the house.

A to the commission. The county court judge found that the negotiations broke down through the fault of Mr. Himsley and not through the fault of the defendants, and he held that the plaintiffs were not entitled to commission under the contract of May 11, 1949, as there was not at the material time a person willing to purchase the house.

B *Barry, K.C.*, and *H. E. Francis* for the plaintiffs.  
*Ungeod-Thomas, K.C.*, and *Neligan* for the defendants.

*Cur. adv. vult.*

Apr. 4. The following judgments were read.

BUCKNILL, L.J.: The plaintiffs, who are house agents, brought an action against Mr. and Mrs. Goody, the owners of a certain house, for £76 5s., which they claimed to be due to them by way of commission. His Honour JUDGE NEAL decided that the defendants were not liable and hence this appeal.

On May 11, 1949, a clerk of the plaintiffs visited the house, and Mrs. Goody, the second defendant, signed a form which constitutes the agreement sued on. It was orally agreed at the same time that the appointment of the plaintiffs as sole agents was to be for a period of one month. Part of the document is printed, but the details of the house, etc., are typed in. The material parts of the document are as follows:

E "Date when vacant possession will be given? Six or eight weeks from date deposit is paid. Are any road or paving charges outstanding? No. Do you desire to appoint us as your sole agent? Yes. I hereby instruct you to find a person ready, able and willing to purchase the above property for the sum of £2,825 or such other price to which I shall assent. Upon your introducing such a person I will pay you commission in accordance with the Incorporated Society's scale . . . I further authorise that, should you consider it desirable so to do, you shall be at liberty to obtain and execute a contract on my behalf."

F Nothing more was said at this interview about road charges. The defendants in their defence admitted that on May 11, 1949, they gave written instructions to the plaintiffs to find a person ready, able and willing to purchase the freehold of the said property for £2,825, or such other price to which they should assent, and agreed that, on the plaintiffs introducing such a person, they would pay to the plaintiffs commission in accordance with the Incorporated Society's scale. The sole question, therefore, is whether, on a proper interpretation of G these words, the plaintiffs introduced such a person.

[His LORDSHIP stated the facts, and continued:] The case made for the plaintiffs was that on May 20, 1949, a Mr. Himsley made an unqualified offer in writing to purchase the house for a sum which had already been agreed between the parties, and on terms which were reasonable and acceptable to the defendants. The plaintiffs had, therefore, on that date introduced a person ready, able and H willing to purchase the house, and the defendants were under an obligation to pay the sum which they had contracted to pay to the plaintiffs on introducing such a person. After a prolonged and very careful hearing, the learned judge came to the following conclusions. (i) The commission was due as soon as the introduction had been effected of a person possessing the qualities of readiness, ability and willingness on which the contract depends, and on proof, so far as the court was concerned, by the plaintiffs that those conditions were fulfilled. (ii) The qualities of readiness and ability, etc., must refer to some future time,



because the agreement could not reasonably be interpreted as meaning that the person expressing his readiness to purchase had £2,825 in legal tender in his pocket at that moment of time when he expressed his willingness to buy. (iii) The proper time at which the court should decide whether the proposed purchaser was ready, able and willing to purchase was the time of the hearing. The learned judge summed up the matter thus:

"Although the condition of the qualities of the person introduced is to be judged as at the time of the introduction, the proof of those qualities must be extracted and given at the time of the hearing . . . If ability [to pay] is to be judged by power to perform the act at the proper time, willingness should also be judged by willingness to perform the act at the proper time. On June 21 the proper time had not passed, but the willingness had."

Counsel for the plaintiffs argued that the decision of the learned judge was based on an erroneous interpretation of the critical words in the agreement sued on and the correct interpretation was that the commission was payable as soon as the agents had found Mr. Himsley, who was on May 20 a person ready and willing to purchase the property as proved by his signature to the agreement, and was, in fact, ready and able to purchase it because he owned assets sufficient to enable him to produce the purchase money at the time of completion of the contract of purchase. I think there is considerable weight in this argument. It seems to me that the plaintiffs place an interpretation on the words which would, in effect, make them equivalent to words such as "on introduction of a purchaser." I think the words of this clause which are in question are intended to give to the agents a claim to commission in circumstances which fall short of the execution of an enforceable contract on both sides. I do not think it unreasonable that house agents should try to arrange for their claim to commission to be earned in some cases where a sale through their introduction of a person willing to purchase is not in fact effected. In my opinion, if, subsequently to May 20, the defendants had refused to sell, while the purchaser remained willing and able to purchase, the commission would have been payable. The fatal defect in the plaintiffs' claim in this case, in my opinion, is that it was the purchaser, and not the defendants, who withdrew from the negotiations. On the other hand, the plaintiffs' claim to commission is, in my opinion, not established merely by showing that Mr. Himsley, the person whom they introduced, was able and willing to purchase the property at any one particular moment of time. They must prove that he was ready, able and willing to purchase up to the time when an enforceable contract for the purchase of the house was made between the parties, or, alternatively, up to a time when the defendants refused to enter into such a contract on terms on which Mr. Himsley was willing to purchase and the defendants were at one time willing to sell. In this case the judge decided that the conduct of the defendants in refusing to sign the draft agreement on May 20 and in failing to sign a contract before Mr. Himsley retired from the transaction was not unreasonable. I agree with the judge's decision on that point. I base my opinion in this case on the ground that Mr. Himsley, although ready, able and willing to purchase the house on May 20, changed his mind before the date for completion had passed, and it was his conduct, and not the conduct of the vendors, which caused the negotiations to break down. He was therefore, in my opinion, not a person ready, able and willing to purchase the house within the proper meaning of those words in the contract of agency sued on. For these reasons I think that this appeal should be dismissed.

**DENNING, L.J.:** In this case a firm of estate agents claim to be entitled to full commission although they never succeeded in effecting a sale. They only introduced a person who made a qualified offer and who withdrew it before any contract was concluded. The house owner was not at fault, but nevertheless the agents claim commission. They base it on a document which the house owner signed, and the case really depends on the true interpretation of that

document. So many cases have now come before the courts on claims by house agents to commission that the document cannot, I think, be interpreted *in vacuo*. It must be interpreted in the light of the general law on the subject which I will endeavour to state.

- When a house owner puts his house into the hands of an estate agent, the ordinary understanding is that the agent is only to receive a commission if he succeeds in effecting a sale, but, if not, he is entitled to nothing. That has been well understood for the last hundred years or more: see *Simpson v. Lamb* (1), per JERVIS, C.J. (17 C.B. 616), and *Prickett v. Badger* (2), per WILLIAMS, J. (1 C.B.N.S. 305). The agent in practice takes what is a business risk. He takes on himself the expense of preparing particulars and advertising the property in return for the substantial remuneration—reckoned by a percentage of the price—which he will receive if he succeeds in finding a purchaser: see *Luxor (Eastbourne), Ltd. v. Cooper* (3), per LORD WRIGHT ([1941] 1 All E.R. 55, 56). No particular words are needed to create the relationship. All the familiar expressions “please find a purchaser,” “find someone to buy my house,” “sell my house for me,” and so on, mean the same thing. They mean that the agent is employed on the usual terms, but none of them gives any precise guide as to what is the event on which the agent is to be paid. The common understanding of men is, however, that the agent’s commission is payable out of the purchase price. The services rendered by the agent may be merely an introduction. He is entitled to commission if his introduction is the efficient cause in bringing about the sale: see *Nightingale v. Parsons* (4), but that does not mean that the commission is payable at the moment of the introduction.
- It is only payable on completion of the sale. The house owner wants to find a man who will actually buy his house and pay for it. He does not want a man who will only make an offer or sign a contract. He wants a purchaser “able to purchase and able to complete as well”: see *James v. Smith* (5), per BANKES, L.J. ([1931] 2 K.B. 318), and *Martin v. Perry & Daw* (6). Some confusion has arisen because of the undoubted fact that, once there is a binding contract for sale, the vendor cannot withdraw from it except at the risk of having to pay the agent his commission. This has led some people to suppose that commission is payable as soon as a contract is signed, and I said so myself in *McCallum v. Hicks* (7) *ante*, p. 866. This, however, is not correct. The reason why the vendor is liable in such a case is because, once he repudiates the contract, the purchaser is no longer bound to do any more towards completion, and the vendor cannot rely on the non-completion in order to avoid payment of commission, because it is due to his own fault: see *Roberts v. Bury Improvement Comrs.* (8) (L.R. 5 C.P. 326), and *Luxor (Eastbourne), Ltd. v. Cooper* (3), per LORD RUSSELL OF KILLOWEN ([1941] 1 All E.R. 45), and per LORD WRIGHT (*ibid.*, 55, 56). If, however, the vendor could show that the purchaser would not, in any event, have been able or willing to complete, he would not be liable for commission: see *British and Beningtons v. North Western Cachar Tea Co.* (9), per LORD SUMNER ([1923] A.C. 72). When it is not the vendor, but the purchaser, who withdraws, the case is entirely different, for, even though a binding contract has been made, nevertheless, if the purchaser is unable or unwilling to complete, the agent is not entitled to his commission: see *James v. Smith* (5), per ATKIN, L.J. ([1931] 2 K.B. 322), and *Martin v. Perry & Daw* (6).
- The vendor is not bound to bring an action for specific performance or for damages simply to enable the agent to get commission. If, however, the vendor does get his money, he would probably be liable to pay the commission out of it. It only remains to add that, when no binding contract has been made, the vendor can himself withdraw at any time without being liable to pay commission: see *Luxor (Eastbourne), Ltd. v. Cooper* (3). *A fortiori*, if the purchaser withdraws, the vendor is not liable for commission.

It is against that background that we have to interpret this document. Some

estate agents have recently put a special clause in their printed forms, and used special words in their confirming letters. Their object is to get commission if they introduce a person who makes an offer to buy on the named terms, even though it never becomes a binding contract. It often happens that a house owner put his house in the hands of several agents, and each of the agents introduces someone who makes an offer. According to the agents, the house owner is liable under this new clause to pay commission, not only on the one offer which he accepts, but also on the other offers which he refuses. This contention has actually succeeded in at least one case that has come before the courts, and the house owner has found himself liable to pay double commission: see *E. P. Nelson & Co. v. Rolfe* (10). In the present case the agents go further. They say that, once an offer is made by someone whom they introduce, they are entitled to commission, even though the offer is withdrawn by him the next day. They say that, if the person introduced is ready, able and willing at the time of the offer, that is sufficient, even if he thereafter becomes unable or unwilling. The new clause has been described by judges of this court as "rather stringent" and "rather undesirable." If it has the effect for which the agents contend, these descriptions are not one whit too strong. When an agent gets an offer which the house owner does not accept, it might be quite reasonable for the agent to ask for his out-of-pocket expenses or even for a reasonable reward for his time and labour, but it is not reasonable for him to ask for full commission at the same rate as if he had actually procured a sale. The commission is a substantial remuneration, not based on the time, labour or money expended—which may be little—but on a percentage of the purchase price. Remuneration on such a scale cannot be justified except on the footing that it is to come out of the purchase money, and should, therefore, in reason only be payable on completion of the purchase. I know that agents often say that they have earned their commission when they have done their part. That, however, is a fallacy. An agent does not earn commission as a labourer earns wages. Even though he has done his part, he does not become entitled to his commission until the purchase is completed.

It is necessary to consider the reasonableness of this clause, because, if it is capable of two interpretations, one reasonable and the other unreasonable, we ought to give it the reasonable one—all the more so in this case because of the way in which the document came to be signed. The clerk to the estate agents went to see the housewife and asked her for particulars of the house which she and her husband wanted to sell. He wrote all the particulars down on a printed form, asked her to read them through, which she did, and then asked her to sign the form. He told her it was "merely a routine matter" and she signed it. The document in fact contained at its foot the special clause. The clerk admitted that he did not explain the meaning of it to her. She herself, apparently, did not notice it, but signed because she thought the agents were all right. The clerk did not leave her a copy of the form, so she did not know what she had signed. She certainly had no reason for thinking that she was committing herself to any other than the usual terms on which estate agents are employed. In this situation, if the clause does mean what the agents contend, it may well be that the courts would not enforce it. The courts might well say to the agents: "If you insert stringent terms, giving you more than is reasonable, without explaining what you have done, you shall not have the aid of these courts to enforce them." That, however, would be a strong course to take, and the courts prefer to construe the terms so as to give them a reasonable effect: see *John Lee & Son (Grantham), Ltd. v. Railway Executive* (11).

On consideration of this clause I am satisfied that it is capable of a reasonable construction. The words "upon your introducing" do not mean that commission becomes due at the moment of introduction. The introduction takes place when the order to view is given, and no one knows then whether the person



introduced will like the house or not. The words "upon your introducing" cannot, therefore, signify the time when an agent becomes entitled to commission, but can only signify the services to be rendered by the agent. They mean "In consideration of your introducing." Now, whom must the agent introduce? He must introduce:

- A** " . . . a person ready, able and willing to purchase the above property for the sum of £2,825 or such other price to which I shall assent."

These words do not mean a person ready, able and willing "to make an offer," or even "to enter into a contract." They mean a person ready, able and willing "to purchase," *i.e.*, to complete the purchase. He must be a person who is "able" at the proper time to complete, *i.e.*, he must then have the necessary financial resources. He must also be "ready," *i.e.*, he must have made all necessary preparations by having the cash or a banker's draft ready to hand over. He must also be "willing," *i.e.*, he must be willing to hand over the money in return for the conveyance. This interpretation means that the special clause has practically the same effect as the usual terms on which an estate agent is employed. This is just as it should be, for, having regard to what took place when the housewife was asked to sign the document, I should not expect it to go beyond the ordinary understanding on these matters.

- C** So far I have considered this particular clause only. I would, however, like to add that the various new clauses that have appeared seem to be capable of a similar interpretation. I can see no sensible distinction between instructions to "find a purchaser," "find a party prepared to purchase," "find a purchaser able and willing to complete the transaction," and "find a person ready, willing and able to purchase." The rights and liabilities of house owners in these cases should not depend on fine verbal differences. If estate agents desire to get full commission, not only on sales, but also on offers, they must use "clear and unequivocal language": see *Luxor (Eastbourne), Ltd. v. Cooper* (3), *per* LORD RUSSELL OF KILLOWEN ([1941] 1 All E.R. 47). Such a claim is, indeed, so contrary to the ordinary understanding on these matters, that I think that the estate agent who desires it should bring it specifically to the notice of the house owner and get his specific agreement to it.

- E** *E. P. Nelson & Co. v. Rolfe* (10) might, at first sight, appear to be against the views that I have expressed, but there it was admitted that Mr. Payne was a person "ready, willing and able to purchase," so the court was not called on to consider the meaning of the words. A later decision, *Graham & Scott (Southgate), Ltd. v. Oxlade* (12) seems to show that the admission was erroneous, because it was there held that a person who had made an offer "subject to contract" or "subject to survey" could not be said to be "willing" to purchase. It seems to follow that [in *Rolfe's* case (9)] Mr. Payne, who had made no offer, not even an offer "subject to contract," could not be said to be "willing" to purchase. *Graham & Scott (Southgate), Ltd. v. Oxlade* (12) does not, however, decide at what time the purchaser must be willing. He must, I think, be willing up to the time for completion, unless he has been previously absolved by the vendor's withdrawal from the contract. What *E. P. Nelson & Co. v. Rolfe* (10) does show, however, is that, if once this clause is given the stringent effect contended for by the agents, there is no implied term which will protect a reasonable vendor—for Mr. and Mrs. Rolfe were reasonable enough. The only solution is to give the clause itself a reasonable interpretation. The result of *Graham & Scott (Southgate), Ltd. v. Oxlade* (12) also is that the three cases at first instance of *Giddys v. Horsfall* (13), *E. H. Bennett and Partners v. Millett* (14), and *Dennis Reed, Ltd. v. Nicholls* (15) can no longer be regarded as of authority, for in each of them the offer was "subject to contract."

Applying the interpretation which I have stated, I am of opinion that the agents here never introduced a person who was ready, able and willing to

purchase. They introduced Mr. Himsley, who was at the beginning willing to make an offer, willing, indeed, to sign a contract, but never willing to make an open offer or to sign an open contract, nor, as it turned out, willing to complete. He backed out before a contract was concluded and the sale went off without any fault of the vendor. The agents are, therefore, not entitled to commission.

**HODSON, J:** This is an appeal from a judgment of His Honour JUDGE NEAL, who gave judgment for the defendants on Jan. 30, 1950, in an action in which the plaintiffs, a firm of estate agents, claimed commission on a contract of agency entered into between the plaintiffs and the second defendant on May 11, 1949. The terms of the contract are contained in a document prepared by the plaintiffs on a printed form giving particulars of the property to be sold and the answers to various questions, one of which gave a negative reply to the question: "Are any road or paving charges outstanding?" At the end of the document above the signature are the following words:

"I hereby instruct you to find a person ready, able and willing to purchase the above property for the sum of £2,825 or such other price to which I shall assent. Upon your introducing such a person I will pay you commission in accordance with the Incorporated Society's scale, *i.e.*, five per cent. on the first £300 of the purchase price, 2½ per cent. on the next £4,700 and 1½ per cent. on the balance. I further authorise that, should you consider it desirable so to do, you shall be at liberty to obtain and execute a contract on my behalf."

The main question in the appeal turns on the construction of the last clause. The learned county court judge found that there was not at the material time a person willing to purchase. The plaintiffs found a person, a Mr. Himsley, who, they contend, was ready, able and willing to purchase the property for the sum of £2,750 to which the defendants (whom I will call the vendors) assented. On May 20 Mr. Himsley signed a paper which contained an offer of the sum of £2,750. This, the plaintiffs contend, was an unqualified offer on the making of which commission became immediately payable. The offer was not immediately accepted by the vendors since they desired to consult their solicitors before so doing. On June 21, before the offer was accepted, the proposed purchaser withdrew his offer. The vendors, through no fault of their own, as the learned county court judge found, gained no benefit from the contract of agency, since it was not they, but the purchaser, who withdrew, and it would seem surprising that a contract should be drawn so as to make them liable to pay commission in such an event. Moreover, if there is any ambiguity in the contract, it must be construed *contra proferentem*.

Much turns on the time when the person referred to is to be ready, able and willing to purchase. There would appear to be three possible times when the readiness, ability and willingness must exist. (i) The time of the introduction of the qualified person. This is the contention of the plaintiffs who seek to synchronise the time of introduction with the moment when the offer was made, itself a proposition not without difficulty. (ii) The time of completion of the contract. (iii) The time when the contract for purchase was entered into. The last two are the alternative contentions of the vendors.

In support of their construction the plaintiffs argue that this contract is of the kind envisaged by VISCOUNT SIMON, L.C., in *Luxor (Eastbourne), Ltd. v. Cooper* (3), where he said ([1941] 1 All E.R. 40):

"There is the class [of contract] in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward,

it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not."

This passage, however, must be read in conjunction with the warning words of LORD RUSSELL OF KILLOWEN in his speech, where he said (*ibid.*, 47):

A "It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

B The plaintiffs argue that the word "upon" in the contract is temporal, so that, when the offer was made, since the person introduced had then the necessary qualifications of ability, readiness and willingness, they became immediately entitled to sue for their commission. It makes no difference, according to this argument, whether the willingness persisted. Whether the sale goes off or not, it is said that the agent can sue before the purchase is completed. Reliance was placed on a decision of LYNKEY, J., in *Dennis Reed, Ltd. v. Nicholls* (15) where the words of the contract of agency corresponded very closely with those in this case, and on the decision of the Court of Appeal in *E. P. Nelson & Co. v. Rolfe* (10). In these two cases it is to be observed that the vendors withdrew before the contracts for sale were signed and no question arose as to the point of time to which the willingness or other qualities of the purchaser related. Indeed, in the last-named case, willingness and the other requisite qualities were admitted. At the time when the vendors drew back, the purchasers were still able and willing, and there was no reason to draw any inference from the facts other than that the ability and willingness would persist until the time for completion arrived. These cases are not, therefore, authority for the proposition that the willingness need exist only at the time when the offer is made in pursuance of the contract of agency, which is put forward to enable the agent to succeed. The agent was still entitled to succeed in those cases, because he had fulfilled his part of the bargain by introducing a person who fulfilled the required qualifications, and to bring his action before the time of completion or the time of execution of the contract for purchase. Similarly in *Graham & Scott (Southgate), Ltd. v. Oxlade* (12), attention was not directed to the period of time after the vendor had withdrawn.

E Some reliance was placed on the decision of the Court of Appeal in *James v. Smith* (5), a case turning on the meaning of ability to purchase. There the sale went off because of the inability of the purchaser to find the price and the agent was held not to be entitled to his commission. ATKIN, L.J., used these words ([1931] 2 K.B. 322):

G "I think that 'ability' does not depend upon whether the purchaser has the money in hand at the time; to my mind it is a question of fact. I do not think it depends upon whether he has a binding agreement by which some third person is obliged to provide him with resources to carry out the contract. I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that if the vendor had been ready and willing to carry out his contract, he on his part at the proper time could have found the necessary money to perform his obligation."

H From this it appears that the ability to find the money at the proper time even though capable of proof in a variety of ways, means ability to find it at the time of completion. It is logical to read all the necessary qualities as bearing on that time. Moreover, the word "purchaser" of itself denotes completion of purchase, as was pointed out by HILBERY, J., ([1948] 2 All E.R. 931) in *E. H. Bennett & Partners v. Millett* (14) although the word may be qualified by other words used in connection with it. It is unnecessary to decide whether the word "purchase" in this contract has its primary meaning of completion of purchase or its secondary meaning of contract to purchase, since the purchaser



withdrew his offer on June 21, 1949, before either event took place. On my reading of the contract, the word "upon" in the phrase "upon your introduction" is properly to be construed in a causal sense, and not temporally. The sale of the property having gone off by reason of the fact that on June 21 the purchaser ceased to be willing, in my opinion, on a true construction of the contract of agency dated May 11, the appeal fails, since on the evidence the purchaser was not willing at the proper time. In my judgment, the appeal also fails on other grounds. A

In order that the plaintiffs should succeed on the construction contended for by them, which I have rejected, they must, in any event, prove that the offer was an unqualified offer and within the terms contained in the contract of agency. The offer dated May 20, 1949, begins by setting out the names of the parties and recites the particulars of the property and goes on to deal with the payment to the agents of the deposit money and the date for completion and vacant possession. It also deals with the rights and claims to which the vendor is or may be entitled in development value in respect of the restricted user under the Town and Country Planning Act, 1947, and the vendor is described as covenanting with the purchaser to do everything necessary to enforce any rights which he may have under that Act. Finally, at the end of the document there appears this paragraph: B C

"It is clearly understood that the purchaser is purchasing on the understanding that the road charges are paid in respect of the property, or, if not, the vendor will indemnify him against any road charges which may be outstanding."

If the offer was qualified, the purchaser was not willing: see the judgment of the Court of Appeal in *Graham & Scott (Southgate), Ltd. v. Oxlade* (12), where it was held that offers subject to contract or subject to survey take the offerors outside the category of willing purchasers. In this case, in my judgment, the qualification as to indemnity in respect of road charges is sufficient to take the purchaser out of the category of willingness, notwithstanding that the vendor had already given a negative reply to the question: "Are there any road or paving charges outstanding?" Further, the only contract which the plaintiffs were empowered to enter into with the purchaser on behalf of the vendors was an open contract in which only the parties, property and price were settled. The offer which was prepared by the plaintiffs and signed by the purchaser goes beyond this in various respects, first, as to the provision for deposit; secondly, as to the road charges; thirdly, in connection with rights under the Town and Country Planning Acts; and, fourthly, in the fixing of the date for vacant possession and completion. Readiness, willingness and ability to purchase must have relation to the vendor. The vendors in this case gave no authority to the plaintiffs for the inclusion of these terms, and, until the vendors had assented to the new terms, no offer within the scope of the agent's authority had been made. It is no answer to say that the terms were, or ought to have been, acceptable to the vendors. It was reasonable in any event for the vendors to have an opportunity of consulting their solicitors before entering into a contract for a sale of land—which is the very course they took on the offer of May 20 being made to them. On these grounds also, in my judgment, the appeal fails. D E F G

*Appeal dismissed with costs.* H

Solicitors: *Hardcastle Sanders & Co.* (for the plaintiffs); *Cameron, Kemm & Co.* (for the defendants).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

## JAMES LAMONT &amp; CO., LTD. v. HYLAND, LTD. (No. 2).

[COURT OF APPEAL (Tucker and Asquith, L.JJ., and Roxburgh, J.), January 30, April 5, 1950.]

*Practice—Summary judgment—Leave to sign judgment—Set-off and counterclaim—Bill of exchange given in pursuance of contract—Claim by defendants for damages for breach—R.S.C., Ord. 14, r. 1.*

A The plaintiffs sued the defendants as the acceptors of a bill of exchange and applied for liberty to sign judgment under R.S.C., Ord. 14, for the amount of the bill and interest. The defendants filed an affidavit in opposition, alleging that the bill was given in pursuance of a contract which the plaintiffs had broken, in respect of which breach the defendants were entitled to unliquidated damages in excess of the amount of the bill, and they contended that they were entitled to set-off against the plaintiffs' claim a sufficient amount of the damages to extinguish it. The master gave leave to sign judgment subject to a stay of execution pending trial of the defendants' counterclaim. On appeal by both parties to the judge, the defendants' appeal was dismissed and the plaintiffs' appeal against the stay was allowed. On the defendants' appeal to the Court of Appeal,

C HELD: having regard to the authorities, it was impossible to say that, in giving liberty to sign immediate judgment without a stay, the judge was guilty of an improper exercise of his discretion, and the appeal should be dismissed.

D *Glennie v. Imri* (1839) (3 Y. & C. Ex. 436), *Warwick v. Nairn* (1855) (10 Exch. 762), and *Anglo-Italian Bank v. Wells. Same v. Davies* (1878) (38 L.T. 197), considered.

[AS TO LEAVE TO ENTER JUDGMENT AND UNCONDITIONAL LEAVE TO DEFEND, see HALSBURY, Hailsham Edn., Vol. 26, pp. 49, 50, paras. 77, 78; and FOR CASES, see DIGEST, Practice, pp. 283-287, Nos. 164-199.]

E Cases referred to:

- (1) *Morgan & Son, Ltd. v. S. Martin Johnson & Co., Ltd.*, [1948] 2 All E.R. 196; [1948] L.J.R. 1530; 2nd Digest Supp.
- (2) *Glennie v. Imri*, (1839), 3 Y. & C. Ex. 436; 3 Jur. 432; 160 E.R. 773; 6 Digest 165, 1050.
- (3) *Warwick v. Nairn*, (1855), 10 Exch. 762; 156 E.R. 648; 6 Digest 164, 1048.
- F (4) *Morgan v. Richardson*, (1806) cited 7 East 482, n.; 1 Camp. 40, n.; 3 Smith K.B. 487, n.; 103 E.R. 187; 6 Digest 163, 1044.
- (5) *Trickey v. Larne*, (1840), 6 M. & W. 278; 9 L.J.Ex. 141; 151 E.R. 414; 6 Digest 151, 990.
- (6) *Jackson v. Murphy*, (1888), 4 T.L.R. 92.
- (7) *Court v. Sheen*, (1891), 7 T.L.R. 556; Digest, Practice, 290, 234.
- G (8) *Anglo-Italian Bank v. Wells. Anglo-Italian Bank v. Davies*, (1878), 38 L.T. 197; 6 Digest 474, 3017.

APPEAL by the defendants from an order of LYNSEY, J., in chambers, made on Nov. 11, 1949, giving the plaintiffs leave to sign final judgment under R.S.C., Ord. 14, r. 1.

H On the plaintiffs' application under Ord. 14, r. 1, to sign final judgment in respect of their claim on a bill of exchange of which the defendants were the acceptors, the master gave leave to sign judgment subject to a stay of execution pending trial of the defendants' counterclaim. Both parties appealed to the judge, and LYNSEY, J., allowed the plaintiffs' appeal, and dismissed that of the defendants.

Before the Court of Appeal counsel for the plaintiffs took a preliminary point that, a form of consent to the dismissal of the appeal having been signed by the defendants and initialled by the president of the Court of Appeal, the defendants

were precluded from proceeding on a fresh notice of appeal, although no order dismissing the original appeal had been made. The Court of Appeal gave judgment as reported, *ante*, p. 341, allowing the appeal to proceed.

*Ashe Lincoln, K.C.*, and *Peter Bristow* for the defendants.

*MacKenna* for the plaintiffs.

*Cur. adv. vult.*

Apr. 5. **ROXBURGH, J.**, read the following judgment of the court. The plaintiffs' claim in this case was (i) for £20,000 (and £575 6s. 10d. interest) against the defendants as acceptors of a bill of exchange for that amount, and (ii) for £15,141 odd for work and materials. This court is not concerned with the second head of claim. As regards the claim on the bill of exchange, the plaintiffs, in proceedings for summary judgment under Ord. 14, swore a common form affidavit verifying the cause of action. The defendants put in an affidavit in opposition to judgment by one Lane (the contents of which will be considered later) indicating an intention to counterclaim. The master gave the plaintiffs liberty to sign judgment for £20,000, plus £575 interest, subject to a stay of execution pending trial of the defendants' counterclaim. Both parties appealed from the master's decision, the defendants asking for unconditional leave to defend, the plaintiffs asking that the stay pending trial of the counterclaim be removed. **LYNSKEY, J.**, before whom these appeals came, dismissed the defendants' appeal and allowed the plaintiffs' appeal against the stay—that is to say, he gave the plaintiffs liberty to sign immediate judgment for the amount claimed on the bill and interest. From that decision the defendants' appeal to this court, reiterating their request for unconditional leave to defend.

The affidavit in opposition to judgment which was before the master, sworn by Lane, the defendants' managing director, can be summarised as follows. He deposed that early in 1948 the defendants employed the plaintiffs to repair and alter a ship. There was a specification and estimate for £15,000. He alleges that it was a condition of this contract that the repairs and alterations should be completed in time for the ship to reach Palermo by Dec. 1, 1948. He says that later there was a contract to pay reasonable charges for repairs up to £40,000 subject to the same conditions, the reason for which was that the ship had been chartered to carry displaced persons at a very high profit (£100,000) conditionally on its being ready by Dec. 1, 1948. He goes on to say that it was later agreed to raise the maximum of the repairs, etc., to £50,000, of which the defendants paid the plaintiffs £30,000 on account, and have accepted a bill of exchange for £20,000 for the balance. He says the plaintiffs violated the condition—failed to complete the repairs within the stipulated time—and that the defendants have lost a profit of £100,000. The defendants, therefore, have a counterclaim for breach of contract far over-topping the claim on the bill of exchange and are entitled to set-off a sufficient amount thereof to extinguish the claim. There was no affidavit in reply to this before the master, who, as has been seen, gave liberty to sign judgment on the bill of exchange subject to a stay of execution.

Before **LYNSKEY, J.**, on appeal, there was an affidavit in reply sworn by one Raeside, secretary of the plaintiff company, which is completely at variance with the case set up in the defendants' affidavit. This deponent denies the successive sums of £15,000, £40,000 and £50,000 alleged as successive contractual maxima in that affidavit and alleges a contract to do the work contracted for, subject to the approval of the Ministry of Transport, on the plaintiffs' usual terms, that is to say, cost plus certain specified percentages. He denies that it was a condition of the contract that the ship should be ready to reach Palermo by Dec. 1, 1948. He says that Lane on Oct. 4, 1948, had said he had £200,000 worth of stores at Malta, much of which had been stolen, and requested that, to save further loss, the ship might be ready by Oct. 20. The plaintiffs never promised this, but had said they would do their best; and the ship would, so



far as their part was concerned, in fact have been at Palermo before Dec. 1, 1948, but for circumstances such as running aground on Oct. 21 and losing her stern anchor in trials in early November—circumstances for which the plaintiffs were in no degree responsible. He says that Mr. Lane gave him the bill for £20,000, dated Nov. 1, on Nov. 5 or 6 as a payment on account. (No doubt part of the consideration was also release of the ship from the plaintiffs' lien as repairers).

The position in law arising on these affidavits is, therefore, shortly, that the plaintiffs sue on a bill of exchange and the defendants seek to prevent the plaintiffs from having liberty to sign immediate judgment without a stay by alleging that the bill was given in pursuance of a contract which the plaintiffs have broken and for which the defendants claim unliquidated damages in excess of the amount of the bill. On these materials the judge has given liberty to sign judgment for the amount of the bill with interest and without any stay. This court has recently decided in *Morgan & Son, Ltd. v. S. Martin Johnson & Co., Ltd.* (1) that where the matters relied on by the defendant, although not strictly matters of defence, would before the Judicature Acts have been regarded by a court of equity as ground for relief by way of equitable set-off, the proper order to make under Ord. 14 procedure as a general rule is that the defendant have unconditional leave to defend and not that the plaintiff recover judgment with execution stayed until the trial of the counterclaim.

The question raised in the present appeal is whether this rule applies to an action between immediate parties to a bill of exchange, where the matters relied on by the defendant afford no defence under the Bills of Exchange Act, 1882. In such cases, although it is not easy wholly to reconcile the authorities, a rule more favourable to the plaintiff has in general prevailed, the court treating the execution of a bill of exchange either as analogous to a payment of cash, or as amounting to an independent contract within the wider contract in pursuance of which it was executed, and not dependent as regards its enforcement on due performance of the latter. Counsel for the plaintiffs cited in particular three cases which illustrate this rule or tendency. Some of them are pre-Judicature Act and pre-Ord. 14 cases.

The first in order of time is *Glennie v. Imri* (2), a case decided on the equity side of the Court of Exchequer in 1839, long before the days of Ord. 14. The plaintiff sued on a bill of exchange given for goods sold and delivered. The defendant, using the language of that day, set up that he had been

“... fraudulently deceived in his contract, the goods delivered being inferior both in quality and quantity to what he had ordered: *Held*, that he could not maintain a bill for an account and for an injunction to restrain the action, inasmuch as his object was to reduce the amount of the bill of exchange by the damages which he claimed for the alleged breach of contract,”

and that, as this was not the subject of set-off in law, it could not be the subject of an account in equity. “Courts of equity will not take an account of debts one way and damages the other.” A court of law would say you must pay the bill first and then bring an action for the fraud, and, apparently, where a bill of exchange was concerned, equity in this matter followed the law.

The second case cited to us under this head was *Warwick v. Nairn* (3). The plaintiff supplied the defendant with goods under a contract and drew a bill of exchange for £313 odd of which all but £108 odd was in respect of their price. The defendant pleaded that the plaintiff promised that the goods should be of a certain quality and that he accepted the bill of exchange on the faith of that promise, which, he alleged, had been broken. On demurrer this was held a bad plea. During the argument POLLOCK, C.B., said (10 Exch. 764):

"The payment by a bill of exchange is to be taken as the payment of so much cash; the defendant ought to satisfy the bill and proceed upon the remedy for the breach of warranty."

Counsel arguing in support of the demurrer contended that such a partial failure of consideration cannot be pleaded to a bill of exchange or promissory note. PARKE, B., intervened and stopped him with the observation (*ibid.*):

"The subject-matter of the plea [the alleged inferior quality of the goods] has been held on several occasions to afford no defence to an action on a bill of exchange: *Morgan v. Richardson* (4) and *Trickey v. Larne* (5) are direct authorities against the plea."

There might, it appears, have been a defence if it had been alleged that the goods tendered had not been of the contract description and had been rejected, for then there would have been no consideration and this is a defence to an action on a bill of exchange, but in the actual case the "inferior" goods were retained by the deliverer, and the failure of consideration, therefore, partial only. So also in the present case. The same principle was applied in *Jackson v. Murphy* (6). In *Court v. Sheen* (7), a different result was reached on similar facts, and the plaintiff was refused liberty to sign immediate judgment. But the case is even more shortly reported than *Jackson v. Murphy* (6), and it is difficult or impossible to say on what grounds it proceeded.

Lastly, among the bill of exchange cases is that of *Anglo-Italian Bank v. Wells* (8). The plaintiffs, by specially endorsed writ, sued the defendants on certain promissory notes and took out a summons under Ord. 14. The defendants resisted on the ground that they had a good defence and a good counterclaim. THESIGER, L.J., said (38 L.T. 201):

"If the appellants had disclosed by their affidavits facts sufficient to establish a good ground of counterclaim, I think the counterclaim would have been sufficiently connected with the cause of action in the present case to justify its being set up as a defence even to a liquidated claim on a bill of exchange."

In the result, however, leave to defend on the bills was refused. And SIR GEORGE JESSEL, M.R., anticipating the possibility envisaged by THESIGER, L.J., strikes rather a different note. He said (*ibid.*, 199):

"... I must say, speaking for myself, that I should hesitate long before I allowed a defendant in an action on a bill of exchange to set up a case for damages by reason of the breach by the plaintiff of some other contract or the commission of some tort."

Pausing there, it would seem that the learned Master of the Rolls means by "some other contract" some contract other than that constituted by the bill of exchange itself. He goes on:

"I do not say that there cannot be a case where the two transactions may not be so connected, but at present I cannot even imagine the existence of such a special case."

Having regard to the tenor of the authorities summarised above in cases where the action is on a bill of exchange, it is impossible to say that in giving liberty to sign immediate judgment without a stay the learned judge in chambers was guilty of an improper exercise of the discretion vested in him. In our view, the appeal fails.

*Appeal dismissed with costs.*

Solicitors: *Torr & Co.*, agents for *Morton, Morton & Shaw*, Sunderland (for the defendants); *Sydney Morse & Co.* (for the plaintiffs).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

# ACKROYDS AIR TRAVEL, LTD. v. DIRECTOR OF PUBLIC PROSECUTIONS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.), March 28, 1950.]

*Aerial Traffic—Reservation of air services—Scheduled journey—Company prohibited from landing aircraft—Feeder service arranged by travel agency and operated by “non-corporation” aircraft companies—Liability of travel agency—Aiding and abetting—Civil Aviation Act, 1946 (c. 70), s. 23 (1) (2).*

Before September, 1948, M. Ltd., a company registered in South Africa, maintained an air service for passengers between Cape Town and London. In September, 1948, M. Ltd. were prohibited by Order in Council from landing their aircraft in the United Kingdom, and thereafter they terminated their flights at Paris. On or about Sept. 26, 1948, M. Ltd. entered into an oral agreement with A. Ltd., that A. Ltd., would, at the request of M. Ltd., arrange for the conveyance from London to Paris of passengers of M. Ltd. who desired to be in Paris in readiness for the flight on which they were booked to proceed to South Africa. From time to time thereafter until Nov. 20, 1948, A. Ltd., at the request of M. Ltd., chartered aircraft for the conveyance of such passengers to Paris from three aircraft companies other than the three corporations under the Civil Aviation Act, 1946. A. Ltd. were convicted by a court of summary jurisdiction of aiding and abetting the unlawful carrying of passengers for hire or reward on a scheduled journey, contrary to the Civil Aviation Act, 1946, s. 23 (1). On appeal,

**HELD:** there was evidence on which the magistrate could properly find that scheduled journeys were undertaken contrary to s. 23 (1) of the Act of 1946, and that A. Ltd., who arranged for the aircraft companies to make the journeys, knew all the circumstances, and were, therefore, rightly convicted under s. 5 of the Act of 1848 of aiding and abetting.

[FOR THE CIVIL AVIATION ACT, 1946, s. 23 (1) (2), see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 138.]

Case referred to :

- (1) *Wessel v. Carter Paterson and Pickfords Carriers, Ltd.*, [1947] 2 All E.R. 280; [1947] L.J.R. 1370; 111 J.P. 474; *sub nom.*, *Carter Paterson and Pickfords Carriers, Ltd. v. Wessel*, [1947] K.B. 849; 177 L.T. 448; 2nd Digest Supp.

CASE STATED by the Chief Metropolitan Magistrate.

On Feb. 17, 1949, at a court of summary jurisdiction at Bow Street, an information was preferred by the respondent, the Director of Public Prosecutions, against the appellants, who were travel agents, charging them that they did unlawfully carry passengers by air for reward on a scheduled journey between Croydon Airport and Le Bourget, contrary to the Civil Aviation Act, 1946, s. 23 (1). It was proved or admitted that the appellants were a limited company, carrying on business in London, and that it was their business, *inter alia*, to make bookings for passengers travelling by air. They did not themselves own either aircraft or land-transport in which to carry passengers by air or otherwise. A limited company registered in South Africa called Mercury Airways, Ltd., had, until September, 1948, operated an airline between the United Kingdom and South Africa, but, following an Order in Council made in that month prohibiting the carriage of passengers by the company from the United Kingdom, they had ceased to operate between the United Kingdom and South Africa, and had operated from Paris, providing a regular service between Paris and South Africa. Mercury Airways, Ltd., from its London office and by means of divers agents, of whom the appellants were one, booked reservations for passengers on aircraft operated between Paris and South



Africa. The appellants, having booked such passengers, remitted the bookings to the said company. On Sept. 26, 1948, an agreement was made orally between the managing director of the appellants and a representative of Mercury Airways, Ltd., that the appellants should, if and when required, by Mercury Airways, Ltd., arrange for the conveyance from London to Paris of such of the passengers of Mercury Airways, Ltd., as desired to be in Paris in readiness for the flight on which they were booked to proceed thence to South Africa. From time to time between Sept. 26 and Nov. 20, 1948, Mercury Airways, Ltd., requested the appellants to arrange for the charter of aircraft for the conveyance to Le Bourget airport of such passengers and to hire a coach to transport such passengers from London to Croydon and to arrange for the necessary catering and baggage-handling facilities. As a result, on fourteen different days between the dates mentioned the appellants chartered aircraft from three aircraft companies other than the three corporations under the Civil Aviation Act, 1946, and in this period a total of thirty-one flights took place. On other occasions Mercury Airways, Ltd., chartered aircraft direct from the same aircraft companies, and not through the agency of the appellants, the cost of the charter being paid by the appellants to the aircraft company concerned. No charge was made to the passengers for the journey. Each of the aircraft operated by an aircraft company was manned and flown by the employees of that aircraft company. No specific aircraft was ever held at the disposal of the appellants. Only such passengers were carried as had been accepted by Mercury Airways, Ltd., as passengers for a flight between Paris and South Africa.

It was contended on behalf of the appellants that (i) the appellants were not carriers of passengers by air for hire or reward within the meaning of s. 23 (1) of the Civil Aviation Act, 1946; (ii) none of the journeys was a scheduled journey within the meaning of s. 23 (2) of the Act; (iii) none of the said journeys was operated in such a manner that the benefit thereof was available to members of the public; (iv) the appellants did not aid or abet any of the offences alleged in the information because there was no principal offender. It was contended on behalf of the respondent that (i) the appellants had carried passengers by air within the meaning of s. 23 (1) and (2) because (a) each of the journeys undertaken had been arranged and organised by the appellants pursuant to an oral agreement between the appellants and Mercury Airways, Ltd.; (b) the appellants had included a profit to themselves in the charges made by them to Mercury Airways, Ltd., in respect of such journeys; (c) each of such journeys was one of a series of journeys undertaken between the same two places which together amounted to a systematic service within the meaning of s. 23 (2); (ii) alternatively, if the appellants had not themselves carried the passengers, they had nevertheless aided and abetted the carriage of them on a scheduled journey by the aircraft companies concerned, and so were properly charged and could be considered as principal offenders by virtue of the Summary Jurisdiction Act, 1884, s. 5.

The magistrate, being of the opinion that (a) the appellants were not themselves carriers of passengers, but had aided and abetted the carriage by air of passengers by the three aircraft companies; (b) the appellants did so for reward; (c) the aircraft companies, although not acting in concert, were together operating a series of journeys which amounted in the aggregate to a schedule; (d) the appellants were aiding and abetting, although no one of the three aircraft companies was necessarily by itself operating a scheduled series of journeys, found the appellants guilty of the charges.

*Vaughan, K.C., and G. D. Lane* for the appellants.

*The Attorney-General (Sir Hartley Shawcross, K.C.) and S. G. Howard* for the respondent.

**LORD GODDARD, C.J. :** This is a Case stated by the Chief Magistrate sitting at Bow Street Magistrate's Court, before whom the appellants were

summoned for unlawfully carrying passengers for hire or reward on a scheduled journey between two places, one of which was in the United Kingdom (namely, Croydon Airport), and Le Bourget. The learned magistrate found that, although the appellants were not themselves carriers of passengers by air, they had aided and abetted the commission of an offence against the Civil Aviation Act, 1946, s. 23 (1), and, relying on the Summary Jurisdiction Act, 1848, s. 5, he convicted them. Section 5 of the Act of 1848 provides:

"... Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender . . ."

So, if the magistrate was right in holding that the appellants had aided and abetted an offence, he was right in convicting them as he did.

The proceedings were taken under the Civil Aviation Act, 1946, s. 23, which provides:

"(1) Subject to the provisions of this section, it shall not be lawful for any person, other than the three corporations [*i.e.*, the British European Airways Corporation, the British South American Airways Corporation, and the British Overseas Airways Corporation], their associates, and the servants and agents of the three corporations and their associates, to carry passengers or goods by air for hire or reward upon any scheduled journey between two places of which at least one is in the United Kingdom. (2) In this Act the expression 'scheduled journey' means one of a series of journeys which are undertaken between the same two places and which together amount to a systematic service operated in such a manner that the benefits thereof are available to members of the public from time to time seeking to take advantage of it."

Mercury Airways, Ltd., a company registered in South Africa, ran a service for air passengers between Cape Town and this country. For reasons which are not stated, and which are immaterial, an Order in Council was made which prohibited Mercury Airways, Ltd., from landing their aircraft in this country. Accordingly, they terminated their flights at Paris. Then they arranged with the appellants to have transported to Paris passengers in the United Kingdom who wished to travel by the Mercury Airways, Ltd., and who changed at Paris into aeroplanes belonging to Mercury Airways, Ltd. Mercury Airways, Ltd., were thereby enabled to run a service between this country and South Africa, although they were prohibited from themselves landing their aeroplanes at an airport in this country.

The Case finds that Mercury Airways, Ltd., from its office, which was in London, and

"by means of divers agents, of whom the appellants were one, booked reservations for passengers on aircraft operating . . . between Paris and South Africa,"

and that the appellants, having booked such passengers, remitted the bookings to the company at their office. It is found that on or about Sept. 26, 1948, an agreement was made verbally between the managing director of the appellant company and a representative of Mercury Airways, Ltd., that the appellants

"should, if and when required by the said company to do so, arrange for the conveyance from London to Paris of such of the company's passengers as desired to be in Paris in readiness for the flight upon which they were booked to proceed thence to South Africa. From time to time thereafter between Sept. 26 and Nov. 20, 1948, the company requested the appellants

to arrange for the charter of aircraft for the conveyance to Le Bourget airport of such passengers and to hire a coach to transport such passengers from London to Croydon and to arrange for the necessary catering and baggage-handling facilities."

The Case then sets out the various flights which were undertaken by three aircraft companies, which shows that whenever anyone wanted to go by a Mercury aircraft to South Africa there was an aeroplane at his disposal in this country to take him to Le Bourget where he would board the South African aeroplane. A

It is enough for this court to say that they are satisfied that there was evidence on which the magistrate could properly find that there were in this case scheduled journeys undertaken by persons other than the three corporations which are named in the statute. The journeys, in the opinion of the court, were enough to justify the magistrate in holding that there was a systematic service operated in such a manner that the benefits thereof were available to members of the public or such members of the public as desired to fly to South Africa. It is true that the magistrate has found that the offence was committed by the aircraft companies, and that the three aircraft companies had been aided and abetted by the appellants. It is sufficient that there was evidence on which the magistrate could find that an offence had been committed against s. 23, and that, whoever committed the offence, whether it was Mercury Airways, Ltd., or whether it was the aircraft companies, the appellants had aided and abetted the commission of that offence, because it is quite clear that they knew about it. B C

In *Wessel v. Carter Paterson and Pickfords Carriers, Ltd.* (1), this court said that a person could only be convicted—apart from some special exceptions—as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realised that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted an offence and he helped in the actions which constituted the offence, that was enough to convict him of being an aider and abettor. In this case, there cannot be any doubt that the appellants, who themselves made all these arrangements, knew all the necessary circumstances. The circumstances point to the fact that there was here a system, and a system which amounted to scheduled journeys. Therefore, as the appellants knew all the circumstances relating to it, in our opinion, there was ample evidence on which the magistrate could convict of aiding and abetting. For these reasons, this appeal must be dismissed. D E F

**HUMPHREYS, J.:** I agree. I think it is probable that the framers of s. 23 did not envisage a case being brought against travel agents. In my opinion, however, the words of the section are wide enough to cover the facts of this case. I also agree that, in order that a person may be convicted as an aider and abettor of an offence punishable by summary conviction, it must be shown that the unlawful act has been committed, and, therefore, that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that the act was unlawful. G

**JONES, J.:** I agree.

*Appeal dismissed. No order as to costs was applied for.* H  
Solicitors: *Roney & Co.* (for the appellants); *Treasury Solicitor.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]



**WILTSHIRE COUNTY VALUATION COMMITTEE v. LONDON  
CO-OPERATIVE SOCIETY, LTD.**

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.),  
March 29, 30, 1950.]

*Rates—De-rating—Industrial hereditament—Adapting for sale—Cleaning and cooling of milk for transport—Factory and Workshop Act, 1901 (c. 22), s. 149 (1) (c) (iii)—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1).*

An assessment committee held that premises of the respondents which were used to clean and cool milk to prepare it for transport to London was an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, because such premises were "occupied and used . . . as a factory." On appeal,

**HELD:** the process of cleaning and cooling the milk was not adapting an article for sale within the Factory and Workshop Act, 1901, s. 149 (1) (c) (iii), for nothing was done to turn an unfinished article into a finished one or anything analogous thereto, and, therefore, the premises were not a factory and so entitled to be de-rated as an industrial hereditament.

*Sedgwick v. Watney, Combe, Reid & Co., Ltd.* ([1931] A.C. 447), *applied*.

[AS TO RATING RELIEF FOR FACTORIES AND WORKSHOPS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 439-459, paras. 876-887; and FOR CASES, see DIGEST Supp. and 2nd DIGEST Supp.]

FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 3 (1), see HALSBURY'S STATUTES, Vol. 14, p. 715.]

**D** Case referred to:

(1) *Sedgwick v. Watney, Combe, Reid & Co.*, [1931] A.C. 447; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

CASE STATED by quarter sessions under the Quarter Sessions Act, 1849, s. 11.

Premises belonging to the respondents at Bulkington, Wiltshire, were used by them to collect milk and treat it so that it might be freed from impurities and cooled before being sent to London for pasteurization. It was contended by the respondents that the premises were a "factory" within the meaning of the Factories and Workshops Acts, 1901 to 1920, and, as such, free, as an industrial hereditament, from being rated, under the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1). The facts appear in the judgment of LORD GODDARD, C.J.

**F** *Percy Lamb, K.C.*, and *Widgery* for the appellants.  
*Charles E. Scholefield* for the respondents.

**LORD GODDARD, C.J.:** This is a Case stated under s. 11 of the Quarter Sessions Act, 1849, on an appeal to quarter sessions against a decision of the Trowbridge Assessment Committee, and it raises the question whether certain premises belonging to the respondents, the London Co-operative Society, Ltd., are a "factory" within the meaning of the Factories and Workshops Acts, 1901 to 1920, and thereby entitled to the benefit of the de-rating provisions of the Rating and Valuation (Apportionment) Act, 1928. A second point submitted by counsel for the appellants, on which the court does not think it necessary to express any opinion, is whether or not the premises were also used for the purposes of a distributive wholesale business.

The premises, according to the Case Stated, are used as a milk collecting depot from which milk is despatched to London, which is about a hundred miles away, where it is pasteurized. Prior to its despatch the milk is prepared for bulk transport to ensure that it is received in London in good condition and at a proper standard in any weather. It would not, it is stated, be possible to ensure this at all seasons if the milk were sent direct from the farms in churns on rail. The milk is collected by lorries from farms and is then brought to these premises

at Bulkington to be put into tankers for transport to London for pasteurization at the respondents' premises there. It is also found that the pasteurization is rendered commercially necessary because people desire to buy pasteurized milk. "For milk to be pasteurizable, as that term is understood commercially," it is stated in the Case, "the deterioration of the milk must not have proceeded below a certain point at the time when it reaches the pasteurization plant. Except for cleanliness and temperature, no change in the characteristics of the milk takes place as a result of the processes applied at the Bulkington premises." It is also found: "After testing, the churns of milk are received in the milk reception bank and are carried by conveyor belt up to a tipping point, and the milk is there weighed and passed by means of power milk pumps through clarifying machinery to remove extraneous dirt and is cooled by chilled water to a temperature of about 40 deg. From the cooling point the milk is pumped into glass-lined insulating tanks and from these tanks is transferred to stainless steel road tankers owned by the respondents and despatched to London."

The only question on which this court proposes to give a decision is whether or not the process which has been described can fairly be held to be an adapting for sale of an article, because, if there has been an adapting for sale of an article, the premises become a factory within the meaning of the Factories and Workshops Acts, 1901 to 1920, and are entitled to be de-rated. This is a matter of first impression. A decision must be taken as to the meaning of the words "adapting for sale of any article" in the Factory and Workshop Act, 1901, s. 149 (1) (c) (iii). Here the only process which is gone through at the premises in question—and is relied upon by counsel for the respondents as showing that the milk is being adapted for sale—is that the milk passes through a filter so that any dirt which may have got into it is taken out, and the milk is then cooled. When milk comes from the cow it is of a certain temperature, and the farmer cools it before he puts it into the churns. The milk taken to these premises is subjected to a further cooling process. Is that "adapting for sale"?

The case from which this court has derived considerable assistance is *Sedgwick v. Watney, Combe, Reid & Co., Ltd.* (1), where VISCOUNT DUNEDIN, giving the decision of the House of Lords, said ([1931] A.C. 463):

"But the point is whether the treatment that the beer undergoes in these premises is a mere prelude to distribution. I am clearly of opinion that it is not. The finished article that is being prepared for distribution is bottled beer. The beer does not enter the premises as bottled beer. It undergoes treatment, a treatment which changes its quality and makes it from an unpotable and unmarketable article into a potable and marketable one. It is true that the treatment requires the use of a bottle, and that, when the treatment is finished, the bottle and its contents are ready for distribution. But what is really done on the premises is the turning of what I may call an unfinished liquid into a finished one."

LORD DUNEDIN was dealing with beer which was to be sold as bottled beer and as a different article from draught beer. The beer brought into the premises was liquid which was not to be sold as draught beer, but was to be subjected to a process of carbonisation so that it could be bottled and sold as bottled beer. The important words, as it seems to me, in the opinion are:

"The beer does not enter the premises as bottled beer. It undergoes treatment, a treatment which changes its quality and makes it from an unpotable and unmarketable article into a potable and marketable one."

The liquid which enters this factory is milk, and it leaves the factory as milk. The only difference is that it is milk which has been passed through a filter and has been cooled. I cannot myself see that the mere cooling of the milk turns the milk from one article into another. It is true that the reason why it is cooled

is because it will travel better cold than it would if it had not been subjected to some cooling process, but I cannot see that what happens is turning an unfinished liquid into a finished one or into anything analogous thereto. Many commodities which are used for food and drink—for instance, fruit—will deteriorate more rapidly while travelling if some provision is not taken to see that the goods are despatched to their destination at a low temperature, but the goods which are despatched and the goods which arrive are the same thing, though, if they had not been cooled, they would have arrived in a changed condition. In my view, it cannot properly be said that the process of cooling the milk changes it from one article into another. For these reasons I am of opinion that this appeal should be allowed and that the question submitted to the court, which is whether the Bulkington premises are a factory and so within the meaning of the expression “industrial hereditament” in s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, should be answered in the negative.

HUMPHREYS, J.: I agree.

JONES, J.: I agree.

*Appeal allowed with costs.*

Solicitors: *Collyer-Bristow & Co.*, agents for *P. A. Selborne Stringer*, Trowbridge (for the appellants); *Prestons* (for the respondents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

## MERIDEN AND SOLIHULL RATING AUTHORITY AND ANOTHER v. TYACKE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.), March 30, 1950.]

*Rates—Agricultural land—Field used for grazing and turf cutting—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 2 (2)—Local Government Act, 1929 (c. 17), s. 67 (1).*

The respondent, a farmer, finding that one of his fields was infested with parasites which were dangerous to young cattle, decided that the infestation could best be cured by his removing the turf and re-sowing grass. He entered into an agreement with a contractor to buy the turf at a price of £80 per acre and to remove it. The contractor did not remove all the turf at once and meantime the respondent used the field as pasture for fully grown cattle. The rating authority assessed the field for rates on the basis that it was not “agricultural land” within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), and the Local Government Act, 1929, s. 67 (1).

HELD: the field was not “agricultural land” within the sub-sections, and, therefore, the respondent was liable to pay rates.

[FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 2 (2), see HALSBURY'S STATUTES, Vol. 14, p. 714.]

CASE STATED by the rating appeals committee of Warwickshire Quarter Sessions.

Quarter sessions allowed an appeal by the respondent from a decision of the second appellants, the Meriden and Solihull Assessment Committee, on a proposal by the respondent for the amendment of the valuation list in respect of a hereditament described as “land used for turf cutting” of which the respondent was the occupier. The hereditament was a field of about ten acres which had for many years before 1948 been used as permanent pasture. In or about 1940



the field became infested with parasites which had caused the death of young cattle, though the land was suitable for grazing fully grown cattle. To remove the infestation the respondent decided to cut the existing turf and re-sow the grass, and to secure the removal of the infested turf he entered into an agreement with a contractor for its purchase at a price of £80 per acre and its removal. During the period of the removal of the turf and throughout the months during which cattle are usually turned out to graze the respondent used the field to graze fully grown cattle. The method adopted by the respondent to clear the field and improve the pasture was not in accordance with customary or approved agricultural practice.

The first appellants, Meriden and Solihull Rating Authority, objected to the respondent's proposal and the assessment committee upheld the objection. On an appeal by the respondent, quarter sessions were of opinion that the field was used for agricultural purposes on the ground that an attempt by an occupier of land to improve its condition, quality, or utility as agricultural land or permanent pasture by unorthodox methods did not disentitle the land from its statutory exemption as agricultural land from liability for rates whether the method did or did not result in a profit or a loss to the occupier. The rating authority and the assessment committee appealed.

*Rowe, K.C., and J. Ramsey Willis* for the appellants.

*Lloyd-Jones, K.C., and Sunderland* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by the rating appeals committee of Warwickshire Quarter Sessions. It raises a very short point. The Rating and Valuation (Apportionment) Act, 1928, provides, among other things, that agricultural land shall be "de-rated." It is provided in the Act (s. 2 (2) ) that:

" . . . 'agricultural land' means any land used as arable meadow or pasture ground only . . . "

There have been several attempts to get round that wording, but "only" is the governing word. To obtain the exemption the land must be arable meadow or pasture ground only. Quarter sessions have found that the respondent found that one of his fields was infested with parasites. To rid the field of the parasites he decided to cut and remove the turf and then re-sow the field with grass. He proceeded to do this and to sell the turf for £80 an acre to a contractor who also agreed to take it away. Eventually, the contractor did take away some of the turf, and then the respondent re-sowed the land. In the meantime full-grown cattle were allowed to come on the land and feed on such of the turf as had not been taken away. Apparently, the parasites on this land only attacked the young, and not the grown-up cattle. The respondent was selling his turf to the contractor who came in and cut it and took it away as he felt disposed, and the respondent's cattle came in and grazed on so much of the turf as had not been taken away. How it can be said in those circumstances that the respondent was using the land as "arable meadow or pasture ground only" it is difficult to understand. That he was using it as pasture one would concede, but he was not using it as pasture only. He was using it partly as pasture and partly as a source of supply of the turf which he had sold to somebody else. This appeal must be allowed and the case must go back to quarter sessions with an intimation that this land is rateable.

**HUMPHREYS, J.:** I agree.

**JONES, J.:** I agree.

*Appeal allowed with costs. Decision of assessment committee restored.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. Maurice Mell*, Solihull (for the appellants); *Ellis and Fairbairn* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

## FREDERICK PLATTS CO., LTD. v. GRIGOR.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Hodson, J.), March 28, 1950.]

**A** *Rent Restriction—Possession—“Conduct which is a nuisance or annoyance to adjoining occupiers”—Evidence—User of premises by tenant for immoral purpose—No evidence from adjoining occupiers of actual nuisance or annoyance—Right to draw inference from user of premises—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) (a), sched. I, para. (b).*

**B** APPEAL by the landlords from an order of His Honour DEPUTY JUDGE KONSTAM, K.C., made at Marylebone County Court, and dated Jan. 30, 1950, in an action for possession of premises subject to the Rent Restrictions Acts.

**C** The landlords sought possession of a flat, which was within the protection of the Rent Restrictions Acts, on the ground that the tenant had been guilty of conduct which was a nuisance or annoyance to adjoining occupiers, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (b). The county court judge found that the tenant was using the premises for bringing in men and associating with them for immoral purposes, but there was no evidence by adjoining occupiers of premises of actual nuisance or annoyance to them, and the judge held that, in the absence of specific evidence to that effect, conduct which was a nuisance or annoyance to adjoining occupiers could not be inferred in the circumstances, and, therefore, he could not make an order under s. 3 (1) (a) of, and sched. I, para. (b), to, the Act of 1933.

**D** *Sir Shirley Worthington-Evans and R. J. Harvey for the landlords.*

**E** *Elson Rees and P. A. Bruce for the tenant.*

**F** THE COURT held that the learned judge was entitled, though not obliged, to infer from the user of the premises by the tenant that she had been guilty of conduct which was a nuisance or annoyance to adjoining occupiers without specific evidence from them to that effect; he had misdirected himself in thinking that he could not draw this inference, but the misdirection had not led him into giving a wrong answer to the question which he had to decide; and the landlords had failed to establish their claim.

*Appeal dismissed with costs.*

Solicitors: *Trower, Still & Keeling*, agents for *Scott, Turnbull & Kendall*, Leeds (for the landlords); *Samuel Coleman* (for the tenant).

C.St.J.N.

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## MCGILLIVRAY v. STEPHENSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.),  
March 30, 1950.]

*Public Health—Statutory nuisance—Abatement notice specifying manner in which nuisance to be abated—Validity—Power of justices to make nuisance order in terms other than those of abatement notice—Public Health Act, 1936 (c. 49), s. 93, s. 94 (1) (2), s. 95 (1).* A

The respondent was the occupier of premises where he kept pigs in such a manner as to be a statutory nuisance. The local authority served on him an abatement notice under s. 93 of the Public Health Act, 1936, requiring him to abate the nuisance and "for that purpose to remove the whole of the pigs from the premises, clean up the effect of their past presence, and cease for the future to allow the premises to be used for pig keeping at all." The respondent, failing to comply with the notice, was summoned under s. 94 (1) in terms of the notice. The justices dismissed the summons on the ground that (a) the abatement notice was bad, because it required the respondent to abate the nuisance in a specific manner, by discontinuing the use of the premises as a piggery, and (b) because the summons was in the terms of the notice and required the justices to prohibit the premises from being so used, which they had no power to do. On appeal, B

HELD: (1) the abatement notice was a good notice, since its operative part was the request to abate the nuisance and the steps indicated whereby the abatement might be effected could be regarded as mere surplusage. C

(ii) the justices, in making the nuisance order, were not bound to direct the respondent to do exactly what the abatement notice required, but had a complete discretion, if they found that a nuisance existed, to make such order as they saw fit, and, therefore, the case must be remitted to the justices for that purpose. D

[AS TO SUMMARY PROCEEDINGS TO ABATE STATUTORY NUISANCES, see *HALSBURY*, Hailsham Edn., Vol. 24, pp. 97-102, paras. 171-179; and FOR CASES, see *DIGEST*, Vol. 36, pp. 232-239, Nos. 719-780. E

FOR THE PUBLIC HEALTH ACT, 1936, s. 93, s. 94 (1) (2), s. 95 (1), see *HALSBURY'S STATUTES*, Vol. 29, pp. 396, 397.]

Cases referred to:

- (1) *R. v. Wheatley, Ex parte Cowburn*, (1885), 16 Q.B.D. 34; 55 L.J.M.C. 11; 54 L.T. 680; 50 J.P. 424; 36 Digest 236, 756. F
- (2) *Millard v. Wastall*, [1898] 1 Q.B. 342; 67 L.J.Q.B. 277; 77 L.T. 692; 62 J.P. 135; 36 Digest 232, 725.
- (3) *Whatling v. Rees*, (1914), 84 L.J.K.B. 1122; 112 L.T. 512; 79 J.P. 209; 36 Digest 233, 726.
- (4) *Ex parte Whitchurch*, (1881), 6 Q.B.D. 545; *sub nom. Re Nottingham JJ., ex parte Whitchurch*, 50 L.J.M.C. 41; *sub nom. Whitchurch v. Nottingham JJ.*, 45 J.P. 392; 36 Digest 236, 751. G
- (5) *R. v. Horrocks, etc., JJ., Ex parte Boustead*, (1900), 69 L.J.Q.B. 688; 82 L.T. 767; 64 J.P. 661; 36 Digest 237, 757.
- (6) *Ex parte Saunders*, (1883), 11 Q.B.D. 191; 52 L.J.M.C. 89; 47 J.P. 584; 36 Digest 236, 752. H
- (7) *Whitaker v. Derby Urban Sanitary Authority*, (1885), 55 L.J.M.C. 8; 50 J.P. 357; 36 Digest 236, 755.

CASE STATED by South Shields justices.

On Sept. 28, 1949, at a court of summary jurisdiction sitting at Jarrow, a complaint preferred by the appellant, the clerk to the Boldon Urban District Council, against the respondent for non-compliance with an abatement notice



A under s. 93 of the Public Health Act, 1936, was dismissed. The justices were of the opinion that, although a *prima facie* case against the respondent was made out, the notice was bad in that it specified the manner in which the respondent should abate the nuisance, namely, by discontinuing the use of premises as a piggery, and gave no alternative, so that if he abated the nuisance by any other means he might still be said not to have complied with the notice, and, further, that the summons was in the same terms as the notice and required the justices to prohibit the use of the premises as a piggery, which they had no power to do.

*Simes, K.C.*, and *Norman Harper* for the appellant.

*Ashe Lincoln, K.C.*, and *Hurwitz* for the respondent.

B LORD GODDARD, C.J.: This is a Case stated by justices for South Shields in the county of Durham on a complaint by the appellant, who is the clerk of the Boldon Urban District Council. The complaint was made under the Public Health Act, 1936, and was

C " . . . for that on July 14, 1949, a notice under s. 93 of the Public Health Act, 1936, was served on the respondent as the person by whose act default or sufferance the nuisance arose requiring him to abate a nuisance, namely, foul smells caused by the improper keeping of pigs, and for that purpose to remove the whole of the pigs from the premises, clean up the effect of their past presence, and cease for the future to allow the premises to be used for pig keeping at all, and that the respondent had made default in complying with the requirement of the said notice, and D calling upon the respondent to show cause why an order should not be made requiring him to comply with the requirements of the said notice or otherwise to abate the said nuisance and to execute any works necessary for the purpose and prohibiting a recurrence of the said nuisance and requiring him to execute any works necessary to prevent a recurrence."

E The respondent was the occupier of a large property part of which was occupied by 264 pigs. In the dry weather the neighbours complained because the stench arising from the pigs was offensive. Accordingly, the sanitary inspector visited the place, came to the conclusion that a nuisance was caused by this extensive pig keeping, and served a notice on the respondent in the terms which I have read. As nothing was done, the respondent was brought F before the justices who dismissed the complaint. They stated the reason for their decision as follows:

G " . . . the appellant had established a *prima facie* case that a statutory nuisance had existed and that there was a case for the respondent to answer, but we considered (a) that the abatement notice was bad on the grounds that it required the respondent to abate the nuisance in a specific manner, namely, by discontinuing the use of the premises for a piggery, and gave him no alternative, so that, if he had abated the nuisance by any other means, he might still be said not to have complied with the abatement notice; (b) that the summons issued was in the terms of the abatement notice and required the justices to prohibit the premises from being used as a piggery, and that, under s. 93 of the Act, the justices H considered that they had no power to make such a prohibition and that the remedy sought by the appellant should have been taken under s. 100 of the Act."

If the scheme of the Act is studied, it is clear that every step taken in this case was perfectly regular and that the justices had a complete discretion, if they found a nuisance existed, to make such order as they thought fit. By s. 92 (1) a statutory nuisance is defined. For the purpose of this case it is enough to say that a statutory nuisance is of the class specified in the Act

which can be dealt with by a court of summary jurisdiction. Section 93 provides:

"Where a local authority are satisfied of the existence of a statutory nuisance, they shall serve a notice (hereinafter in this Act referred to as 'an abatement notice') on the person by whose act, default or sufferance the nuisance arises or continues . . . requiring him to abate the nuisance and to execute such works and take such steps as may be necessary for that purpose."

There is no doubt that the abatement notice in this case complied with the requirements of that section. "As may be necessary," of course, means as the local authority think necessary, because they are the people serving the notice. They told the respondent what steps they thought were necessary to abate the nuisance, although in their notice they need not call on him to execute any particular works. It is enough if they tell him to abate the nuisance. Section 94 provides:

"(1) If the person on whom an abatement notice has been served makes default in complying with any of the requirements of the notice, or if the nuisance, although abated since the service of the notice, is, in the opinion of the local authority, likely to recur on the same premises, the authority shall cause a complaint to be made to a justice of the peace, and the justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction. (2) If on the hearing of the complaint it is proved that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, then, subject to the provisions of sub-sections (4) and (5) of this section the court shall make an order (hereinafter in this Act referred to as 'a nuisance order') for either, or both, of the following purposes—(a) requiring the defendant to comply with all or any of the requirements of the abatement notice, or otherwise to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose; (b) prohibiting a recurrence of the nuisance, and requiring the defendant, within a time specified in the order, to execute any works necessary to prevent a recurrence; and may also impose on the defendant a fine not exceeding five pounds."

By s. 95 (1) it is provided that, if a person neglects to obey the order of the justices, he is liable to a penalty of £5 and £2 a day as long as the nuisance continues.

Where, in my view, the justices have erred is in considering that when the respondent is brought before them they must, if they find a nuisance, follow the words of the abatement notice and order him to do exactly what that notice has directed him to do, and, therefore, if they think, as they seem to have considered in this case, that the abatement notice went too far, they could not make an order at all. That is an entire misapprehension of the situation. It is entirely contrary to what several cases to which our attention has been called have laid down. It is for the justices to say what is to be done. They must first order the respondent to abate the nuisance. They can then go on to order him to do such things as they consider necessary to effect the abatement. No doubt, they would pay great attention to what the local authority consider should be done, because they would want evidence as to the best way that the nuisance could be abated, but the decision is the decision of the justices. It is clearly laid down in the Act that it is for them to consider whether or not the nuisance exists, whether or not it has been abated, and whether it still exists, and, if it does, it is for them to consider which of the requirements of the abatement notice are to be carried out or how otherwise the nuisance is to be abated. They have full jurisdiction to say: "We are satisfied

that there is a nuisance here, but we are not going to order you to do what the local authority say you are to do because we think it can be done in another and cheaper way or in a more effective way." Alternatively they may say: "We think the best way to do it is to follow what the local authority have said you are to do."

A The other objection to which the justices have given effect is that the notice requires that the respondent should cease keeping pigs. I agree that they have no power to issue an injunction against keeping pigs, but what they can say is: "You have to stop this nuisance, and, if the only way is to stop keeping pigs, you will have to do so because if you do not you will be fined £2 a day for every day the nuisance continues."

B The Case must, therefore, go back to the justices with an intimation that they did not come to a correct determination and decision in point of law, that the notice was a good notice, that it was for them to order the nuisance to be abated and to lay down any particular steps which in their opinion were required for the abatement of the nuisance and to prohibit its recurrence, and, if to comply with the order abating the nuisance the respondent has to cease keeping pigs, that is a matter for him. Therefore, this appeal is allowed with costs.

C **HUMPHREYS, J.:** I agree. There seems to have been, as my Lord has said, a confusion in the minds of the justices between the requirements of the notice which is served by the local authority and the order which can be made only by the justices themselves. *R. v. Wheatley* (1) is authority for the proposition that, if, in the opinion of the local authority, the abatement of a statutory  
D nuisance necessitates certain works being done, the authority must specify by their notice what those works are to be. There is equally the authority of a Divisional Court in *Millard v. Wastall* (2) to the effect that where no specific works are required, it is a perfectly good notice if it calls on the recipient "to abate the nuisance and for that purpose to abstain at all times from doing or suffering to be done anything which will cause a recurrence of that nuisance."  
E In that case the nuisance was black smoke issuing from a chimney, and, in the view of the local authority, it was not necessary to execute any particular works to prevent black smoke issuing. There the justices made very much the same mistake as has been made by the justices in the present case, in thinking that it was necessary that the works to be executed should be stated. DAY, J., however, said ([1898] 1 Q.B. 343):

F "Where any works are necessary to the abatement of a particular nuisance, and the notice calls upon the person responsible for the nuisance to do the necessary works, the notice must specify what those works are. But here the notice did not call upon the appellant to do any works at all; it simply required him to abstain from permitting black smoke to issue from his chimney."

G He and LAWRENCE, J., held that that was a good notice under the terms of the statute.

In the present case the nuisance consisted of foul smells caused by the improper keeping of pigs and the notice required that that nuisance should be abated. That is the important term of the notice. It goes on to say:

H "... and for that purpose you are required to remove the whole of the pigs from the premises, clean up the effect of their past presence, and cease for the future to allow the premises to be used for pig keeping at all."

It is clear, as my Lord has pointed out, that that part of the notice did not compel the justices, if they were going to order the nuisance to be abated, to follow those words and to order that the keeping of pigs should cease, and the view I take is that those words are mere surplusage.



This case would have been unarguable if it had not been for a decision of a Divisional Court in *Whatling v. Rees* (3). That, however, was a peculiar case very unlikely to recur, and AVORY, J., in particular, based his judgment almost entirely on the special facts that the nuisance consisted of water in a cellar. It turned out that there was a spring under that cellar and that it would have been useless to carry out the work which it was thought the notice intended to require, which was to drain the cellar, because, as AVORY, J., said (84 L.J.K.B. 1124), the water would immediately have risen again. There was an argument whether or not the terms of the notice meant, not only that the cellar should be drained, but that something should be done to prevent the water getting there, and that, said the court, was an ambiguous notice. On those lines the case would be easy enough to follow, but, if it were not for the peculiar facts, I confess I should have difficulty in understanding the judgment of the court. In general, I entirely agree with everything said by my Lord regarding the present case and with the judgment he proposed.

JONES, J.: I agree.

*Appeal allowed with costs; case remitted.*

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Patterson, Glenton & Stracey*, South Shields (for the appellant); *Torr & Co.*, agents for *Huntly, Foster, Bretherton & Ditchburn*, Sunderland (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

## R. v. BRIGHTON AND AREA RENT TRIBUNAL. *Ex parte* MARINE PARADE ESTATES (1936), LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.),  
March 28, 29, 1950.]

*Rent Control—Rent tribunal—Procedure—Need to hear parties or evidence—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1 (1)—Landlord and Tenant (Rent Control) Regulations, 1949 (S.I. 1949, No. 1096), regs. 4, 5, 8 (1).*

Tenants of service flats (the services including central heating, constant hot water, porters and lifts) which had first been let after Sept. 1, 1939, applied to a rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1) to determine what rents were reasonable for the flats in question. At the hearing, counsel on their behalf made statements which were accepted as accurate, but called no evidence. The landlords called witnesses who were not cross-examined and the figures submitted by one of whom, showing that, on the existing rents the landlords were already making a loss on the flats, the tribunal did not examine. The tribunal made reductions in rents averaging £50. On motions for *certiorari* to quash the proceedings and for *mandamus* to direct the tribunal to hear and determine according to law,

HELD: the Landlord and Tenant (Rent Control) Act, 1949, did not require that proceedings of a rent tribunal under the Act should necessarily involve a hearing like that of a court, but contemplated that the tribunal might act on its own knowledge and information, without evidence, unless submitted, and without a hearing except on notice from a party, and as the tribunal had observed all the formalities of the Act, had offended against none of its provisions or against the regulations made under it, there was no ground for holding that the tribunal's determination was

not in accordance with law, and, therefore, the motions for *certiorari* and *mandamus* should be refused.

*Per curiam*: the fact that a loss was already being made by the landlords on the flats was not conclusive as to the reasonableness of the rents being charged.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1 (1), see A HALSBURY'S STATUTES, Second Edn., Interim Service, p. 289.]

Case referred to:

(1) *R. v. Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane), Ltd.*, [1940] 4 All E.R. 132; [1941] 1 K.B. 53; 110 L.J.K.B. 6; 165 L.T. 43; 104 J.P. 428; Digest Supp.

B MOTION by the landlords for an order of *certiorari* to bring up and quash orders made by a rent tribunal on Sept. 21, 1949, under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), whereby, on applications made to the tribunal by tenants to fix reasonable rents of flats owned by the landlords, they reduced the rents of the flats. The landlords also moved for orders of *mandamus* ordering the tribunal to hear and determine the applications according to law. The landlords contended that the tribunal's order was contrary to the evidence and that the tribunal had failed to act in accordance with the principles of natural justice.

*Gardiner, K.C.*, and *Alan Campbell* for the landlords.

D *The Attorney-General (Sir Hartley Shawcross, K.C.)* and *J. P. Ashworth* for the rent tribunal.

LORD GODDARD, C.J.: Counsel for the landlords moves for orders of *certiorari* and *mandamus* addressed to the Brighton and Area Rent Tribunal to bring up and quash orders made by them in respect of the rents of certain flats, Nos. A5, C4, D4 and D5, Marine Gate, Brighton, or to hear and determine those applications according to law. The flats in question are contained in a large building in Brighton and are dwellings in which professional men and persons in that station of life live. These flats were all let for the first time after Sept. 1, 1939. *Prima facie*, therefore, the rents at which they were first let, which were substantial, became, by virtue of the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, the standard rents, and, on application being made, were subject to review by a tribunal in accordance with s. 1 (1) of the Landlord and Tenant Act, 1949. Certain of the tenants considered that they were paying too much in rent and sought to obtain a reduction under the Act of 1949. Accordingly, they submitted to the tribunal the statutory forms, showing the position and giving a description of the premises, indicating who the landlords were, the rents at which the premises were held, whether the tenant or landlord bore the rates, what services the landlord undertook to provide, and the rateable value. In addition to accommodation, the tenants were provided with central heating, constant hot water, the services of porters, and the use of lifts, and other amenities were going to be provided. The amenities and accommodation were those usually offered in a block of modern flats.

H When the matter came before the tribunal, the tenants called no evidence, but counsel who appeared for them made certain statements which were accepted as accurate. Several witnesses were called on behalf of the landlords, and they gave evidence at length and do not seem to have been cross-examined. One of the witnesses proffered to the tribunal certain schedules showing figures, but the tribunal did not examine them. That must be a matter entirely for the discretion of the tribunal. The tribunal reserved their judgment, and subsequently they gave a decision in each case, making a substantial reduction in the rent, the average reduction being about £50.

The landlords complain that they showed on the figures produced that with the existing rents they were getting no return, but were, in fact, making a loss on the building, and that with the reduced rents they would make a still further loss and might have to go into liquidation. How far that should be taken into account is a matter which the tribunal must decide for itself, but it certainly cannot be conclusive. A speculator—I am not using that expression offensively—who goes in for buying and selling properties, might well buy a house at a time when prices were high. He might divide it into tenements or flats and let them at rents which would show a profit to him, but the tribunal could not, in my opinion, be debarred from saying in any particular case: “The rent which you are charging is excessive for the accommodation which you are offering. The tenant ought to be required to pay, not £x, but only £x-y.” If that is the fair price for the accommodation it would be no answer for the landlord to say: “If he only pays that, I must go out of business.” It may be a hardship, but we cannot see that that of itself is a reason for saying that a rent which has been fixed by a landlord is necessarily fair.

The real complaint is that the tribunal disregarded the principles of natural justice, and it is said that in such a case *certiorari* will lie to bring up their decision, or that, alternatively, *mandamus* will lie directing the tribunal to hear and determine according to law. We have had argument on either side, with the citation of many cases, as to whether *certiorari* will lie where this court finds that an inferior court or tribunal has acted contrary to natural justice. It is not necessary to decide which of the two orders would have been appropriate if we had come to the conclusion that one or other should issue because the court has formed the opinion, in one sense reluctantly, that they cannot interfere in this case or issue either *mandamus* or *certiorari* in respect of these decisions.

The object of the Act of 1949, as is conceded on both sides, was to deal with rents which became standard rents after Sept. 1, 1939, because the premises were first let then. Accommodation was not so scarce at the beginning of the war as it subsequently became. In great cities, especially those exposed to enemy action, accommodation became severely limited by the amount of destruction which took place. Rents tended to rise to such a height that Parliament thought it was necessary to say, in effect: “Although in September, 1939, it was provided that the standard rents of these premises were to be the rents at which they were first let after Sept. 1, that must now be modified because those rents may be excessive.” Accordingly, it was enacted that the standard rents should be open to review by tribunals which were already in existence, having been set up to deal with furnished lettings under the Furnished Houses (Rent Control) Act, 1946.

The Landlord and Tenant (Rent Control) Act, 1949, s. 1, provides:

“(1) Where apart from this section the standard rent of a dwelling-house would be—(a) the rent at which it was let on a letting beginning after Sept. 1, 1939, or (b) an amount ascertainable by apportionment of the rent at which a property of which it formed part was let on such a letting as aforesaid (whether such an apportionment has been made or not), then, subject to the provisions of this section, the landlord or the tenant may make application to the tribunal to determine what rent is reasonable for that dwelling-house, and on any such application the tribunal shall determine that rent and shall notify the parties of their determination: Provided that an application shall not be made in respect of a dwelling-house if a previous application in respect thereof has been made under this sub-section.”

That proviso is very sweeping because it does not allow a landlord who may be put to great expense—especially in the case of flats by reason of rising wages, increases in the price of coal, and so forth—to go later to the rent



tribunal and ask that a rent which has been lowered should be increased. It is, however, not for us to express an opinion on the policy of the Act.

By the Landlord and Tenant (Rent Control) Regulations, 1949 (S.I. 1949, No. 1096), reg. 3, the Minister of Health, pursuant to powers conferred on him by s. 5 (2) (b) and s. 6 (5) of the Act of 1949, provided:

A "All applications under the Act to a tribunal shall be made in writing, and shall specify the address of the dwelling-house to which the application relates, the names of the landlord and tenant and the address of the landlord."

By reg. 4:

B "Where an application is made to a tribunal, the tribunal shall give notice in writing to each party to the tenancy of the dwelling-house in respect of which the application is made informing him that he may within such time as the tribunal may allow (not being less than seven days from the date of the notice) give notice to the clerk of the tribunal that he desires to be heard by them, or may send to the clerk of the tribunal representations in writing."

C The tenant, having made his application on the prescribed form, may—not "must"—apply to be heard in person, or he may make representations in writing. If he makes such representations, the tribunal must consider them, but there is no provision that the landlord may call on the tenant to be produced for cross-examination on that statement.

By reg. 5:

D "If either party to the tenancy informs the clerk of the tribunal that he desires to be heard the tribunal shall give to each party not less than seven clear days notice in writing of the time and place at which the parties will be heard."

E That, again, is significant. It is only if the parties give notice that they desire to be heard that they are to have notice of the time when and place at which the tribunal will consider the matter. The tribunal must consider the matter once the statutory form has been sent in. Therefore, it is clearly the intention of the Act and of these regulations that the tribunal may proceed and give a decision without hearing either party unless a party states that he wishes to be heard. Obviously, therefore, Parliament intended the procedure of these tribunals to be of the most informal nature. No court can proceed to hear a case without having some evidence before it, nor can it give any judgment affecting a person's rights to property unless that person not only is before the court, but also has an opportunity of cross-examining the other party. Parliament, however, has said that the ordinary procedure to which lawyers are accustomed shall not apply to these cases. The reason is probably, as the Attorney-General has stated, that it was supposed that the great majority of cases to be dealt with under the Act would concern small working-class properties, unfurnished lodgings, or separate rooms in houses. It is provided, however, by reg. 7:

H "At any hearing before a tribunal any interested party may appear in person or by counsel or a solicitor or by any other representative or may be accompanied by any person whom he may wish to assist him at the hearing."

By reg. 8:

"(1) Subject to the provisions of these regulations the procedure at a hearing shall be such as the tribunal may determine, and the tribunal may, if they think fit, and at the request of either party shall, unless for some special reason they consider it undesirable, allow the hearing to be held in public. (2) The tribunal may postpone or adjourn the hearing from time to time as they think fit."

The procedure which I have indicated can only work if the tribunal can act on their own knowledge and on their own inspection. If the evidence of witnesses is tendered I have no doubt it is the duty of the tribunal to hear them, and, if cross-examination of such witnesses is desired, it is the duty of the tribunal to allow that cross-examination. If the other side wish to call evidence in reply, it is, again, their duty to allow it, but these tribunals can act without having any evidence before them. Neither party need appear or file any statement in writing unless he wishes. A tenant can merely ask the tribunal to fix a proper rent, and if he does so the landlord can appear, or submit a statement, or call any evidence he likes. How, therefore, can it be said that the tribunal in the present case have offended against the rules of justice according to the statute and the regulations? These proceedings have not been conducted in a way which would be tolerated in an ordinary court, but the ordinary courts do not have statutes which permit them to act on their own knowledge and without any evidence. Here the formalities prescribed by the Act were observed. The tenants instructed counsel, but they did not think fit to give evidence themselves—a matter which might have weighed very strongly with the tribunal, but, apparently, it did not. Counsel for the tenants made statements. It would be very odd if we had to quash these proceedings because, although those statements might have been put into writing, they were made by counsel instead. If counsel had made a statement of fact which was not accepted or which turned out to be incorrect, different considerations might have arisen, but no one disputes that the statements were absolutely accurate. The tribunal heard all the evidence which was submitted to them by the landlords, and, having done so, they were not bound to accept the figures which were put before them. That is clear from *R. v. Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane), Ltd.* (1), to which we have been referred. They gave their decision after they had heard all that evidence, and, by so doing, they did not offend against any provision of the statute or of the regulations.

While it would be improper for us in any way to question the policy of the Act, I feel that possibly it might be a more satisfactory state of affairs if there were some method of appeal to a central tribunal, such as has so often been provided for where these *ad hoc* tribunals have been set up. Though one recognises to the full the virtue and value of these tribunals and of their inquiries being held in an informal manner, it is unfortunate if conflicting decisions are given by different tribunals in different parts of the country without there being any method through some appellate tribunal of co-ordinating and correcting the decisions. That, however, is a matter for the legislature and not for this court to take into account. For the reasons given these applications fail and must be dismissed.

**HUMPHREYS, J.:** As far as I am concerned, the judgment which my Lord has given is the judgment of the court.

**JONES, J.:** I agree.

*Applications for mandamus and certiorari dismissed.*

Solicitors: *Stanley Johnson & Allen* (for the landlords); *The Solicitor, Ministry of Health* (for the rent tribunal).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL v. ST. AUBYN (L.M.)  
AND OTHERS (No. 2).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.),  
March 6, 7, 8, 9, 10, 13, April 5, 1950.]

*Estate Duty—Determination of life interest—Exclusion of deceased from benefit  
“by contract or otherwise”—“Property in which the interest subsisted”—  
Transfer of assets of settlement to company for cash payable partly by instal-  
ments—Trustees transferring some cash and title to instalments to life tenant  
absolutely—Trustees and life tenant purchasing shares of company—  
Extinguishment of life tenant’s interest in assets remaining settled—  
Application of “statutory hypothesis”—Finance Act, 1940 (c. 29), s. 43 (1),  
(2), s. 56 (1), (2).*

Under a re-settlement dated Apr. 26, 1879, and a deed poll dated Jan. 9, 1905, certain freehold estates, investments representing capital moneys, and equitable interests were held on such trusts as the deceased and P. should by deed or deeds jointly appoint, and, in default and pending such appointment, in trust for the deceased for life with remainders over. On Mar. 21, 1927, a company limited by shares was registered with a nominal capital of £200,000 divided into two hundred thousand shares of £1 each, and each of the seven subscribers to the memorandum took one ordinary share as nominee for the trustees of the re-settlement. By a deed poll dated Mar. 23, 1927, the deceased and P., in exercise of their joint general power of appointment, varied the provisions of the re-settlement in such a way as to authorise the sale of the settled property to the company in consideration wholly or partly of a capital sum of money payable by instalments or of debentures or other securities, shares or stock of the company. On Mar. 24, 1927, an agreement was made between the deceased, P. and the company whereby it was agreed that the whole of the settled property should be sold to the company in consideration of (a) £950,000 to be paid in cash by the company to the trustees on completion of the sale, and (b) £750,000 to be paid by the company to the trustees by forty half-yearly instalments of £18,750 each without interest (unless default were made in payment of instalments). The sale was completed accordingly, the deceased, as tenant for life under the Settled Land Act, 1925, conveying the legal estate in the freehold land and the trustees of the re-settlement conveying the equitable interests and the investments (the deceased joining in the conveyance of equitable interests and directing the transaction as tenant for life), and the company paying £950,000 to the trustees by means of a cheque drawn by the company against an advance made by its bankers for the purpose. Out of the money so obtained, the trustees expended £849,993 in subscribing for ordinary shares of the company, and this, with the seven shares already held by the subscribers to the memorandum as nominees for the trustees, made the trustees the holders of fifty thousand ordinary shares of the company. The trustees advanced a sum of £100,000 to the deceased (apparently in anticipation of the forthcoming enlargement of his life interest in that amount into an absolute interest), thus absorbing the £950,000 paid to them by the company, and with the money so advanced the deceased subscribed for one hundred thousand preference shares of £1 each of the company at par. By a deed poll dated Mar. 28, 1927, the deceased and P., in exercise of their joint general power of appointment, directed and appointed that the said sum of £100,000 advanced by the trustees to the deceased and the said sum of £750,000 payable by the company to the trustees by forty half-yearly instalments as aforesaid (and any interest thereon) should be held in trust for the deceased absolutely instead of for



his life only. On Mar. 29, 1927, by a further deed poll, the deceased and P., in further exercise of their joint general power of appointment, extinguished the deceased's life interest in the property remaining subject to the trusts of the re-settlement and declared other trusts which excluded the deceased from all benefit.

The result of all the above transactions was that the property remaining settled consisted of fifty thousand ordinary shares of the company, in which the deceased had no interest, and that £100,000 (used by the deceased for the purchase of one hundred thousand preference shares of £1 each of the company) and the forty half-yearly instalments of £18,750, had become the absolute property of the deceased. All the property which was previously comprised in the settlement had been vested in the company. On Nov. 10, 1940, the deceased died, and it was admitted that estate duty was payable in respect of his one hundred thousand preference shares and of the remaining instalments of the sum of £750,000 then due, which were the deceased's absolute property. The Crown also claimed duty in respect of the fifty thousand ordinary shares of the company, and this claim was the subject of the present litigation. It was admitted that the company was one to which s. 56 (2) of the Finance Act, 1940, applied.

**HELD:** on the application of the "statutory hypothesis" imposed by s. 56 (1) of the Act of 1940, "the property in which the interest subsisted" within the meaning of s. 43 (2) (a) of that Act must be taken as being the settled property as it stood before the sale to the company, and, therefore, it was clear that the determination of the deceased's life interest did not take effect "to the entire exclusion" of the deceased "and of any benefit to him by contract or otherwise" as required by s. 43 (2), inasmuch as he retained the right to receive the forty instalments of £18,750 each, which benefit continued down to the date of his death. Even if, however, "the property in which the interest subsisted" must be considered as consisting only of the residue of the settled property after provision for the forty instalments and the capital sum of £100,000, the benefit taken by the deceased (the right to receive the forty instalments), though not taking effect out of the "property in which the interest subsisted," was so clearly referable to and connected with the determination of the deceased's life interest in that property as to exclude exemption under s. 43 (2).

*A.-G. v. Seccombe* ([1911] 2 K.B. 688), explained.

[FOR THE FINANCE ACT, 1940, ss. 43 and 56, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 470, 486.]

Cases referred to:

- (1) *A.-G. v. St. Aubyn*, [1950] 1 All E.R. 79.
- (2) *A.-G. v. Worrell*, [1895] 1 Q.B. 99; 64 L.J.Q.B. 141; 71 L.T. 807; 59 J.P. 467; 21 Digest 12, 54.
- (3) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490; Digest Supp.
- (4) *Re Cochrane*, [1906] 2 I.R. 200; 21 Digest 17, 83i.
- (5) *Munro v. Stamp Duties Comr.*, [1934] A.C. 61; 103 L.J.P.C. 18; 150 L.T. 145; Digest Supp.
- (6) *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co., Ltd.*, [1943] 1 All E.R. 525; [1943] A.C. 425; 112 L.J.P.C. 55; 169 L.T. 414; 2nd Digest Supp.
- (7) *A.-G. v. Seccombe*, [1911] 2 K.B. 688; 80 L.J.K.B. 913; 105 L.T. 18; 21 Digest 13, 59.
- (8) *Inland Revenue Comrs. v. Wesleyan and General Assce. Society*, [1948] 1 All E.R. 555; [1948] L.J.R. 948; 2nd Digest Supp.

APPEAL by the Crown from an order of CROOM-JOHNSON, J., dated May 20, 1949, made on an English information laid by the Attorney-General.

The Crown claimed estate duty under the Finance Act, 1894, s. 1, by virtue of the provisions of the Finance Act, 1940, s. 43, if and so far as necessary supplemented by s. 56 (2) of that Act, or, alternatively, by virtue of s. 46 of that Act. CROOM-JOHNSON, J., rejected the arguments of the Crown, and gave judgment for the taxpayers with costs.

*The Solicitor-General (Sir Frank Soskice, K.C.), Upjohn, K.C., and J. H. Stamp for the Crown.*

*Sir Andrew Clark, K.C., and N. C. Armitage for the taxpayers.*

*Cur. adv. vult.*

Apr. 5. JENKINS, L.J., read the following judgment of the court. In this case estate duty is claimed by the Crown to have become payable on the death, on Nov. 10, 1940, of John Townshend, second Baron St. Levan (whom we will call "the deceased"), either (i) under s. 43, if and so far as necessary supplemented by s. 56 (2), of the Finance Act, 1940, on the principal value (ascertained in accordance with s. 55 (2) of the same Act) of the ordinary shares of the defendant company; or, alternatively, (ii) under s. 46 of that Act on a proportion of the assets of the defendant company valued in accordance with s. 50 and subject to the provisions against duplication of charge contained in s. 51 (2). The Solicitor-General, on behalf of the Crown, while not admitting that the two claims are not capable in principle of cumulative application, concedes that they should be treated as alternatives for the purposes of the present case. By his judgment, dated May 20, 1949, CROOM-JOHNSON, J., rejected both claims and dismissed the information, and from that judgment the Crown now appeals. We will deal first with the claim under s. 43 and s. 56 (2) of the Act.

It is unnecessary to repeat what was said in the judgment of this court in *A.-G. v. St. Aubyn* (1) about the history of this legislation. It will, however, be convenient to begin by setting out the relevant provisions of the two sections. Section 43, so far as material for the present purpose, provides:

"(1) Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession,—(a) if apart from the disposition or determination the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death . . . (2) Where the relevant disposition or determination was *bona fide* effected or suffered three years before the death (or, if it was effected or suffered for public or charitable purposes, one year before the death), the preceding sub-section shall not have effect—(a) if *bona fide* possession and enjoyment of the property in which the interest subsisted was assumed immediately thereafter by the person becoming entitled by virtue of or upon the disposition or determination and thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise; or (b) in the case of a partial determination, if the conditions specified in the preceding paragraph were not satisfied by reason only of the retention or enjoyment by the deceased of possession of some part of the property, or of some benefit, by virtue of the provisions of the instrument under which he had the interest: Provided that nothing in this sub-section shall be construed as affecting any charge of estate duty arising otherwise than by virtue of the provisions of the preceding sub-section . . . (6) This section shall have effect only in relation to a person dying after the commencement

of this Act, and s. 11 of the Finance Act, 1900, and ss. 35 and 39 of the Finance Act, 1930, shall not have effect in relation to such a person."

Section 56 provides:

"(2) Where a company to which this section applies was concerned in the disposition or determination of an interest limited to cease on a death effected or suffered as mentioned in sub-s. (2) of s. 43 of this Act, or in a surrender made as mentioned in sub-s. (3) of s. 48 of this Act, or was concerned in any one or more of associated operations of which the disposition or determination or surrender formed one, the conditions as to the entire exclusion of the person who had the interest or of the deceased, and of any benefit to him, specified in the said sub-s. (2) or in the said sub-s. (3) as the case may be, shall be treated as having been satisfied if and only if they would have been so treated in the circumstances aforesaid."

The "circumstances aforesaid" referred to in s. 56 (2) are defined in sub-s. (1) of the same section as

"the following circumstances, namely, if the assets of the company had been held by it on trust for the members thereof and any other person to whom it is under any liability incurred otherwise than for the purposes of the business of the company wholly and exclusively, in accordance with the rights attaching to the shares in and debentures of the company and the terms on which any such liability was incurred, and if the company had acted in the capacity of a trustee only with power to carry on the business of the company and to employ the assets of the company therein."

Reference should also be made to the definitions of the terms "associated operations" and "disposition" contained in s. 59 which are in these terms:

" 'Associated operations' means any two or more operations of any kind being,—(a) operations which affect the same property or one of which affects some property and the other or others of which affect property which represents, whether directly or indirectly, that property, or income arising from that property, or any property representing accumulations of any such income; or (b) any two operations of which one is effected with reference to the other, or with a view to enabling it to be effected or to facilitating its being effected, and any third operation having a like relation to either of those two, and any fourth operation having a like relation to any of those three, and so on; whether those operations are effected by the same person or by different persons, whether they are connected otherwise than as aforesaid or not, and whether they are contemporaneous or any of them precedes or follows any other; . . . 'Disposition' includes any trust, covenant, agreement or arrangement, whether made by a single operation or by associated operations, and also, in relation to shares in or debentures of a company, the extinguishment or any alteration of rights attaching thereto, whether effected by a single operation or by associated operations."

The claims for duty arise in the following circumstances. At the date of the registration of the defendant company, to which we are about to refer, certain freehold estates in the counties of Devon and Cornwall together with certain investments representing capital moneys and certain equitable interests representing former undivided shares in land were, by the joint effect of a re-settlement dated Apr. 26, 1879, and a deed poll dated Jan. 9, 1905, and in the events which had happened, held (so far as is material for the present purpose) on such trusts as the deceased and one Sydney Alexander Ponsonby (whom we will call "Mr. Ponsonby") should by any deed or deeds, with or without power of revocation and new appointment, from time to time jointly appoint, and in default of and until and subject to any such joint appointment in trust for the deceased for life with remainders over. The deceased had had no



male issue (and, in fact, never afterwards had any) and the position under the re-settlement was that, subject to any exercise of the above-mentioned joint power of appointment and in default of male issue of the deceased, the settled property would pass on his death to his nephew, Francis Cecil St. Aubyn, as next tenant for life, with remainder to such nephew's eldest son, John Francis Arthur St. Aubyn, subject to a charge for portions contingently payable to such nephew's four younger children. The legal estate in fee simple in the settled freeholds was vested in the deceased as tenant for life under the provisions of the Settled Land Act, 1925, and the trustees of the settlement for the purposes of that Act were one Francis Dudley Williams Drummond and Mr. Ponsonby (to whom we will refer as "the trustees"). On Mar. 21, 1927, the defendant company was registered under the Companies Acts, 1908-1917, as a company limited by shares with a nominal capital of £200,000 divided into two hundred thousand shares of £1 each, and with a provision in its memorandum of association to the effect that any of its capital might be issued with (*inter alia*) such preferential rights as might be thought expedient. The seven subscribers to such memorandum (who included the deceased and Mr. Ponsonby) each agreed to take one share, and these seven shares were admittedly taken by them as nominees for the trustees. By a deed poll dated Mar. 23, 1927, the deceased and Mr. Ponsonby, in exercise of their joint general power of appointment, varied the provisions of the re-settlement (in effect) so as to authorise the investment of capital moneys in any debentures, debenture stock or other securities, or any shares or stock of or in the defendant company, and so that any of the same might be subscribed for at such premium as the defendant company might require, and, further (in effect), so as to authorise the sale of equitable interests representing former undivided shares in the land comprised in the re-settlement for any such debentures, debenture stock or shares as aforesaid (with a like provision as to subscription at a premium), and, further, so as to confer on the deceased as tenant for life certain extended powers in addition to those conferred on him by the re-settlement and the Settled Land Act, 1925, consisting (in effect, of (a) power to sell the whole or any part of the settled land to any purchaser (including a company) in consideration wholly or partially of a capital sum of money payable by instalments, the whole of which should be capital money and should not carry interest in respect of any part thereof for the time being unpaid, except that any instalment not paid within twenty-one days after becoming due might be made to carry interest at any rate as from the date on which it became due, and (b) power to effect any such sale to the defendant company for a consideration consisting wholly or partially of fully paid debentures or debenture stock or other securities or of shares or stock of the defendant company.

By an agreement dated Mar. 24, 1927, and made between the deceased, of the first part, the deceased and Mr. Ponsonby, of the second part, and the defendant company, of the third part, it was (so far as is material for the present purpose) agreed:—(i) that the deceased in exercise of his statutory and additional powers as tenant for life should sell and the defendant company should purchase all the freehold property then subject to the re-settlement; (ii) that the deceased and Mr. Ponsonby in exercise of their joint general power of appointment should direct the sale to the defendant company of the investments therein mentioned (being investments representing capital moneys arising under the re-settlement) and also all the equitable interests then subsisting in respect of former undivided shares in land comprised in the re-settlement, the sale of such investments and interests to be carried into effect by the trustees of the re-settlement pursuant to such direction by way of investment or variation of investment of capital money; (iii) that the consideration for the sale of the freehold property should be the sum of £1,117,000 to be paid and satisfied as to £367,000 by payment to the trustees in cash on completion of the sale, and as to £750,000 by the payment

thereof to the trustees in cash by forty half-yearly instalments of £18,750 each payable on June 24 and Dec. 25 in each year the first payment to be made on June 24, 1927. No interest was to be payable on the part of the £750,000 for the time being unpaid, except that any instalment not paid within twenty-one days of becoming due was to carry interest at five per cent. per annum from the day on which it ought to be paid until actual payment thereof; (iv) that the consideration for the sale of the investments should be £573,000 and of the equitable interests £10,000, both these sums to be paid to the trustees in cash on completion of the sale; (v) that completion should take place on Mar. 26, 1927. The total consideration for the sale to the defendant company was thus to be £1,700,000, of which £950,000 was to be paid to the trustees in cash on completion of the sale, and the balance of £750,000 was to be paid to the trustees by forty half-yearly instalments of £18,750 on the dates and in the manner above stated. On the same date (that is, Mar. 24, 1927) the defendant company allotted one hundred thousand seven per cent. cumulative preference shares to the deceased at par, and 49,993 ordinary shares (making, with the seven shares allotted to the subscribers to the memorandum of association, total of fifty thousand issued ordinary shares) to the trustees at a premium of £16 per share. By a deed dated Mar. 25, 1927 (so far as material for the present purpose) the deceased, as tenant for life, directed, and the deceased and Mr. Ponsonby, in exercise of their joint general power of appointment, by way of ratification of such direction appointed and directed, that all capital money or investments representing capital money then subject to the re-settlement should forthwith be invested in or exchanged for ordinary shares of the defendant company which might be subscribed for or taken at the premium required by the defendant company for the same.

The sale to the defendant company was completed on Mar. 26, 1927, (a) as regards the freehold properties by a conveyance of that date made between the deceased (who conveyed under his statutory and additional powers as tenant for life), of the first part, the deceased and Mr. Ponsonby (who ratified and confirmed such conveyance in exercise of their joint general power of appointment), of the second part, the trustees (who acknowledged receipt of the £367,000 immediately payable by the defendant company and took a covenant from the defendant company for payment of the balance of £750,000 by the instalments and in the manner mentioned above), of the third part, and the defendant company (as purchaser), of the fourth part; and (b) as regards the equitable interests, by a conveyance of the same date between the trustees (as vendors for the sum of £10,000 of which they thereby acknowledged receipt), of the first part, the deceased (directing the transaction as tenant for life), of the second part, the deceased and Mr. Ponsonby (confirming the transaction in exercise of their joint general power), of the third part, and the defendant company (as purchaser), of the fourth part. It is to be assumed that the investments representing capital moneys (sold to the defendant company for the aggregate consideration of £573,000) were, on or about the same date, transferred to the defendant company by appropriate separate instruments. Between Mar. 24 and 29, 1927, the total cash consideration of £950,000 immediately payable by the defendant company to the trustees was paid by means of a cheque drawn by the defendant company in favour of the trustees against an advance made by its bankers for the purpose, and the trustees paid to the defendant company by cheque the sum of £849,993 for the 49,993 ordinary shares of the defendant company allotted to them, making, with the seven subscribers' shares taken for cash at par, a total of £850,000 paid to the defendant company by the trustees for fifty thousand ordinary shares at an overall premium of £16 per share, and the deceased paid the defendant company by cheque the sum of £100,000 for the one hundred thousand preference shares of the defendant company allotted to him at par, having been put in funds for this purpose by means of a cheque for the like

amount drawn in his favour by the trustees. It is not clear whether the last-mentioned cheque represented moneys due to the deceased on income account or was drawn in his favour in anticipation of the appointment of Mar. 28, 1927, mentioned below. At all events, the £100,000 paid by the deceased for the preference shares, if and so far as it represented an advance by the trustees was offset, and if and so far as it represented moneys to which he was already entitled, A was recouped to him by means of that appointment.

The net result of the transactions so far described was that the freehold property, equitable interests, and investments of capital money formerly subject to the re-settlement had been converted into fifty thousand fully paid ordinary shares of the defendant company, the right to receive from the defendant company a capital sum of £750,000 by forty half-yearly instalments of £18,750 B each payable on the half-yearly dates above mentioned and carrying no interest unless and until twenty-one days or more in arrear, and a sum of £100,000 to be regarded either as being in the hands of the trustees or else as outstanding on a temporary loan made by them to the deceased to enable him to pay for his one hundred thousand preference shares.

By a deed poll dated Mar. 28, 1927, the deceased and Mr. Ponsonby jointly C directed and appointed that the said sum of £100,000 and the said sum of £750,000 payable by the defendant company by the instalments aforesaid, and the successive instalments thereof and any interest which might become payable in respect of any instalment, should be in trust for the deceased absolutely and he should be entitled thereto for his own sole use instead of D for his life only. By a further deed poll dated Mar. 29, 1927, after recitals, including a recital to the effect that all the lands and hereditaments subject to the re-settlement had been sold and that the property then subject thereto consisted of 49,993 fully paid ordinary shares of £1 each in the defendant company (no specific mention being made of the seven shares taken by the subscribers to the memorandum of association though these did, in fact, clearly form part of the settled property), the deceased E and Mr. Ponsonby, in exercise of their joint general power of appointment, appointed new trusts of (in effect) the whole of the property then remaining subject to the re-settlement (that is, in view of the appointment of the previous day, the fifty thousand issued ordinary shares of the defendant company) and released their joint general power of appointment. It is unnecessary for the present purpose to state in detail the somewhat complicated terms of the new trusts so declared, which admittedly had F the effect of extinguishing the life interest of the deceased in the fifty thousand ordinary shares and of excluding him from all benefit so far as those shares and the income thereof was concerned. In brief outline, the trusts in question included:—(i) a trust for payment to the deceased's nephew, Francis Cecil St. Aubyn, of an immediate life annuity of £5, and, subject thereto, (ii) a trust G for the accumulation of the income of the settled property for a period of twenty years (determinable as therein mentioned) for providing the portions contingently charged thereon for the younger children of such nephew, and (iii) provisions to the effect that no beneficiary was to be entitled to possession of the settled property during such period, and that on its expiration or sooner determination the property was to be held in trust for such issue of the H deceased's father, the first Baron St. Levan (other than the deceased himself) as the deceased should appoint, and, in default of and subject to any such appointment, on the trusts which, on the expiration or sooner determination of such period, would be subsisting under the re-settlement if the deed poll now in statement had never been executed and the deceased had died immediately before such execution.

Notwithstanding the provision under which no beneficiary was to be entitled to possession of the settled property during the period of accumulation, it was



conceded on behalf of the Crown that the trustees should be regarded for the purposes of s. 43 (2) (a) as having assumed possession and enjoyment of the fifty thousand shares on the determination by the deed poll of Mar. 29, 1927, of the deceased's life interest therein. This point being thus disposed of, it follows that, as the deceased survived the execution of the last-mentioned deed by more than three years, all the conditions of the exemption from liability to duty under s. 43 (1) afforded by sub-s. (2) (a) of the same section would be satisfied if the appointment thereby made was the only disposition to be considered and the fifty thousand ordinary shares were the only property to be taken into account. It is, however, contended on the part of the Crown that although the deceased received no benefit out of the ordinary shares or the income thereof, he nevertheless was not excluded from "any benefit to him by contract or otherwise" as required by s. 43 (2) (a) inasmuch as he did receive a benefit in the shape of the right to receive the forty half-yearly instalments of £18,750 each which had been vested in him absolutely by the deed of Mar. 28, 1927. In support of this contention, reference was made to *A.-G. v. Worrall* (2) ([1895] 1 Q.B. 104), as authority for the proposition (which we fully accept) that the benefit relied on as a bar to exemption need not necessarily be carved out of the property in which the determined life interest subsisted. The Solicitor-General argued that the Crown was entitled to succeed on this ground even under s. 43 alone and unaided by s. 56 (2). We are by no means satisfied that this is so. It is, no doubt, true that each of the steps taken in March, 1927, formed part of one pre-arranged scheme and was taken with a view to the carrying out of that scheme. Counsel for the taxpayers very properly admitted this perfectly obvious fact. It is also hardly open to doubt that the scheme was framed in the form it took with a view to avoiding the liability to duty on the death of the deceased which would (even as the law then stood) have been likely to arise if, without the preliminary expedient of a sale to a company formed for the purpose, a substantially similar provision had been made for the deceased directly out of the settled property, and subject thereto his life interest in such property had been extinguished. Nevertheless, there is nothing unlawful in a scheme designed to minimise the incidence of duty by legal means, and its success or failure must be judged by reference to the true legal effect of what has been done: see *Inland Revenue Comrs. v. Duke of Westminster* (3). Thus, in the present case the sale to the defendant company must, apart from s. 56 (2), be given its true legal effect, and, so considered, the result of it in conjunction with the trustees' subscription for ordinary shares was to convert the settled property into fifty thousand ordinary shares of the defendant company, a capital sum of £750,000 payable by the defendant company to the trustees by instalments, and a further capital sum of £100,000. Thenceforward, these assets, and these alone, constituted the settled fund. Under the deeds of Mar. 28 and 29, 1927, the deceased took absolutely the £750,000 and the £100,000, and his interest in the fifty thousand ordinary shares was absolutely extinguished. The deceased having survived the transactions by more than three years, it is difficult to see how, under s. 43 alone, the enlargement of his life interest in the £750,000 and the £100,000 (part of the capital of the settled fund) constituted a reservation of a benefit to him so as to prevent the exemption afforded by sub-s. (2) (a) from applying. If the £750,000 had been payable in a lump sum and not by instalments, the case would have been equivalent to the simple one of the assignment by a remainderman to a tenant for life of the reversion in part of a settled fund in consideration of the surrender by the tenant for life to the remainderman of his life interest in the remaining part of the fund. It is not contended by the Crown that the simple transaction I have instanced would attract duty, given survival by the life tenant for the prescribed statutory period, and, indeed, it would otherwise be hard to see how any surrender of a life interest for value

could escape duty at any distance of time, though the section clearly contemplates that a surrender for value is capable of qualifying for exemption under sub-s. (2). The only difference in the present case is that the capital assets taken absolutely by the tenant for life consisted chiefly of a debt payable by instalments. We find it difficult to see how this can alter the character of the transaction or affect the result unless the legal effect of the sale to the defendant company can be disregarded, which there is no warrant for doing independently of s. 56 (2).

However, it is unnecessary to take up time in considering what the position might be if s. 56 (2) did not apply, as the taxpayers admit that s. 56 (2) is, in fact, applicable, the defendant company being, under the definition provided by s. 58, a company to which s. 56 applies, and having been concerned in an "associated operation" in the shape of the sale and transfer to it of the settled property. Section 56 (2), which we have already quoted at length, requires the assumption of certain circumstances set out in sub-s. (1) and also fully quoted above. The circumstances thus required to be assumed have been conveniently termed "the statutory hypothesis." The effect of the application of the statutory hypothesis in the present case is, as we understand it, to eliminate completely the element of sale from the transfer to the defendant company and the consequent conversion of the settled property, and to make the case stand for the purposes of s. 43 (2) as it would have stood if the settled property had been transferred to the company as a trustee on the following trusts:—(i) to pay thereout to the trustees of the settlement £750,000 by the instalments and on the dates hereinbefore mentioned to be held by them as capital moneys on trust for the deceased for life with remainders over as in the re-settlement provided; (ii) subject as aforesaid to raise and pay thereout to the deceased, on whatever future event should be taken as corresponding for the purposes of the hypothetical trusts to the winding-up of the company, £100,000, and in the meantime to pay him interest on that sum at the rate of seven per cent. per annum out of the net income of the property; (iii) subject as aforesaid, on trust both as to income and (on the event taken as corresponding to such winding-up) capital for the trustees of the settlement absolutely on the trusts for the deceased for life with remainders over applicable to income and capital respectively under the re-settlement. It will thus be seen that the application of the statutory hypothesis results in the conversion of the right to receive the instalments of the £750,000 into an equitable interest charged by way of primary trust on the entire capital and income of the settled property as it stood before the sale to the defendant company. It follows that the appointment to the deceased absolutely of the right to receive the forty half-yearly instalments of the £750,000 effected by the deed of Mar. 28, 1927, must, by virtue of the statutory hypothesis, be regarded for the purposes of s. 43 (2) as an appointment to him absolutely of an equitable interest of the nature above described in the settled property as it stood before the sale to the defendant company, and not of a separate and distinct capital asset consisting of the right to receive the instalments from the defendant company. It also follows that the appointment of Mar. 29, 1927, by which the deceased's life interest in the fifty thousand ordinary shares of the defendant company was extinguished must be considered as an appointment extinguishing his life interest, not in the fifty thousand ordinary shares as a separate and distinct capital asset, but in the equitable interest in the settled property as it stood before the sale to the defendant company which the statutory hypothesis imputes to the trustees of the settlement as holders of the ordinary shares, that is to say, the entire equitable interest in the settled property as it stood before the sale to the defendant company subject to (i) the primary trust for payment thereout of the instalments of the £750,000, and (ii) the trust for payment to the deceased of the £100,000 with interest in the meantime payable

out of income at the rate of seven per cent. per annum substituted by the statutory hypothesis for his holding of preference shares.

Counsel for the taxpayers admits that the statutory hypothesis is applicable, and also, we think, substantially accepts the effect of its application as above described, except that he divides the interests to be imputed to the deceased in respect of the one-hundred thousand preference shares and to the trustees in respect of the fifty thousand ordinary shares into trusts of income pending the winding-up of the defendant company and of capital on the defendant company being wound-up. On the footing that the company is to be considered as a trustee of the property, we find difficulty in regarding its winding-up, as such, as an event having any relevance to the terms of the hypothetical trusts. Looking, however, at the voting rights attached to the shares, we find that under art. 48 of the defendant company's articles of association a poll may be demanded by any member present in person or by proxy, and that under art. 52, on a show of hands, every member present in person has one vote and on a poll every member has one vote for each share of which he is the holder, the voting rights attached to the preference shares being restricted to certain specified matters which, however, include a resolution for the winding-up of the company. It follows that, as the trustees and their nominees held fifty thousand ordinary shares carrying on a poll a like number of votes, while the deceased held one hundred thousand shares carrying on a poll a like number of votes with respect to a resolution for winding-up the defendant company, a resolution for that purpose could have been carried if, but not unless, it was concurred in by the trustees and the deceased. Translating this into the nearest equivalent we can suggest for the purposes of the hypothetical trust, we think the capital sum of £100,000 corresponding to the deceased's capital rights in respect of the one-hundred thousand preference shares should be considered as payable to him at the joint request of the trustees and the deceased and that the interest corresponding to the trustees' capital rights in respect of the fifty thousand ordinary shares—that is to say, the residue of the corpus of the settled property remaining after provision for the half-yearly instalments of the £750,000 and for the deceased's equitable interest corresponding to the one-hundred thousand preference shares—should be considered as transferable to them on the like joint request. We do not, however, regard the precise event on which the corpus of the settled property remaining after provision for the instalments of the £750,000 is to be considered as payable or transferable to the trustees and the deceased according to their respective interests under the hypothetical trusts as having any material bearing on the result.

The substantial effect of applying the statutory hypothesis is to impute to the deceased the following equitable interests in the property immediately before the execution of the deed of Mar. 28, 1927, namely, (i) a life interest in the forty half-yearly instalments of £18,750 each charged by way of trust on the whole of the settled property; (ii) an absolute interest in £100,000 raisable thereout with interest in the meantime at the rate of seven per cent. per annum (that is, £7,000 per annum) payable out of income, and (iii) a life interest in the residue of the settled property. Counsel for the taxpayers has forcibly argued that, even so, the claim under s. 43 and s. 56 (2) must fail. His contention is to the effect that, even when the statutory hypothesis is applied, all it does is to create three separate and distinct interests in the settled property, namely, (i) the trust to raise and pay to the trustees the forty half-yearly instalments of £18,750 each to be held by them on trust for the deceased or life with remainders over; (ii) the trust to raise and pay to the deceased a capital sum of £100,000 and in the meantime to pay him £7,000 per annum out of income; and (iii) the trust of the residue of the property for the trustees in trust for the deceased for life with remainders over, all these three interests being subject to the overriding joint general power of appointment.



By the deed of Mar. 28, 1927, the joint general power was exercised so as to enlarge the deceased's life interest in the forty half-yearly instalments of £18,750 each into an absolute interest. He already had an absolute interest in the £100,000 when raised and the £7,000 per annum payable out of income until it was raised, though the cost of such interest was ultimately provided by means of the appointment to him absolutely of the sum of £100,000 effected by the same deed. There remained the third separate and distinct interest, that is to say, the residue of the settled property remaining after provision for the other two, which, after the execution of the deed of Mar. 28, was the only property remaining subject to the trusts of the re-settlement. This residue alone (so it is argued) was the subject of the deed of Mar. 29, 1927, and the relevant disposition for the present purpose was the determination of the deceased's life interest in such residue effected by the deed. *Quoad* such residue, says counsel for the taxpayers in effect, the determination of the deceased's life interest was complete, and the deceased was wholly excluded from all benefit out of or in respect of it. The absolute interest taken by the deceased in the forty half-yearly instalments under the deed of Mar. 28, 1927, and the interest imputed to him by virtue of his holding of preference shares are (so proceeds the argument) irrelevant for this purpose. These, it is said, were separate and distinct interests forming no part of the subject-matter of the relevant disposition, or in other words of "the property in which the interest subsisted" within the meaning of s. 43 (2), and the deceased held them as separate and distinct items of property, his title to which was complete before the date of, and in no way referable to, the relevant disposition, that is, the deed of Mar. 29, which simply determined his life interest in a third separate and distinct item of property.

We find it impossible to accept the argument of the taxpayers. We propose for simplicity's sake to ignore the interest imputed to the deceased under the statutory hypothesis by virtue of his ownership of the one hundred thousand preference shares, in view of the unsatisfactory state of the evidence as to the precise manner in which the £100,000 paid for these shares was originally provided, and to deal with the matter on the footing that the only interest taken by the deceased to be regarded as relevant to the question of exemption under s. 43 (2) is the right to receive the forty half-yearly instalments of £18,750 each, converted by the application of the statutory hypothesis into a trust for payment of those instalments out of the settled property as it stood before the sale to the defendant company. This interest, as so converted, was, in its very nature, essentially an interest taking effect out of, and as it were permeating every part of, the settled property. It was, moreover, admittedly created in order that it might be vested in the deceased as a preliminary to the determination of the deceased's interest in the residue of the settled property, which must for this purpose be treated, by virtue of the statutory hypothesis, as substituted for the fifty thousand ordinary shares of the company. Furthermore, the deceased's interest in it was enlarged into an absolute interest the very day before his life interest in the residue of the settled property was determined, admittedly in order that after such determination the deceased might nevertheless be entitled to receive half-yearly out of the settled property the sum of £18,750 for a period of twenty years. Once the statutory hypothesis is applied, we see no escape for the taxpayers from the conclusion that the determination of the deceased's life interest did not take effect "to the entire exclusion" of the deceased "and of any benefit to him by contract or otherwise" as required by s. 43 (2), inasmuch as he did retain a benefit in the shape of the right to receive the forty half-yearly instalments of £18,750 each, which benefit continued down to the date of his death, and was even then not exhausted. We think that for this purpose "the property in which the interest subsisted" within the meaning of s. 43 (2) (a) must be taken as being the

settled property as it stood before the sale to the company, the subsequent creation of the different equitable interests which the statutory hypothesis supposes being merely in the nature of a preliminary carving up of the property into the appropriate beneficial interests with a view to securing the desired benefit to the deceased out of it on the intended determination of his life interest. But, even if we are wrong in this, and "the property in which the interest subsisted" must, as counsel for the taxpayers contended, be considered as consisting only of the residue of the property remaining after provision for the other interests, we are satisfied that the benefit taken by the deceased in the shape of the creation and vesting in him of the right to receive the half-yearly instalments, though on this view not taking effect out of the "property in which the interest subsisted," was on the facts so clearly referable to and connected with the determination of the deceased's life interest in that property as to constitute a fatal objection to exemption under s. 43 (2).

Counsel for the taxpayers placed some reliance on the Irish case of *Re Cochrane* (4) and on the Privy Council cases of *Munro v. Stamp Duties Comr.* (5) and *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co., Ltd.* (6) in support of his argument to the effect that the mere retention of a previously existing interest in property outside the subject-matter of the relevant gift or disposition does not constitute a relevant benefit for the purposes of provisions such as those of s. 43. None of these cases seems to us to have the faintest resemblance to the present case, and we can derive no assistance from any of them. It is one thing to hold (for instance) that a man who settles property on trusts which confer no benefit on himself, but do not or may not exhaust the whole beneficial interest in the property settled, and thus retains, subject to those trusts, some residual vested or contingent resulting or reversionary interest in the property, has nevertheless—to the extent of the beneficial interests taking effect under those trusts—made a complete disposition to the entire exclusion of himself and of any benefit to him by contract or otherwise. It is quite another thing to hold, and we decline to agree, that a similar entire exclusion is achieved if (for instance) a man who has a general overriding power of appointment over property settled on himself for life with remainders over creates, in exercise of the power, an annuity payable to himself in priority to his life interest for a term of twenty years certain, and then releases the power and surrenders his life interest subject to the annuity, or (which comes to the same thing) appoints by way of final exercise of the power that subject to the annuity the property shall be held on trusts which have the effect of extinguishing his life interest.

Counsel for the taxpayers also placed some reliance on *A.-G. v. Secombe* (7). That is the well known case in which it was held that for the purposes of the Customs and Inland Revenue Act, 1889, s. 11 (1), (relating to gifts *inter vivos*) as applied to estate duty by the Finance Act, 1894, s. 2 (1) (c), the words "or otherwise" in the phrase "or of any benefit to him by contract or otherwise" must be read as meaning some arrangement *ejusdem generis* with contract, that is to say, an enforceable arrangement. Counsel sought to apply that decision to the present case in this way. There was (he said in effect) no contractual *nexus* between the various steps here carried out. Thus, the execution of the deed of Mar. 28, 1927, which gave the deceased the absolute interest in the instalments, imposed no obligation on the appointors to execute the deed of Mar. 29, 1927, which determined the deceased's life interest in the ordinary shares of the defendant company, or the corresponding interest in the settled property substituted by the statutory hypothesis for those ordinary shares. Thus, he argued, there was no legally enforceable arrangement under which the deceased took the instalments in exchange for the determination of the life interest. We think that this places on the decision in *A.-G. v. Secombe* (7) a construction which it will not well bear. The decision, as we

understand it, goes no further than to hold that the benefit must be secured by some legally enforceable arrangement as opposed to being merely casual or eleemosynary. That may be so, but it does not follow that the right to the benefit must be contractually connected with the disposition. In our judgment, it is quite enough if it appears on the facts that the benefit is conferred or reserved with a view to, or on account of, the gift or disposition, or, in other words, that the one is referable to the other.

For the reasons above stated we are, therefore, of opinion that the claim for duty under s. 43 in conjunction with s. 56 (2) of the Finance Act, 1940, should succeed. The learned judge held that the claim under s. 43 could not succeed without the aid of s. 56 (2), and so far we are not disposed to differ from him, though we have not found it necessary to express any concluded opinion on the position as it might have been if s. 56 (2) had not been enacted. But he also found himself able to hold, for reasons which we have found a little difficult to follow, that, even with the aid of s. 56 (2), the claim could not be made out. In so holding we think that the learned judge was in error. The terms of s. 56 (2) are far from being a model of clarity, and they demand a feat of imagination by no means easy to perform, but it is admitted that s. 56 (2) does apply in this case, and effect must, therefore, be given to the hypothesis which it enjoins, however unreal and remote from the actual facts of the case the process may appear. Having done, to the best of our ability, that which the sub-section requires, we think there is really no doubt as to the validity of the claim.

It remains to consider the claim under s. 46 of the Finance Act, 1940. Liability under that section (in the form in which it stood at the death of the deceased) arises where a person dying after the commencement of the Act

“ . . . has made to a company to which this section applies a transfer of any property (other than an interest limited to cease on his death or property which he transferred in a fiduciary capacity), and any benefits accruing to the deceased from the company accrued to him in the three years ending with his death . . . ”

Where these conditions are satisfied, the assets of the company are to be deemed for the purposes of estate duty to be included in the property passing on his death to an extent determined in accordance with the somewhat complicated provisions of sub-section (2) by reference to the proportion that the aggregate amount of the benefits accruing to the deceased from the company bore to the net income of the company. Section 47 defines in very wide terms the matters to be treated as benefits to the deceased from the company, including—s. 47 (1) (a)—

“ Any income of the company, and any periodical payment out of the resources or at the expense of the company, which the deceased received for his own benefit whether directly or indirectly . . . ”

By sub-s. (2) the expression “ periodical payment ” means

“ . . . a payment by way of dividend or interest, a payment by way of remuneration . . . and any other payment being one of a series of payments, whether interconnected or not, whether of the same or of varying amounts, and whether payable at regular intervals or otherwise.”

The defendant company in the present case being admittedly a company to which s. 46 applied, by virtue of the definition contained in s. 58, it remained for the Crown to establish (a) that the deceased had made a transfer or transfers of property to the defendant company (other than an interest limited to cease on his death or property which he transferred in a fiduciary capacity), and (b) that benefits (within the meaning of s. 46 as explained by s. 47) had accrued to the deceased from the defendant company in the three years ended with



his death; and, of course, given proof of such transfer or transfers, the greater the benefits so accruing could be shown to have been, the larger the dutiable proportion of the assets of the company would become.

Elaborate arguments were presented to us on both points. Counsel for the taxpayers relied on the exception from s. 46 of property transferred by the deceased in a fiduciary capacity, and contended that all the transfers here made to the company of the settled lands, equitable interests, and investments, so far as made by or by the direction of the deceased, were made or directed by him in the fiduciary capacity imposed on a tenant for life by the Settled Land Act, 1925. The payment by the deceased to the defendant company of the sum of £100,000 by way of subscription for the one hundred thousand preference shares allotted to him was admittedly not made in a fiduciary capacity, but counsel contended that this was not a transfer within the meaning of s. 46. The Solicitor-General relied on s. 58 which provides that:

“(4) References in this Part of this Act to a disposition's being made by any person . . . include references to its being made . . . by him and another jointly or by another at his direction,”

and also on s. 58, sub-s. (5), which provides that references

“to a person . . . doing any act in an fiduciary capacity shall be construed as references to his . . . doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only.”

Applying these definitions to the present case, the Solicitor-General contended that the settled lands, equitable interests, and investments must be regarded as having been transferred by the deceased to the defendant company in a fiduciary capacity imposed on him by a disposition made by himself, that is, by the deed poll of Mar. 23, 1927, whereby the deceased and Mr. Ponsonby, in exercise of their joint general power of appointment, extended the deceased's powers as tenant for life for the purpose of enabling the sale to the defendant company to be carried out. He also relied on the concurrence in the two conveyances dated Mar. 26, 1927, of the settled land and equitable interests of the deceased and Mr. Ponsonby to confirm those assurances in exercise of the joint general power, contending that, as this was admittedly not a fiduciary power, the deceased could not be said to have transferred in a fiduciary capacity “only.” As regards the investments, he pointed out that the sale agreement of Mar. 24, 1927, expressly provided that these were to be sold by the direction of the deceased and Mr. Ponsonby in exercise of the joint general power, which direction they in fact gave by the deed of Mar. 25, 1927. He also referred to the wide terms of s. 58 (2) which provides that:

“A person shall be deemed . . . to have made a transfer of property to a company if the property came to be included in the resources of the company by the effect of a disposition made by him or with his consent or of any associated operations of which such a disposition formed one.”

As to the payment by the deceased to the defendant company of the £100,000 subscribed by him for the preference shares, the Solicitor-General claimed that a payment of cash was clearly a transfer of property according to the plain literal meaning of the words, and did not cease to be such because it was made in consideration of an allotment of shares.

Counsel for the taxpayers argued that the deed poll of Mar. 23, 1927, merely enlarged the deceased's powers as tenant for life and did not alter the capacity in which he made or directed the transfers to the company which was simply the fiduciary capacity imposed on him by the Settled Land Act, 1925, as tenant for life under that Act. He further argued that the concurrence of the deceased and Mr. Ponsonby as holders of the joint general power should be disregarded

as otiose and superfluous, and that the only necessary and effective dispositions or directions made or given by the deceased were made or given by him simply in his fiduciary capacity as tenant for life. As to the payment by the deceased of £100,000 for the preference shares, counsel, while conceding that such payment might literally be described as a transfer of property to the defendant company, contended that it was not a transfer of property to the defendant company

**A** within the meaning of s. 46 and s. 47, as this would, he forcibly argued, give an impossibly wide scope and effect to the provisions in question and to the stringent ancillary provisions as to disclosure and so forth. He pointed out that s. 59 defines "payment" as including a transfer of property, and not unnaturally relied on this as showing that the converse could not have been intended. As to the receipt of benefits by the deceased from the defendant company, counsel

**B** admitted that the dividends received by the deceased on the preference shares and the half-yearly instalments of £18,750 paid to him were benefits within the meaning of s. 46 and s. 47. There was, however, considerable argument on the question whether certain annual loans made by the defendant company to the deceased were benefits for this purpose. The loans in question were secured by two mortgages dated respectively Jan. 30, 1933, and Aug. 4, 1936. By the

**C** mortgage of Jan. 30, 1933, the company covenanted to advance to the deceased quarterly during the joint lives of the deceased and his nephew, Francis Cecil St. Aubyn, at four per cent. interest the sum of £500 (making a total of £2,000 per annum) with a stipulation that payment of the sums so advanced and the interest thereon should not be required by the defendant company until two years after the death of the deceased, and that in the meantime the interest

**D** should be added to the principal, and carry interest accordingly. The same deed provided for the deduction of the debt by instalments from any instalments of the £750,000 remaining outstanding at the expiration of two years from the death of the deceased and for charging the debt upon such instalments. The mortgage of Aug. 4, 1936, provided for the advance to the deceased of additional half-yearly instalments of £500 each (making an additional £1,000 per annum) on the same

**E** terms. The deceased received the full aggregate advance of £3,000 from the defendant company under these mortgages during each of the three years preceding his death. The Solicitor-General contended that these yearly advances were "benefits" for the purposes of s. 46 as being "periodical payments" within s. 47 (1) (a) and (2). He also argued that in view of the special terms of repayment these advances should be regarded as being (in effect) accelerated

**F** payments on account of future instalments of the £750,000 which increased the yearly total of the instalments received during each of the three years preceding the death of the deceased from £37,500 to £40,500. The latter argument appears to us to be one which should, to say the least of it, be accepted with reserve in view of the case of *Inland Revenue Comrs. v. Wesleyan and General Assurance Society* (8). Counsel for the taxpayers, while conceding that a loan might for

**G** some purposes and to some extent be described as a benefit, contended with force that a loan could not be a benefit for the purposes of s. 46 owing to the impossibility of assessing the value of the benefit represented by a loan, and the necessity for placing a money value on any benefit before the provisions of the section could be applied to it. He also forcibly argued that if the intention had been to treat a loan as constituting *per se* a benefit to be taken at its full amount

**H** for the purposes of s. 46, s. 47 (2) would inevitably have included an express reference to loans. We have sufficiently summarised the issues and arguments on the claim under s. 46 to indicate the difficulty and complexity of this aspect of the matter. As the claim under s. 46 is, for the purposes of the present case at all events, to be treated as an alternative to the claim under s. 43 and s. 56 (2) on which we have held the Crown entitled to succeed, we will refrain from expressing any concluded opinion on it. The claim under s. 46 was decided adversely to the Crown by the learned judge, and we should, therefore, make it clear that we

are not to be taken as expressing or implying any view one way or the other as to the correctness of his decision in this respect.

In the result, we hold that the order of CROOM-JOHNSON, J., should be discharged, and that estate duty should be declared to have become payable under s. 43, read in conjunction with s. 56 (2), of the Finance Act, 1940, on the death of the deceased on the principal value, ascertained in accordance with s. 55 (2) of the same Act, of the fifty thousand ordinary shares of the defendant company. Duty having already been paid on the principal value of the instalments of the £750,000 which remained outstanding at the death of the deceased and of the preference shares, no smaller value should be placed on those instalments or on the preference shares for the purpose of valuing the ordinary shares by reference to the net assets of the company under s. 55 (2), except on the footing of an appropriate adjustment in favour of the respondents of the duty already paid.

*Appeal allowed. No order as to costs before CROOM-JOHNSON, J.; taxpayers to pay costs of appeal.*

Solicitors: *Solicitor of Inland Revenue; Dawson & Co. (for the taxpayers).*

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

### THOMAS v. LINDOP.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finemore, JJ.), April 19, 1950.]

*Intoxicating Liquor—Consumption during prohibited hours—Consumption by customers—Licensee unaware of offence—Aiding and abetting—Licensing Act, 1921, s. 4 (b).*

Customers in licensed premises had been served with intoxicating liquor before closing time and were still consuming it, or about to consume it, in the bar room of the premises nearly half an hour afterwards, contrary to the Licensing Act, 1921, s. 4 (b). The licensee had no knowledge that there were any drinks in the room or that they were being consumed.

**Held:** as the licensee did not know that the customers were consuming intoxicating liquor, she did not know the facts which must be proved to show that they had committed an offence, and, therefore, she was not guilty of aiding and abetting the commission of that offence.

[FOR THE LICENSING ACT, 1921, s. 4, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 303.]

Cases referred to:

- (1) *Bowker v. Woodroffe, Bowker v. Premier Drug Co.*, [1928] 1 K.B. 217; 96 L.J.K.B. 750; 137 L.T. 347; 91 J.P. 118; Digest Supp.
- (2) *Ackroyd's Air Travel, Ltd. v. Director of Public Prosecutions*, ante, p. 933.
- (3) *Bosley v. Davies*, (1875), 1 Q.B.D. 84; 45 L.J.M.C. 27; 33 L.T. 528; 40 J.P. 550; 25 Digest 430, 301.

CASE STATED by justices for the county of Chester.

At a court of summary jurisdiction sitting at Sandbach on Sept. 20, 1949, two informations were preferred by the respondent, a police officer, charging the appellant with having at 10.25 p.m. on July 29, 1949, being a time not during the permitted hours, contrary to s. 5 of the Summary Jurisdiction Act, 1848, aided, abetted, counselled and procured two persons to consume on licensed premises intoxicating liquor, contrary to the Licensing Act, 1921, s. 4 (b). For the appellant it was contended that, as she was unaware that the persons were consuming intoxicating liquor at a time not during permitted hours she was not guilty of the offences. The respondent contended that the appellant



was under an obligation to see that the law was observed, and that, by abstaining from performing, or neglecting to perform, that duty, she was guilty of the offences charged. The justices held that the appellant was under a duty to see that the law was observed and was guilty of aiding and abetting the customers in committing the offence of which they were convicted. They, therefore, convicted the appellant and fined her £5 for each offence.

- A *Hubert C. Rose* for the appellant.  
*Horner* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Chester before whom the appellant, who is the licensee of certain licensed premises, was charged that

- B “at the hour of 10.25 p.m., that being a time not during the permitted hours, unlawfully did aid abet counsel and procure Philip Thomas Broster and Elizabeth Mason to consume on the licensed premises certain intoxicating liquor.”

It is curious that the exact point has never arisen before, but I must emphasise that we are deciding this case simply on the special facts found by the justices.

- C What they find is that the police entered the premises at 10.25 p.m. and found Broster and Mason sitting at a table on which there was intoxicating liquor. Broster had not then drunk the liquor before him, but he would have drunk it if he had known it was there, and so the justices regarded it as liquor which was about to be consumed. Mason had consumed some of the stout which she had ordered. Then the justices find:

- D “The appellant, who is the licensee of the Crown Inn, was at the time the respondent entered the premises in the bar at the front of the premises where there were several people. She was cleaning and washing glasses assisted by one Ethel Allcock, a servant of the appellant. The drinks which were on the table had been served by Ethel Allcock before 10 p.m. The appellant did not know when the drinks were served and the respondent was satisfied that the appellant had no knowledge that there were any drinks in the room or that [the persons named] were consuming intoxicating liquor. ‘Time’ had been called by the appellant at 10 p.m. and the above-mentioned persons had heard her.”
- E

So the justices find that the liquor had been supplied before 10 p.m. and that the appellant had no knowledge that these people were consuming intoxicating liquor.

- F By the Licensing Act, 1921, s. 4:

- G “Subject to the provisions of this Part of this Act, no person shall, except during the permitted hours—(a) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed either on or off the premises; or (b) consume in or take from any such premises or club any intoxicating liquor.”

- Paragraph (a), therefore, creates an offence which can be committed by the licensee in selling or supplying for consumption outside permitted hours. Paragraph (b) creates an offence by the customer. It is curious that the Act does not make it an offence for a licensee to permit the consumption of any intoxicating liquor after hours, but, so far as the licensee is concerned, the substantive offence is confined to the selling or supplying of liquor except during permitted hours, and in this case it is found that the sale or supply took place within the permitted hours. So there is clearly no offence there. If the statute had made it a substantive offence for the licensee to permit the consumption, no question would have arisen. The appellant would clearly have permitted it by allowing the people to be in the premises, though, perhaps, she did not know they were there. They were customers, and, if it had been an offence to permit the
- H

consumption, it might well be said that there was a duty on her to see that people did not remain there after those hours.

It is said, however, that, as the customers were consuming liquor after the permitted hours, the licensee must be taken to have aided and abetted that offence. More than once this court has pointed out that it is impossible to convict persons of aiding and abetting the commission of an offence unless they know the facts which must be proved to show that an offence has been committed. We pointed that out in *Ackroyd's Air Travel, Ltd. v. Director of Public Prosecutions* (2), and AVORY, J., and SHEARMAN, J., said it in no uncertain terms in *Bowker v. Premier Drug Co.* (1). It is, of course, not necessary to show that the person knew that it was an offence, because he cannot plead ignorance of the law, but where anyone is charged with aiding and abetting a person to commit an offence, it must, at least, be shown that he knew what that person was doing. A person who does not know of the acts which another person is doing cannot be charged with aiding and abetting him because he does not know that he is doing acts which amount to an offence.

The justices have found that the appellant did not know that anyone was consuming drink on these premises, and, therefore, it cannot be said that she aided and abetted those persons to consume the liquor. The case is not unlike that of *Bosley v. Davies* (3) to which counsel for the appellant has directed our attention. That was a case under the Licensing Act, 1872, where it was held (1 Q.B.D. 84):

"In order to support a conviction under the Licensing Act, 1872, s. 17,—by which if any person licensed under the Act 'suffers any gaming or any unlawful game to be carried on on his premises' he is made liable to certain penalties—it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises."

In that case, the court, consisting of COCKBURN, C.J., and MELLOR and QUAIN, J.J., said (*ibid.*, 88):

"The case must be sent back to the justices with an intimation of the opinion of the court that actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but that there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on."

There must, therefore, be actual knowledge or connivance. It seems to me that considerations applying to a section which deals with the suffering of some act to be done apply with equal force to a charge of aiding and abetting a person to do an act, because that is suffering the person to do the act. Therefore it is necessary to show either that the licensee in a case of this sort knew what was being done or connived at what was being done, and, in view of the findings of the justices in the present case, they ought to have dismissed the informations. If the justices had found in the present case that the appellant had shut her eyes to the fact that there were people on the premises or that she had in any way connived at their being on the premises, it would be an entirely different matter, but that is not so. For these reasons the appeal succeeds.

MORRIS, J.: I agree.

FINNEMORE, J.: I also agree.

*Appeal allowed.*

Solicitors: *Hatchett Jones & Co.*, agents for *Poole, Alcock & Co.*, Sandbach, Cheshire (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Geoffrey C. Scrimgeour*, Chester (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. DOWDELL  
O'MAHONEY & CO., LTD. SAME v. SAME.

[COURT OF APPEAL (Somervell and Singleton, L.J.J., and Roxburgh, J.), March 20, April 4, 1950.]

*Excess Profits Tax—Deductions against profits—Deduction of Eire taxes against English profits—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 3 (a)—Finance (No. 2) Act, 1939 (c. 109), s. 14 (1).*

A  
B A company resident in Eire carried on business at two branches in England. The whole of its profits, including those arising from the businesses in England, were subject in Eire to income tax, corporation profits tax (corresponding to the United Kingdom national defence contribution), and excess profits tax, and its profits from the businesses in England were subject to United Kingdom income tax and excess profits tax. The company sought to deduct the proportion of the Eire taxes corresponding to its income from the businesses in England in computing the profits of those businesses for assessment to excess profits tax in the United Kingdom.

C HELD: (i) the Irish taxes could and should be regarded as a disbursement laid out for the purposes of the company's trade in England within the exception in r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, and were, therefore, having regard to the Finance (No. 2) Act, 1939, s. 14 (1), deductible for the purposes of computing the profits of the company liable to excess profits tax.

D (ii) even if r. 3 (a) did not apply so as to admit the deduction, looking at the excess profits tax code as a whole it was clearly the intention of Parliament that the taxes in question should be deducted, and, as the contrary view would lead to injustice, the court ought to give effect to that intention.

[FOR THE FINANCE (NO. 2) ACT, 1939, s. 14, see HALSBURY'S STATUTES, Second Ed., Vol. 12, 438.]

E Cases referred to:

- (1) *Inland Revenue Comrs. v. Sansom*, [1921] 2 K.B. 492; 90 L.J.K.B. 627; 125 L.T. 37; 8 Tax Cas. 20; 28 Digest 101, 612.
- (2) *Stevens v. Durban-Roodepoort Gold Mining Co.*, (1909), 100 L.T. 481; 5 Tax Cas. 402; 28 Digest 54, 277.
- F (3) *Inland Revenue Comrs. v. Von Glehn*, [1920] 2 K.B. 553; 89 L.J.K.B. 590; 123 L.T. 338; 12 Tax Cas. 232; 28 Digest 46, 236.
- (4) *Smith's Potato Estates, Ltd. v. Bolland, Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.
- (5) *A.-G. v. Lockwood*, (1842), 9 M. & W. 378; 152 E.R. 160; *affd.* on other grounds *sub nom.*, *Lockwood v. A.-G.*, 10 M. & W. 464; 42 Digest 767, 1934.
- G (6) *Salmon v. Duncombe*, (1886), 11 App. Cas. 627; 55 L.J.P.C. 69; 55 L.T. 446; 42 Digest 676, 874.

APPEAL by the taxpayer, Dowdell O'Mahoney & Co., Ltd., and cross-appeal by the Crown from an order of CROOM-JOHNSON, J., dated Oct. 25, 1949.

H The taxpayer had appealed to the Special Commissioners against the refusal of the Crown to allow the deduction of an appropriate proportion of Eire taxes in computing the taxpayer's profits from its English branches for assessment to excess profits tax, and the Special Commissioners had allowed the appeal. CROOM-JOHNSON, J., remitted to the Special Commissioners a Case stated for the opinion of the High Court for them to state the evidence on which their finding was based, and to state, in summary form, the nature, effect, and incidence of the three Irish taxes referred to. From this order the company appealed and



the Crown cross-appealed, both parties agreeing that the Case set out all the evidence called and desiring the Court of Appeal to dispose finally of the matter. They further agreed in summary form a statement as to the Irish taxes. The appeal was placed in the interlocutory list for hearing, but the Court of Appeal decided that it had jurisdiction to dispose finally of the substantive issue, and indicated that the appeal should have been placed in the final list. The transfer of the appeal to the final list was ordered, the order of CROOM-JOHNSON, J., for remitting the Case to the Special Commissioners was set aside, and the Court of Appeal proceeded to hear the appeal as a final appeal.

*Grant, K.C., and Senter for the taxpayer.*

*Cyril King, K.C., and R. P. Hills for the Crown.*

*Cur. adv. vult.*

Apr. 4. **SOMERVELL, L.J.**, read the following judgment of the court. The appellant taxpayer is a company incorporated in Eire with its head office in Cork. It has two branches in England. It is assessable to excess profits tax here in respect of the profits of its trade here and the case is concerned with assessments for that tax. In Eire, during the years covered by the assessments—1940 to 1946, the whole of the profits of the taxpayer, including those made here, were subject to income tax, corporation profits tax, and excess profits tax, which have been paid. It is agreed that these taxes are similar to income tax, national defence contribution, and excess profits tax as imposed under our statutes. The question is whether the proportion of the taxes paid by it in Eire in respect of the two branches in England were deductible in arriving at its profits assessable to excess profits tax here. The Special Commissioners held that it was. The Crown appealed. CROOM-JOHNSON, J., remitted the case for them to state the evidence on which their finding was based and to state in summary form the nature, effect and incidence of the three Irish taxes referred to. The learned judge proceeded on the basis that there must have been evidence before the commissioners which had not been set out in the Case. The taxpayer appealed, and the Crown cross-appealed. Before us counsel for the taxpayer and counsel for the Crown agreed that the Case set out all the evidence called. They had agreed in summary form a statement as to the Irish taxes, and both sides desired this court to dispose finally of the Case.

The appeal had been placed in the interlocutory list, and we were at first doubtful whether we could dispose finally of the substantive issue. Our attention was drawn to *Inland Revenue Comrs. v. Sansom* (1) in which an appeal was brought to this court in a case in which ROWLATT, J., had made an order similar to that made by CROOM-JOHNSON, J., here. This court decided that the case ought not to be remitted, and upheld the decision of the commissioners. This is clear authority for the jurisdiction of this court to decide an appeal finally when the learned judge has ordered that the case be remitted. In our opinion, the appeal should have been entered in the final, and not in the interlocutory, list. We transferred it to that list, and proceeded to hear argument on the substantive issue. We have come to the conclusion, in the first place, in the light of what has been set out above as stated and agreed by counsel, that the order for remission should be set aside.

It is unnecessary to set out the general scheme of the excess profits tax. The tax applies to profits arising from a trade or business. The profits so arising are, under the Finance (No. 2) Act, 1939, s. 14 (1), to be computed on the income tax principles on which profits of a trade or business are computed, *i.e.*, under Case I of sched. D to the Income Tax Act, 1918, as adapted in accordance with the provisions of Part I of sched. VII to the Act of 1939. The commissioners' finding is as follows:

"The respondent company is resident in Eire. The assessments under appeal are made upon it in respect of the trading carried on by the two English branches. For the purpose of taxation in Eire, the results of the

whole of its trading, including those of the two English branches, have to be brought into the computation. In our opinion, it was a necessary expense for the respondent company, in carrying on part of its trade at branches in England, to incur Irish taxes. We hold that the appropriate part of the taxes paid in Eire by the respondent company, applicable to the English branches, constitutes money wholly and exclusively laid out and expended for the purpose of its trade as a whole and is deductible in computing its profits or gains for excess profits tax. We consider that *Stevens v. Durban-Roodepoort Gold Mining Co.* (2) supports this view."

Two points were argued before us—first, that, applying the Case I rules irrespective of any special provisions in the excess profits tax code, the finding of the commissioners was correct, and, secondly, that, assuming the result on that basis led to the prohibition of the deductions, there were provisions in the excess profits tax code which, though not expressly modifying the relevant Case I rules, showed plainly the intention of Parliament that such deductions were to be allowed for excess profits tax, and that the court should, on recognised principles that have been laid down for the construction of statutes, give effect to that intention.

Before considering the authorities, we will refer briefly to the nature of the argument. It is said that a tax on profits cannot be a disbursement for the purposes of the trade within r. 3 (a) of the Rules Applicable to Cases I and II. The trader trades, makes his profit, and then in a different capacity, that of taxpayer, has to hand over a share of those profits to the Crown. Does, however, this broad principle apply when, as here, one is dealing with a claim to deduct taxes imposed by a different, in this case a Dominion, government in respect of profits which are assessable here because made here? One may consider a Dominion trader contemplating opening a branch here, the Dominion law imposing a tax on all his profits wherever made. He realises he is taxed here on the profits referable to his branch here. There is, we think, a good deal to be said for the view that the Dominion tax which he will have to pay is a sum laid out for the purposes of his trade here. We are fortified in this provisional view by the fact that it was, so far as we can see, the view taken by the Crown's advisers in *Stevens v. Durban-Roodepoort Gold Mining Co., Ltd.* (2). There the taxpayer was an English company which carried on a gold mining business in the Transvaal. In the Transvaal it was subject to a profits tax. The tax, according to the Case, was imposed on the net produce of the individual year.

The ordinance is not set out in the report, but the Attorney-General, in his reply, said (5 Tax Cas. 406): "It is true that both the profits tax and the income tax are taxes on profits." It was, therefore, regarded as a tax on profits. The Crown did not contest the right of the taxpayer to deduct the amount of the Transvaal tax on profits for the purpose of assessing the taxpayer's liability here. The dispute was whether the amount of the Transvaal tax payable in the year in which it was first imposed should be spread over that and the two preceding years for the purpose of arriving at the three years' average or should be charged against the profits of the year in which it was imposed. The Attorney-General, in opening, stated that it was rightly dealt with as a deduction from the profits of the year in which it falls. In reply he emphasised the point we have indicated. Following on the phrase we have already quoted as to the two taxes being taxes on profits, he says (*ibid.*):

"... but they are different taxes, applying to different areas, assessed on different principles, collected by different machinery, appropriated to different purposes. In one sense the company suffers double assessment, because it lives in England and is subject to English taxes, and it works in the Transvaal and is subject to Transvaal taxes... The amount paid in profits tax is not taxed twice. It is not taxed to income tax at all, for it is

taken out of the profits before the sum assessable to income tax is arrived at."

We have quoted this because it analyses the position in very clear language. The Crown regarded the taxpayer's claim to deduct the Transvaal tax as a disbursement laid out for the purposes of the trade here as plainly right. In that case the court were dealing with the assessment on the head office and here we are having to consider an assessment in respect of a branch, but the view taken by the Crown's advisers establishes, at any rate, that the proposition that a tax on profits paid in a country outside the United Kingdom may be a disbursement deductible within the rules is not plainly wrong.

Counsel for the Crown referred us to *Inland Revenue Comrs. v. Von Glehn* (3). That was an excess profits duty case. The company, who were general merchants, had committed breaches of certain regulations, no "moral obloquy" being suggested. Proceedings were taken and a compromise penalty accepted. The company sought to deduct the penalty and their legal expenses. We do not think that case assists for the reason stated by LORD STERNDALE, M.R. He says ([1920] 2 K.B. 565):

"This business could perfectly well be carried on without any infraction of the law."

No one here suggests that the trade in the English branches could have been carried on without paying the Irish taxes. The argument for the taxpayers, as summarised by LORD STERNDALE, was that all you had to look at was the "actual sum that the taxpayers put in their pocket." That, of course, is plainly wrong. We were also referred to *Smiths Potato Estates, Ltd. v. Bolland* (4). In that case the taxpayers sought to deduct under r. 3 (a) and (e) of Cases I and II a sum incurred as legal costs in successfully appealing against a decision of the Inland Revenue Commissioners that only £3,500 out of a salary of £6,486 14s. paid to a manager should be allowed in the computation for excess profits tax. The taxpayers contended that there were business reasons, which it is unnecessary to specify, as well as purely financial ones, for their action. The House of Lords held by a majority that the sum could not be deducted. The fact that two of their Lordships, VISCOUNT SIMON and LORD OAKSEY, dissented shows that the borderland is debatable, which has some relevance to the second point if it arises. We think the difficulty of the present case is exemplified by quoting the issue as formulated by LORD PORTER ([1948] 2 All E.R. 372):

"... what your Lordships have to determine is whether the expense is incurred in order to earn gain or is the application or distribution of that gain when earned."

Going back to the Dominion trader contemplating opening a branch here and considering the gain to be earned by that branch which will be the subject-matter of his United Kingdom assessment, he will take into account that he will have to hand over part of what he gains to the Dominion government. Having regard to our code under which all profits made are taxed here, it is in one sense a precedent liability from his point of view. In the present case we are told the Irish profits tax was fifty per cent. Ours started at sixty per cent. and rose to one-hundred per cent. There is a certain artificiality in saying that the payment of ten per cent. or fifty per cent. over and above his total gains by trading here are an application or distribution of that gain when earned. This again brings out the relevance so clearly emphasised by the Attorney-General in *Stevens'* case (2) of the tax on profits sought to be deducted being a different tax payable to a different government. If one is considering one tax system only, the tax could plainly not exceed one hundred per cent.

We do not think the case is covered by authority. In one sense, of course, the Irish taxes are taxes on profits when earned, but it is on the profits made by an Irish company trading through a branch in this country. Before that



company opened a branch in England it had made itself chargeable to tax in Ireland, and when it opened a branch in England the profits of that branch were chargeable in Ireland. Looking at the matter, as has to be done under our code, as profits of a "trade exercised within the United Kingdom" by a person "not resident in the United Kingdom," we should have come to the conclusion that the Irish taxes could and should be regarded as a disbursement laid out for the purposes of his trade here within the rule.

As, however, we think the point is one of difficulty we will assume we may be wrong and consider the second argument. It is submitted by the taxpayer that the excess profits tax statutes show a clear intention that the taxes such as those in question should be deducted. The statutes were drafted, it is said, on the assumption that such taxes were deductible for income tax purposes under the rules applicable to Case I. The correctness of the assumption is now challenged by the Crown. The taxpayer submits that effect ought to be given in dealing with excess profits tax to the intention of Parliament if, as they submit, it is sufficiently plain. The principle invoked by the taxpayer is stated by ALDERSON, B., in *A.-G. v. Lockwood* (5) (9 M. & W. 398):

"The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."

(See also *Salmon v. Duncombe* (6)). The words, it is said here, in their literal application provide that the issue is to be decided in accordance with the rules applicable to Case I. Ought they, however, to be given this construction if it would lead to a plain and clear contradiction of the apparent purpose of the Act?

The actual-provisions relied on in the excess profits tax code will be more intelligible if we trace, first, the history of the legislation relating to the deduction of foreign or Dominion taxes. Cases IV and V of sched. D deal with tax in respect of income arising from securities or possessions abroad. Rule I of the Rules Applicable to Case IV, which is made applicable in certain circumstances to Case V, provides:

"The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not received in the United Kingdom, to the same deductions and allowances as if it had been so received, and to the deduction, where such a deduction cannot be made under any other provision of this Act, of any sum which has been paid in respect of income tax in the place where the income has arisen, and to a deduction on account of any annual interest or any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom, and the provisions of this Act (including those relating to the delivery of statements) shall apply accordingly."

If one assumes £100 of income arising abroad subject to foreign income tax of £10, the United Kingdom income tax is levied on £90. It is suggested, we think probably rightly, that the words "where such a deduction cannot be made under any other provision of this Act" suggest or assume that such deductions could be made under the general provisions of the Rules Applicable to Cases I and II. It would seem illogical to allow the deduction under Case IV if it was not to be allowed under Cases I and II. By the Finance Act, 1920, s. 27, a more generous form of relief was granted in respect of income liable to tax here in respect of which Dominion income tax had been paid. The form of relief was to reduce the

rate of the United Kingdom tax as applied to the full amount of the income before deduction of the Dominion tax, to the following extent: (a) if the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom income tax, the rate at which relief is to be given shall be the Dominion rate of tax; (b) in any other case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom income tax. This scheme obviously could not stand with r. 1 of Case IV. This is dealt with in the opening words of s. 27 (4) of the Finance Act, 1920:

"Notwithstanding anything in the Rules Applicable to Case IV or Case V of sched. D or in any other provision of the Income Tax Acts, no deduction shall be made on account of the payment of Dominion income tax in estimating income for the purposes of United Kingdom income tax . . ."

The later words of the section do not concern us. Their complexity is, we were told, due to the fact that in certain Dominions a shareholder is affected by two taxes, one a general tax on the profits of the company, and a further tax on any dividend declared.

We now turn to the provisions dealing with excess profits tax which are relied on. Paragraph 5 of Part I of sched. VII to the Finance (No. 2) Act, 1939 (which contains, as we have said, the adaptations of income tax principles) provides:

"The provisions of sub-s. (4) of s. 27 of the Finance Act, 1920 (which disallows deductions on account of the payment of Dominion income tax) shall not apply."

Now if the rules of Case I disallow the deduction of Dominion income tax *in all cases*, this was meaningless, misleading and not an "adaptation" of any principle. The words in italics are, of course, of crucial importance. Counsel for the Crown, as we understood him, agreed that, if the deduction was inadmissible under the rules of Case I, it must be inadmissible in all cases. It was argued for the Crown that full effect could be given to the intention of the paragraph by construing it in this way. If, but for s. 27 (4), the taxpayer would be entitled to deduct under Case I, the deductions may be made, leaving open the argument whether such deductions were or were not admissible. There are, in our opinion, two conclusive arguments against this as the "intention." In the first place, it would have been worded differently on the following lines: "Nothing in s. 27 (4) shall prohibit deduction on account of payment of Dominion tax which but for that section would be admissible." That form would have at once raised the second point. The excess profits tax was sixty per cent. at its inception, and, as we know, rose later to one hundred per cent. The question whether income tax and other similar taxes were deductible was a vital factor in considering the whole scheme. Taking the rate as eighty per cent., if a trader had in respect of the same income to pay Dominion income tax at, say, thirty per cent., he was in effect being fined for activities which were presumably regarded as useful as they were permitted to continue during the war. If, on the other hand, one assumes that income tax and other taxes of a similar kind are deductible under the rules of Case I, the paragraph is logical and self-explanatory. It removes the one statutory bar to the deduction of any of such taxes, namely, Dominion income tax, the reason for the existence of which we have given.

Counsel for the taxpayer also relied on the Finance Act, 1940, s. 30. Section 30 (1), which we need not set out in detail, gave power to His Majesty by Order in Council to put into force arrangements, if made, with the government of a Dominion which levied an excess profits tax for relief against double taxation on the basis of a formula set out in s. 30 (1) (b). Sub-section (2) provides:

"Where any such Order in Council is made, then, if the commissioners are satisfied that any case is one which falls within the arrangements to which

the Order relates, they shall, in lieu of allowing, in computing profits for the purpose of excess profits tax or the national defence contribution, any deduction in respect of excess profits tax charged in the part of His Majesty's dominions outside the United Kingdom to which the Order relates, make such adjustment of the excess profits tax payable in the United Kingdom or the national defence contribution as may be necessary to give effect to the arrangements, and allow any necessary relief accordingly by repayment or otherwise, so, however, that the effect of the adjustment shall not be less favourable to the taxpayer than the effect of allowing the deduction."

Again this makes it, we think, clear beyond argument that Parliament has passed this legislation on the basis that the taxpayer is entitled to make deduction for his tax here of excess profits tax charged in the Dominions in respect of the same income. The relief under any arrangements to be made is in lieu of this right. The effect of the adjustment is not to be less favourable than the effect of allowing the deduction. Those negotiating any arrangements are, in effect, instructed to proceed on this basis. If the arrangements for any reason do not put the taxpayer here in a better position than he is in on the basis of deducting, they will plainly not be worth pursuing.

The argument can be put in two ways. First, r. 3 (a) falls to be construed for excess profits tax in the context of the provisions to which we have referred. If a provision is capable of two meanings, other provisions dealing with the subject-matter may be looked at to decide the question as to the meaning or application of the ambiguous words. If r. 3 (a) had appeared for the first time in the excess profits tax code, we would have had no difficulty in construing or applying it in the way contended for by the taxpayer. It may be said that the position here is different. Income tax principles are to be applied except in so far as they are adapted or modified. Parliament has not sought to adapt or modify them *quoad* this issue, because it assumed a construction or application which has turned out to be erroneous. If there were no such principle of construction as that laid down by ALDERSON, B., and applied in many cases (see

MAXWELL ON THE INTERPRETATION OF STATUTES, 9th ed., chap. 9), that would be an end of the matter. That principle being a principle that in proper cases has to be applied, the present case, is, we think, well within it. In the first place, we hold that the intention of Parliament that the taxes in question here should be deducted for excess profits tax is plainly established. In the second place, having regard to the high level of excess profits tax, the construction contended

for by the Crown would in this, and, no doubt, in many other cases, lead to the manifest injustice that traders affected would be called on to pay in respect of their trade here more than the total profits they earned. Put in another way, the form of this legislation would lead any trader to believe that he could deduct such sums. On this basis he continues to trade, and, as he was allowed to do so during the war, presumably his activities were useful to us. It is said, now that

it is all over, the basis is much more onerous.

We, therefore, come to the conclusion that, if we are wrong in our conclusion on the first point, the court ought to give effect to the plain intention of Parliament and hold that these taxes are deductible for the computations in question.

*Appeal of the taxpayer allowed with costs. Cross-appeal of the Crown dismissed.*

Solicitors: *Last, Sons & Fitton*, agents for Crofton, Craven & Co., Manchester (for the taxpayer); *Solicitors of Inland Revenue*.

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]



## SHEARMAN v. FOLLAND.

[COURT OF APPEAL (Tucker and Asquith, L.J.J., and Roxburgh, J.), January 24, 25, April 5, 1950.]

*Damages—Measure of damages—Special damages—Personal injuries—Fees paid to nursing home—Deduction of hotel expenses not incurred by plaintiff.*

In a claim for personal injuries in which liability was conceded the trial judge awarded £5,234 17s. 10d., being as to £4,500 general damages and as to £734 17s. 10d. special damages. In an appeal against the award as insufficient, the plaintiff contended that it was wrong to deduct from her claim for special damages for nursing home fees a sum representing hotel expenses which she would have incurred for her board and lodging had she not been injured.

HELD: (i) the defendant could not set-off the money which the plaintiff would, or would probably, have spent on living at hotels if she had not been injured, because the precise style in which she might have lived was a collateral matter not to be taken into consideration in mitigation of damages and the two payments were not *in pari materia*.

(ii) had evidence been adduced to show what part of the nursing home fees was attributable to board and lodging it would have been open to the judge to make a deduction in respect thereof, but, in the absence of such evidence, it was impossible to do so. Nevertheless, as part of the fees was obviously referable to the provision of food, it was proper to deduct the sum of £55 (or £1 a week) in respect of the time spent in the nursing home.

[AS TO MEASURE OF DAMAGES IN GENERAL, see HALSBURY, Hailsham Edn., Vol. 10, pp. 119-121; and FOR CASES, see DIGEST, Vol. 17, pp. 130-136, Nos. 380-421, and DIGEST Supp.]

Cases referred to:

- (1) *Bradburn v. Great Western Ry. Co.*, (1874), L.R. 10 Exch. 1 ; 44 L.J.Ex. 9; 31 L.T. 464; 17 Digest 125, 339.
- (2) *Simpson v. Thomson*, (1877), 3 App. Cas. 279 ; 38 L.T. 1; 29 Digest 290, 2355.
- (3) *Jebsen v. East and West India Dock Co.*, (1875), L.R. 10 C.P. 300 ; 44 L.J.C.P. 181; 32 L.T. 321; 17 Digest 125, 340.
- (4) *Liffen v. Watson*, [1940] 2 All E.R. 213; [1940] 1 K.B. 556; 109 L.J.K.B. 367; 162 L.T. 398; Digest Supp.
- (5) *Billingham v. Hughes and Another*, [1949] 1 All E.R. 684; [1949] 1 K.B. 643; [1949] L.J.R. 1147.
- (6) *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 17 Digest 79, 9.

APPEAL against a decision of SLADE, J., awarding the plaintiff £5,234 17s. 10d. damages for personal injuries. There was no issue as to liability and the plaintiff appealed solely on the insufficiency of the award. The facts appear in the judgment of the court delivered by ASQUITH, L.J.

*Laskey and Neil Lawson* for the plaintiff.

*John Thompson* for the defendant.

*Cur. adv. vult.*

Apr. 5. ASQUITH, L.J., read the following judgment of the court. This is an appeal from a decision of SLADE, J., awarding the plaintiff £5,234 17s. 10d., being as to £4,500 general damages and as to £734 17s. 10d. special damages in respect of personal injuries admitted to be caused by the negligence of the defendant's servant. There is no issue as to liability. The appeal is by the plaintiff against the alleged insufficiency of the award. The plaintiff was at the material time a woman of sixty-seven, healthy, active, and young for her years.

In the period preceding the accident she had been in the habit of residing at hotels in London—in particular, immediately before the accident, at the Montana Hotel, where she paid seven guineas a week for board and lodging. She was shockingly injured. One leg had to be amputated at the thigh; the other became permanently unstable, and in practice largely useless. She cannot now walk more than 150 yards, and that only on a perfectly even surface. She cannot  
A without assistance go up or downstairs, or get into or out of a bath or a motor car. She spent fifty-five weeks in nursing homes and part of the special damage in respect of which she claimed consisted of the fees charged by these homes. These fees did not include operations, theatre fees, and other special expenses (which are claimed separately), but did include maintenance and general nursing. The charge was not apportioned between these two constituent elements, so  
B as to show how much was attributable to the one and how much to the other. It was a composite “global” sum, and, although it differed from one nursing home to another, a typical charge would be about twelve guineas a week.

The plaintiff complains of the inadequacy of the award on two grounds. The first concerns the special damages. She had claimed as part of her special damages fees which she had to pay to nursing homes during the fifty-five weeks she had  
C to spend in them after the accident. SLADE, J., has deducted from these fees the amount which the plaintiff would have had, during that period or most of it, to pay to her hotel at the rate of seven guineas a week if there had been no accident and she had continued to live at such hotels in her normal style. These hotel bills he treats as having been saved in consequence of the accident, and gives credit in respect of them to the defendant. The second ground on which  
D the award is impugned is that SLADE, J., has also made an unjustifiable deduction from that part of the general damages which is represented by the necessity resulting to the plaintiff from the accident of having a competent attendant. Under this head she claimed an expense of £10 10s. a week, a figure based on a salary of £3 3s. a week and a bedroom and board in the same hotel and of the same quality as her own, at £7 7s. a week, for a period equal to her expectation of  
E life, namely, eight or nine years. This sum of ten guineas a week alone worked out at a sum exceeding that at which SLADE, J., has assessed the whole of the general damages, *viz.*, £4,500. Hence he drastically reduced it. We are forced to assume so, since otherwise there is no room left in his figure for general damages for pain and suffering and loss of “amenities.” He expressed the view in his judgment that ten guineas was unreasonable and exorbitant. By how much  
F precisely he reduced it must remain conjectural.

We will deal first with the deduction from the special damages of hotel living expenses treated as saved during the plaintiff’s sojourn in the various nursing homes. The defendant argues that in the absence of the accident she would presumably have had to board and lodge somewhere, and that probably she would have continued residing at the Montana or some similar hotel, paying  
G seven guineas a week or some similar sum. This expenditure the accident has obviated. The actual loss caused by the accident is all that can be recovered as special damages, and that actual loss (so the argument runs) is, not the gross nursing home fees, but the difference between those fees and the hotel bills which she would otherwise have incurred. That is to say, *not*, to take the figures above, twelve guineas a week, but twelve minus seven guineas. This contention  
H SLADE, J., accepted, and he reduced the special damages accordingly, with this qualification, very reasonably conceded by counsel for the defendant, that it was right to spread the set-off, not over the whole fifty-five weeks, but over forty-five, since some margin of time must reasonably be allowed to the plaintiff to make up her mind whether to release herself from her contract with the Montana Hotel after the accident and to make arrangements for re-engaging her rooms there on her recovery.

The contrary argument for the plaintiff may be introduced by a quotation

from MAYNE ON DAMAGES, 11th ed., p. 151, in a passage where the learned editor is considering what evidence is allowed in mitigation of damages to arrive at the actual damage directly resulting from the defendant's act:

"Matter completely collateral, and merely *res inter alios acta*, cannot be used in mitigation of damages."

The plaintiff contends that the hypothetical hotel expenses are matters "completely collateral." It is easier to formulate this maxim than to apply it. What in a given case is, and what is not, "collateral"? Insurance affords the classic example of something which is treated in law as collateral. Where X is insured by Y against injury which comes to be wrongly inflicted on him by Z, Z cannot set up in mitigation or extinction of his own liability X's right to be recouped by Y or the fact that X has been recouped by Y: *Bradburn v. Great Western Ry. Co.* (1) and *Simpson v. Thomson* (2). There are special reasons for this. If the wrongdoer were entitled to set-off what the plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself.

The plaintiff might have invoked in support of her contentions the judgment of the Court of Common Pleas in *Jebsen v. East and West India Dock Co.* (3). In that case the plaintiffs, owners of ship "A", claimed damages from the defendants for delaying its departure in breach of contract, whereby passengers had cancelled their passages and the shipowners suffered loss. As the result, however, of the defendant's breach another ship—ship "B"—in which some of the plaintiffs owned shares was benefited by getting an increase of passengers consisting of some persons who had had to cancel their passage by the first-named ship. This was held to be no ground for reducing the damages. The case was somewhat complicated by the fact that the persons who lost on ship "A" were not exactly coincident with the persons who gained on ship "B", and by other circumstances, but it is clear that the court would have reached the same conclusion if there had been a single plaintiff owning both ships. Another case in which accidental *de facto* recoupment of part of the loss caused by the wrongdoer was ignored was *Liffen v. Watson* (4). It is a case of some interest in the present connection since the expenses involved were those of board and lodging. The plaintiff, a domestic servant before the accident, had been paid by her employer £1 a week wages and furnished with board and lodging free. After the accident had precluded her from remaining in service she went to live with her father, to whom she paid nothing in respect of the board and lodging which he supplied. It was held she had none the less lost, owing to the defendant's tort, the free board and lodging previously supplied by her employer, because she had acquired its equivalent *aliunde*, and that she could claim for it without deduction or set-off. The case resembles *Jebsen v. East and West India Dock Co.* (3).

Strange results might certainly follow if it were possible in every case for the defendant to mitigate damages by proving what course of conduct the plaintiff would probably have followed or what his expenses would probably have been if the act complained of had never been committed. A millionaire accustomed to live at a palatial hotel, where his weekly expenses far exceed the charges of the nursing home to which, after being injured by the defendant's negligence, he is transplanted, would recover nothing by way of special damages. Can it really lie in the mouth of the wrongdoer in such a case to say: "I am entitled to go scot-free. I have, by my negligent act, not merely inflicted no loss, but conferred a net financial benefit on the defendant by saving him from the consequences of his habitual extravagance"? Apart from such an anomaly it is clear that the court will not pursue beyond certain limits a speculation as to what would have been the position or conduct of the plaintiff if his rights had



not been invaded. For instance, in the recent case of *Billingham v. Hughes and Another* (5), a doctor was negligently run down and claimed as part of his special damages loss of what he would probably have earned but for the injuries he received. He was awarded a lump sum based on estimated earnings without any deduction in respect of income tax or surtax. Although a year after receiving the income he would, in fact, have had to pay income tax, and two years after receiving it, surtax, on or measured by such income, the court regarded those facts as collateral to the damage. What he would have done in respect of his earnings if he had realised them was no concern of the wrongdoer who had prevented him from realising them, although the effect of ignoring the factor might be, and was, to give the plaintiff more than an indemnity. Another illustration of the same tendency is that given by LORD HALSBURY, L.C., in his speech in *The Mediana* (6) ([1900] A.C. 117):

“What right has a wrongdoer to consider what use you are going to make of your vessel [a vessel injured in a collision]? More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me absurd.”

Again, it is argued for the plaintiff that the payments to the nursing home are not *in pari materia* with the saving sought to be set-off against them. If it were a clear case of a tort directly causing an increase of living expenses to the plaintiff and no other sort of damage, that, it is argued, is one thing. It is quite another when the payments against which the set-off of maintenance saved is claimed consist (as in this case) of composite sums attributable in unascertained proportions to maintenance and nursing fees. Finally, there appears to be no case of personal injuries in which the claim to a set-off such as that put forward in this appeal has ever been advanced, let alone succeeded. In this connection the observations of the court in *Jebsen v. East and West India Dock Co.* (3) are pertinent ((1875) L.R. 10 C.P. 304):

“The absence of authority for a claim by defendants like this, which yet if well founded must have arisen in many cases, affords a strong presumption against its having any legal foundation. It is true that there must be a first instance in every claim, and that ingenuity often for the first time suggests a point which has escaped observation, and which yet, when brought to the test of argument, is found to be a sound one. But this is a point which must have arisen so frequently that it is to us incredible that, if sound, it never should have been taken.”

What are the arguments the other way? First, it is contended that the novel character of the claim is no evidence of its invalidity, if its novelty can be accounted for by factors which are consistent with its validity, and that such factors exist. The normal plaintiff in a personal injuries case is not a migratory hotel dweller. He is a member of a household. He may himself be a householder or a lodger, a person in either case defraying his own keep and that of his family, if any, or he may be a child or dependant, supported by others. If he is a dependant, he does not save any living expenses because he incurs none. If he is a householder or lodger, many of his expenses, *e.g.*, rent, rates, and similar expenses are fixed charges which continue while he is in hospital, while those which do not so continue and are in fact saved (*e.g.*, those for food attributable entirely to the plaintiff's consumption) are exceedingly difficult for the defendant (who may be wholly unacquainted with the plaintiff's household arrangements) to disengage from the total and may be too trifling to make their ascertainment worth while. This may, no doubt, account for the invariable

omission on the part of defendants to attempt a set-off of these items in cases of personal injury. On the other hand, in the same class of case plaintiffs do often claim for "extra nourishment" necessitated by the accident, a claim which by implication concedes that the plaintiff is claiming, not a gross sum, but a margin or differential, and is giving credit for the nourishment—ordinary in quantity and quality—for which he would have to pay, accident or no accident.

So much for the absence of precedent for the plaintiff's claim. When the stigma of novelty is removed and the claim can be considered on its merits and (in the absence of authority) in the dry light of principle, how does it emerge from this scrutiny? The governing principle is that the special damages recoverable (providing some damage is foreseeable) is that directly attributable to the tort, and no more. The plaintiff may in certain circumstances receive less than an indemnity, but (subject to the insurance cases) he should not in general receive more. The question is: What difference did the commission of the act complained of make to the plaintiff? The difference (answers the defendant) between having to pay a hotel seven guineas a week and having to pay a nursing home on the average twelve guineas a week over a period of fifty-five weeks or thereabouts. If she had not been injured, the plaintiff would not have escaped the liability to pay something for board and lodging and would probably have continued to provide for these on the scale and in the manner which she had adopted for many years past. Unless these potential payments are brought into account she makes a profit by being run down. A complicating element is, indeed, introduced by the fact that, while her hotel bills were for board and lodging only, her nursing home fees are for these items plus nursing. Let us, for the sake of argument, think this difference away and take a simpler case in which no expenses are involved except those of maintenance. X is living in town A where bed and breakfast can be had for 10s. a night. He takes the train for town A, and in breach of its contract the railway company carries him beyond his destination to town B, where bed and breakfast cannot be had for less than £1. Clearly his damages would be, not £1, but the difference between £1 and 10s.; nor presumably would it make any difference if, not a breach of contract, but a tortious act had been responsible for such additional expenses. It would be the same if he had been kidnapped in town A and "dumped" in town B, but for the possibility of exemplary damages which is not here in question. On reflection it is not clear why the composite character of the payments made to the nursing home should preclude the defendant altogether from setting-off living expenses of some amount from such payments. It can, of course, be urged with force—and this is really a different point—that life in a hospital or nursing home attended with pain and punctuated by operations is a very different thing from a padded and painless existence in a hotel. For this difference the plaintiff surely falls to be compensated under a different head—general damages (a) for pain and suffering, and (b) for loss of "amenities,"—and, no doubt, she has been.

On this part of the case we have reached the conclusion: (i) That the defendant cannot set-off the seven guineas a week which the plaintiff would, or would probably, have spent on hotels if not injured. The precise style in which she would probably or might well have lived is, in our view, a collateral matter and the two payments are not *in pari materia*. (ii) If evidence had been adduced to show what proportion of the twelve guineas a week was attributable to board or lodging, we think that it would have been open to the judge to make a deduction in respect thereof. In the absence of such evidence it seems to us impossible to estimate the proportion attributable to lodging—in fact, we doubt whether an expert analysis of the accounts of a nursing home would assist the court in this respect since the charges of such an institution are not arrived at by taking into account considerations which would be reflected in the charges of a hotel or boarding house. With regard to food the position is different. A jury would, we think, be quite entitled in such a case as this to say: "These

fees must be referable to some extent to the provision of food. We think, in the absence of evidence as to actual cost, that at least £1 a week should be deducted under this head." We think that we are entitled to act in this matter as a jury would have done, and we, accordingly, propose to deduct the sum of £55 from the amount of the special damages claimed in respect of nursing home fees.

- A The second point taken by the plaintiff covers the item (labelled "special damage") attributable to the necessity, consequent on the accident, that the plaintiff should for the future have an attendant. The claim under this head is not merely that she should have an attendant, but that that attendant should live in the same hotel as the plaintiff, in a room costing the same weekly sum as the plaintiff's (namely, seven guineas), and at a minimum salary of three guineas a week (ten guineas a week in all). SLADE, J., has held that, while an attendant was necessary, (i) the ten guineas claimed in respect of her were excessive, (ii) the claim, relating as it did to attendance expenses not already incurred but prospective, was a claim for general and not special damages. On the second point he was unquestionably right. All damages which up to the time of the hearing have not yet crystallised in actual disbursement, but are still prospective, are general damages. SLADE, J., has awarded £4,500 as general damages. Somewhere embedded in this figure is the prospective damages represented by the need for an attendant, along with other elements such as damages for pain and suffering and for loss of amenities. However, the fact that the plaintiff claims over £4,000 for attendance alone, and has recovered only £4,500 for this plus the two other and considerable items indicated, makes it quite clear that SLADE, J., has very materially reduced the attendance item. Indeed, he announced his intention to scale it down in the following passage in his judgment:
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"She is entitled to reasonable assistance . . . I am not satisfied that £7 7s. a week for accommodation at the same hotel as the plaintiff plus £3 3s. a week for wages, which makes £10 10s. a week, is a reasonable claim against the defendant. Indeed, I think it is entirely unreasonable, but, on the other hand, I am satisfied . . . that Mrs. Shearman is entitled to recover for the period based on her expectation of life a sum of money which will enable her to receive assistance of the kind indicated, in the evidence."

- E The learned judge, accordingly, incorporated in his global figure of £4,500 for general damages a sum the precise magnitude of which we cannot gauge, beyond saying that it must fall very considerably short of £10 10s. a week, since on the ten guineas basis this single item is £4,680, leaving nothing for pain and suffering, loss of amenities, etc. We think that SLADE, J., in drastically reducing this item, must have been much influenced by the evidence as to what happened at a guest house called Westbrook House, Bampton, Devon, when at one period after her accident (Sept. 17, 1948—Nov. 24, 1948) she was looked after by Mrs. Cannon (the attendant whom she still has and wishes to retain) at a cost, not of ten guineas, but of five pounds, a week, Mrs. Cannon paying for her own accommodation. It is quite true that the very moderate outlay during this period of ten weeks was in part due to the fortunate accident that Mrs. Cannon had a cottage in Bampton, but we cannot say that the learned judge was wrong if, in view of this evidence, he made a substantial though unascertained reduction in the figure of ten guineas a week claimed by the plaintiff. In the result, the appeal succeeds to the extent that only £1 a week should be deducted from the nursing home fees instead of seven guineas.
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*Appeal allowed with two-thirds costs to the plaintiff.*

Solicitors: *Edwin Coe and Calder Woods* (for the plaintiff); *P. A. Gascoine* (for the defendant).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]



KNEEN (INSPECTOR OF TAXES) *v.* ASHTON.

[CHANCERY DIVISION (Roxburgh, J.), April 3, 1950.]

*Income Tax — Exemption — Superannuation contribution — “Ordinary annual contribution” — Payment of back contributions by annual instalments — Finance Act, 1921 (c. 32), s. 32 (1) — Regulations dated Nov. 10, 1921 (S.R. & O., 1921, No. 1699), reg. 5.*

By s. 32 (1) (a) of the Finance Act, 1921, any sum paid by an employed person by way of contribution towards a superannuation fund shall, for the purpose of assessment to income tax, be allowed to be deducted as an expense incurred in the year in which the sum is paid, provided that no such allowance shall be made in respect of any contribution which is not an “ordinary annual contribution.” By reg. 5 of regulations made by the Commissioners of Inland Revenue dated Nov. 10, 1921: “ordinary annual contribution” is defined as “an annual contribution of a fixed amount or . . . calculated on some definite basis by reference to the earnings, contributions, or numbers of the members of the fund.”

In 1946 the taxpayer, who was employed by a railway company, became eligible as a salaried officer of the company to be a contributing member of a superannuation fund association. In accordance with the rules of the association, he was permitted to begin his membership from an earlier date subject to the payment by him of back contributions which amounted in his case to some £200, and it was agreed that this total should be paid off by six annual payments of £33 16s.

**HELD:** the payments, being merely a convenient way in which to pay off what was, in its true nature, the purchase price for the right to be deemed a member of the association for longer than was, in fact, the case, were not “ordinary annual contributions” within the meaning of s. 32 (1) (a) and reg. 5, and, therefore, could not be allowed to be deducted as expenses.

[FOR THE FINANCE ACT, 1921, s. 32 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 229.]

**CASE STATED** by the General Commissioners of Income Tax.

The taxpayer, who was a member of a superannuation fund association, claimed to be allowed to deduct as an expense under s. 32 (1) of the Finance Act, 1921, back contributions paid by him to the association in order that his membership might be deemed to begin at a date earlier than that of his admission. The taxpayer contended that the payments in question were “ordinary annual contributions” within the meaning of s. 32 (1) (a).

*R. P. Hills* for the Crown.

The taxpayer appeared in person.

**ROXBURGH, J.:** At a meeting of general commissioners of income tax held on Oct. 21, 1948, the taxpayer, Frederick Arthur Ashton, appealed against certain assessments which were made on him under the Income Tax Act, 1918, sched. E. He claimed that, in arriving at the amount of the assessment for the year ended Apr. 5, 1947, he should be allowed to deduct as an expense under s. 32 (1) of the Finance Act, 1921, four-fifths (being the approved proportion, as explained in the Case Stated) “of the full amount which he paid in that year to the Superannuation Fund Association of the London, Midland and Scottish Railway Company.” This payment included back contributions. Alternatively, the taxpayer claimed that, for the years ended Apr. 5, 1945, and Apr. 5, 1946, he should be “allowed to deduct as an expense under the said s. 32 (1) four-fifths of the ‘back contribution’ attributable to each year respectively.” The taxpayer had been allowed as an expense for the year ending Apr. 5, 1947, four-fifths of the amount of his current contribution to the association. There is no dispute that four-fifths was the correct amount

of the allowance. The sole question for determination is whether the back contributions were deductible.

A Before 1941 the taxpayer was employed by the railway company at weekly wages as a shunter, class 1. During 1941 he was appointed temporary inspector, class 4. On Apr. 15, 1946, he was promoted to be an inspector on the establishment at St. Pancras Station, and on that date he became a member of the superannuation scheme. He was then forty-eight years of age. Rule 7 of the scheme provides:

“Every person on the wages staff of the company who becomes a salaried officer under fifty years of age shall be entitled, if he desires, to become a contributing member.”

B The taxpayer, therefore, had the right to become a contributing member, but only as from the date of his admission. Rules 10 and 11 of the scheme, however, provide as follows:

C “10. The committee with the assent of the directors shall have power to impose whatever special conditions they think fit in admitting salaried officers over forty years of age to membership of the fund. 11. The committee may, at the time of admission of a member over forty years of age, with the assent of the directors, permit the membership to commence as from an earlier date subject to back contributions from such earlier date being paid by such member and by the company at the rate for the age at such earlier date with the addition of compound interest at the rate credited by the company to the fund on the fund account in the year previous to the year of admission of such member, subject to the following limitations:—(a) D No member over forty and under fifty years of age at the date of admission shall be permitted to join as from an earlier age than forty . . . Back contributions paid as so provided shall be based on the member’s salary at the time of actual admission.”

E Rule 18 provides for the calculation of the contributions to be paid by the contributing members and concludes with sub-rule (3):

“Back contributions of persons becoming members on or after Aug. 1, 1941, shall be calculated on the scale set forth in column III of the table.”

F The commissioners found that, acting under para. 11 of the scheme, the committee of the association permitted the taxpayer to commence contributory membership as from the date when he became forty years of age, subject to the payment by him, of back contributions to the fund from that earlier date. The back contributions to be paid by the taxpayer were fixed in accordance with para. 18 of the scheme and amounted in all to £146 6s. Interest thereon in accordance with para. 11 of the scheme amounted to £56 10s., making a total amount due from the taxpayer in respect of back contributions of £202 G 16s. The committee agreed (as is usual in such cases) to this total amount being spread forward equally over the six succeeding years, resulting in an annual payment being due for each of those years of £33 16s. in addition to the current contributions. There is no provision in the scheme for payment of such contributions by instalments, but I do not understand the commissioners to mean that the committee had no power to make such an arrangement. If they H did mean that, as at present advised, I do not think that that would be correct. The commissioners further state that for the year ended Apr. 5, 1947, there was deducted from the salary of the taxpayer, in addition to the current contribution for the year of £25 10s. 2d., the first instalment of back contributions of £33 16s., making a total of £59 6s. 2d. It was not disputed that the taxpayer was entitled to, and had been allowed, a deduction for the year ended Apr. 5, 1947, of four-fifths of the contribution of £25 10s. 2d., but the inspector of taxes had disallowed altogether the first instalment of the back contribution amounting

to £33 16s. The commissioners decided in favour of the taxpayer. Hence this appeal.

Section 32 (1) of the Finance Act, 1921, provides as follows:

"Subject to the provisions of this section and to any regulations made thereunder ... any sum paid by ... an employed person by way of contribution towards a superannuation fund shall, in computing profits or gains for the purpose of an assessment to income tax under ... sched. E, be allowed to be deducted as an expense incurred in the year in which the sum is paid: Provided that—(a) no allowance shall be made under the foregoing provision in respect of any contribution by an employed person which is not an ordinary annual contribution ..."

A

The Commissioners of Inland Revenue made regulations (S.R. & O., 1921, No. 1699) dated Nov. 10, 1921, under s. 32 (4) of the Finance Act, 1921, reg. 5 of which provides:

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"The expression 'ordinary annual contribution' shall mean an annual contribution of a fixed amount or an annual contribution calculated on some definite basis by reference to the earnings, contributions or numbers of the members of the fund."

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The form of that regulation does introduce some doubt into a question which would otherwise have seemed to me to be free from all doubt. This payment called "back contributions" seems to me to be the purchase price of the right to be deemed to have been a member of the association for a longer number of years than was in fact the case—which is, undoubtedly, a valuable right. It seems to me, *prima facie*, to be a lump sum, once for all, payment. There is no express suggestion in the scheme that it should be paid otherwise than once and for all, but, for the convenience of persons faced with a liability to pay a comparatively large sum all at once, it has been the practice of the committee to allow it to be paid by annual instalments. I do not wish to suggest that the committee has exceeded its powers under the scheme in making such arrangements, but, nevertheless, such arrangements cannot change the essential nature of the payment. But for the superannuation funds regulation, I should have no doubt on the matter because s. 32 (1) of the Finance Act, 1921, uses the phrase "ordinary annual contribution." While I can understand the argument that this back payment was an annual contribution, I cannot see how it can be regarded as an *ordinary* annual contribution. The Commissioners of Inland Revenue, however, have thought fit, as they were entitled to do, to define the expression "ordinary annual contribution" in such a way as to cut out the word "ordinary." That raises the only difficulty in this case. On the whole, however, I think that, even with the word "ordinary" omitted it is impossible to say that these yearly instalments of the purchase price of these valuable rights were "annual contributions" within the meaning of the phrase in reg. 5.

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*Appeal allowed. No order as to costs.*

Solicitors: *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]



NOEMIJULIA STEAMSHIP CO., LTD. v. MINISTER OF FOOD.

[KING'S BENCH DIVISION (Devlin, J.), March 21, 22, April 5, 1950.]

*Shipping—Charterparty—Loading—"Ready to load"—Stowage space occupied by bunkers—Mainmast and after derricks not in position.*

A Under her voyage charter a ship was required to be ready to load a cargo of grain in bags or bulk by 6 p.m. on Dec. 27, 1948, the time specified in the cancelling clause (cl. 12). By cl. 6 of the charter the charterer was "to have the full reach and burthen of the steamer including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores)." By cl. 17 it was provided that the cargo was to be brought to and taken from alongside at the charterer's expense and risk. At the time specified in cl. 12 the No. 3 lower deck hold (which was designed as reserve bunker space, but was capable of carrying cargo) contained bunker coal and the ship had no mainmast or after derricks, the absence of which might have interfered with the loading of certain of the holds. In these circumstances the charterer claimed to be entitled to cancel the charterparty on the ground that the ship was not ready to load. The charterparty did not give the charterer the right to use any part of the ship's gear, or prescribe or permit the charterer to select the method of loading.

B HELD: (i) as No. 3 lower deck hold was being used for its primary purpose, the proviso to cl. 6 was probably enough to exclude that hold from cargo space to which the charterer was entitled, but, even if the hold was to be treated as ordinary cargo space, the charterer had to establish that it could not reasonably be required for bunkers required for the whole voyage, and he had not done so.

D (ii) on the construction of the charterparty, the charterer was entitled to the reasonable co-operation of the owner in selecting and working the most convenient method of loading, but this did not mean, for instance, that, in anticipation of loading the grain in bulk by elevator (when support would be required for its tube), the owner must have erected the mainmast or a jury-rig to supply the necessary support, for that method might not be adopted, nor was it certain that the after derricks would be required if the grain were loaded in bag; the evidence was not sufficient to show that the ship would probably be unready to play her part in the agreed method of loading or in giving co-operation in any reasonable method which might be employed; and, therefore, the charterer was not entitled to cancel the charterparty.

E [AS TO READINESS TO LOAD A SHIP, see HALSBURY, Hailsham Edn., Vol. 30, pp. 427-428, paras. 593, 594; and FOR CASES, see DIGEST, Vol. 30, pp. 447-450, Nos. 2804-2819.]

G Cases referred to:

- (1) *Groves, Maclean & Co. v. Volkart Bros.*, (1884), 1 Cab. & El. 309.
- (2) *Sociedad Anonima Commercial de Esportacion e Importacion (Dreyfus (Louis) & Co.) v. National S.S. Co.*, [1935] 2 K.B. 313; 104 L.J.K.B. 529; 153 L.T. 180; Digest Supp.
- H (3) *Darling v. Raeburn*, [1907] 1 K.B. 846; 76 L.J.K.B. 570; 96 L.T. 437; 41 Digest 517, 3465.
- (4) *Jardine, Matheson & Co. v. Clyde Shipping Co.*, [1910] 1 K.B. 627; 79 L.J.K.B. 634; 102 L.T. 462; 41 Digest 645, 4764.
- (5) *Vaughan v. Campbell, Heatley & Co.*, (1885), 2 T.L.R. 33; 41 Digest 448, 2805.
- (6) *Grampian S.S. Co., Ltd. v. Carver & Co.*, (1893), 9 T.L.R. 210; 41 Digest 448, 2807.

(7) *Armement Adolf Deppe v. Robinson (John) & Co., Ltd.*, [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664; 41 Digest 529, 3568.

SPECIAL CASE stated by an umpire.

The charterer, the Minister of Food, claimed to be entitled to cancel the charterparty on the ground that the ship was not ready to load at the time for loading specified in the cancelling clause in the charterparty by reason of the presence of coal bunkers in No. 3 lower deck hold, and the absence of mainmast and after derricks. The shipowners contended that there was a right to use No. 3 lower deck hold for bunkers under the charterparty when reasonably necessary to carry sufficient coal for the whole voyage (and the charterer had not shown it was not necessary), and that readiness to load did not involve the presence of a mainmast to provide support for loading which might only possibly be required and which could be provided by erecting a jury rig in case of need, or of gear which could only be required at a subsequent port below the bar in a special eventuality. The facts appear in the judgment.

*Sir Robert Aske, K.C.*, and *E. W. Roskill* for the shipowners.  
*Mocatta* for the charterer.

*Cur. adv. vult.*

Apr. 5. **DEVLIN, J.**, read the following judgment. The question which the court has to determine is whether on the facts set out in this case the charterer was entitled to cancel the charterparty. He claimed to do so on the ground that the ship, which was required under her voyage charter to load a cargo of grain in bags or bulk, beginning at San Lorenzo as the first loading port, was not ready to load by 6 p.m. on Dec. 27, 1948, the time specified in the cancelling clause (cl. 12). The umpire has held that she was not then ready to load in two respects. First, her No. 3 'tween deck and No. 3 lower hold contained bunker coal, there being about ten tons in the latter. Secondly, she had no mainmast or after derricks. There is not much direct authority on either point, but I have had the advantage, which the umpire, apparently, did not have, of legal argument on the principles involved.

On the first point, counsel for the shipowners accepts as a general proposition the statement of principle which is taken from the judgment of **LOPES, J.**, in *Groves, Maclean & Co. v. Volkart Bros.* (1) and set out in **SCRUTTON ON CHARTERPARTIES**, 15th ed., p. 141, that the ship

"must be completely ready in all her holds so as to afford the charterer complete control of every portion of the ship available for cargo."

His first point is that No. 3 lower hold was not a part of the ship available for cargo, nor a part in which the charterer had the right under the charterparty to load cargo. The umpire finds that both No. 3 'tween deck and No. 3 lower hold were designed as a reserve bunker space, and adds that, if not used as reserve bunkers, they are capable of carrying cargo. The argument has not been much concerned with the 'tween deck, since it appears that on any view it would be needed for bunkers. The charterer's rights under the charterparty are contained in cl. 6, which provides that he is

"to have the full reach and burthen of the steamer including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores)."

These words are not intended to include anything that is not cargo space in the ordinary acceptation of that term: see *Sociedad, etc. (Dreyfus & Co.) v. National S.S. Co.* (2) ([1935] 2 K.B. 319). Counsel for the shipowners argues that, even if the reserve bunker space in No. 3 lower hold is properly described as cargo space, it is excluded by the proviso to this clause, since it was, in fact, occupied by bunker coals. Counsel for the charterer argues that No. 3 lower hold is within the full reach and burthen of the steamer,

and that the proviso does not apply since on its true construction it is restricted to 'tween and shelter decks, bridges, poop, etc., which items do not include No. 3 lower hold. I do not agree with this construction of the proviso and I think that in any event it is rendered ineffective by the presence of the word "etc.". That word must bring in at the least other parts of the ship similar to 'tween and shelter decks, bridges and poop. The only general description which can be given of these spaces is that given by BRANSON, J., in *Sociedad, etc. (Dreyfus & Co.) v. National S.S. Co.* (2) (*ibid.*), namely, that they are

"spaces which might in the ordinary course be used for bunker coals and/or stores."

A reserve bunker space certainly comes under that description. It would, indeed, be curious if the proviso applied to all the 'tween decks and to such places as bridges and poop, while excluding a space specially designed as a reserve bunker space.

I am inclined to think that it is sufficient to sustain the point of counsel for the shipowners that the primary use of No. 3 lower hold was for bunkers and that bunkers were in fact in it, but, if No. 3 lower hold is treated as ordinary cargo space, then counsel concedes that the proviso must be read with an implied limitation to bunkers and stores reasonably required for the voyage. It would not be permissible for the owners to rob the charterer of ordinary cargo space by taking an unlimited supply of bunkers: see *Darling v. Raeburn* (3). The umpire has found that in order to get to the nearest bunkering station with a safe margin, the vessel would require 130 tons over her permanent bunker capacity, but that this could be carried in the No. 3 'tween deck, leaving No. 3 lower hold free for grain. Counsel for the shipowners contends, and I did not understand counsel for the charterer to dispute, that the nearest bunkering station is not for this purpose the test, and that under *Darling v. Raeburn* (3) the ship can properly carry the bunkers required for the whole voyage. There is no evidence of what this quantity would be.

I hold that under cl. 6 a charterer who contends that a reserve bunker space should be made available to him for cargo is bound to establish at least that the space could not reasonably be required for bunkers to be used on the voyage. On the facts in this case, therefore, I hold that No. 3 lower hold was not a part of the ship which the owner had to make ready for loading. I should not, however, leave this point without referring to cl. 19, which says:

"Owners undertake that the steamer shall not load more than 7,350 tons, and not less than 6,650 tons."

This type of clause was considered by HAMILTON, J., in *Jardine, Matheson & Co. v. Clyde Shipping Co.* (4) ([1910] 1 K.B. 630). It is, I think, a warranty by the owners that they will not ask for more than 7,350 tons and that the ship can take at least 6,650 tons, but it neither enlarges nor curtails the charterer's rights under cl. 6. If the space available under cl. 6 is not sufficient to take 6,650 tons, the owner will be liable for whatever may be the appropriate consequences of his breach of undertaking, but the cargo could not overflow into spaces of which the charter did not grant the use. Although these clauses are thus distinct, every clause must be construed with reference to its fellows. If cl. 6 is clear, there is no more to be said, even though it be established as a fact that without the use of No. 3 lower hold 6,650 tons could not be loaded, but, if the meaning of cl. 6 is doubtful and that fact was established, it would, I think, be a material fact to be considered in the construction of cl. 6. The umpire has found in para. 5 (iv) of the Case that the ship might not be able to take 6,650 tons without the use of No. 3 lower hold. It would depend on the stowage factor, *i.e.*, the number of cubic feet to the ton. Counsel for the shipowners suggests that there is a miscalculation in this paragraph, and that the capacity plan, which is attached to the award, shows that, even at the highest stowage factor, the minimum cargo



could be loaded without the use of No. 3 lower hold. Counsel for the charterer agrees that there appears to be a discrepancy between the calculation and the capacity plan. I cannot amend or disregard the calculation except by consent. There may have been matters known to the umpire which would justify it. Neither side asked for the Case to be remitted, and I am not myself of the opinion that the point is of sufficient importance to be remitted. If the calculation was confirmed, the effect of it would still be uncertain because the stowage factor is unknown, and there would not, therefore, be forthcoming any clear fact to aid in the construction of cl. 6.

The second point I find much more difficult. The lack of mainmast and after derricks meant a deficiency in the ship's gear which might have interfered with the loading of Nos. 4 and 5 holds. The extent of the possible interference is dependent on the method of loading and it is detailed in para. 5 (ii) (a) of the Case. The authorities on readiness to load mostly deal with the condition of the holds, but it was not disputed that the principle in some form must be applied to the ship's gear where it has to be used, for it would be pointless to insist on the space being available if the ship were in no condition to play her part in filling it. But it does not follow that the principle is to be applied with the same stringency. It is obvious that sooner or later all the space in which cargo is to be loaded must be emptied and made fit to receive the cargo, and so there is good business sense in saying that it should be done sooner rather than later. It would be unsatisfactory if the work of making ready had to be chased by the work of loading. The shipper wants to know that all is in readiness before he begins, and it is best to make a firm rule. The ship's gear is different. Some of it may not be required at all; some of it may not be needed until an advanced stage of the loading and the keeping of it in constant readiness from the first moment to the last may involve labour and expense unnecessarily. *Vaughan v. Campbell, Heatley & Co. (5), Grampian S.S. Co., Ltd. v. Carver & Co. (6) and Armement Adolf Deppe v. John Robinson & Co., Ltd. (7)* have been cited to me; and, though none is directly in point, each in its own way shows, I think, that outside the clear rule about the condition of the holds some elasticity is permissible. In particular, in the last-mentioned case *SWINFEN EADY, L.J.*, lays down the test of readiness in a business and mercantile sense and deprecates the idle formality of incurring useless expense ([1917] 2 K.B. 208). Apart from useless expense, I find it hard to believe that if, for example, a winch which would not be needed for some days after the loading began, required an hour or two's overhaul, the cancellation of the charter would be justified. Examples of this sort could be multiplied and would serve to show that a test which produces a sensible result in the case of the holds may not work equally well in respect to gear. It must always be remembered that this a forfeiture clause, and so not to be applied lightly. It would be a misfortune, I think, if defects of no real significance in the adventure were to be used as a means of throwing up a charter at the last moment.

I have not here to deal with a charterparty which expressly gives to the charterer the right to use any part of the ship's gear. In such a case it might well be argued that all such gear must be in readiness. Nor have I to deal with a charterparty which prescribes any particular method of loading or allows the charterer to select a method. In such a case it might be argued that any ship's gear required for such method must be in readiness. All that the charterparty says in cl. 17 is that the cargo is to be brought to and taken from alongside at charterer's expense and risk. It is, therefore, the duty of the ship to remove the cargo from alongside and load it. Counsel for the shipowners argues that the way in which it is loaded from alongside and the sort of gear that is used for the loading are no concern of the charterer, provided, presumably, that it is done expeditiously. It is difficult to fit into the conception of "alongside" the methods of loading grain in bulk that are described in the Case—by chute, belt

conveyor or elevator. There was no evidence which of these methods would have been used, nor does the Case state who would have been responsible for operating them. There is nothing to show that the charterer is entitled to impose any one of these methods on the owner. I think that the highest the charterer can put his case is to say that he is entitled to the reasonable co-operation of the owner in selecting and working the most convenient method.

- A What that involves in relation to the ship's gear can best be illustrated by the loading of bulk grain. Of the three methods I have mentioned none required the use of the ship's gear, but, if the elevator had been used, its tube would have required support normally afforded by the mainmast. That does not mean, in my judgment, that the charterer is entitled as of right to an easement of support. It means at the highest that, if he notifies the master that he wants to
- B load by that particular method, he is entitled to the reasonable co-operation of the master in getting the necessary support. In the absence of the mainmast, a jury-rig could have been erected. I do not think that a state of readiness requires that a jury-rig should have been permanently erected from Dec. 27 onwards on the chance that one of several possible methods of loading at one of several possible loading ports might have required it. That would, I think, be an idle formality and a useless expense. I have dealt with the loading of grain in bulk.
- C As it was the charterer's option to load either in bulk or in bags I think that the ship should be ready for either. For the loading of bags the ship's gear would not be required at all, except at a subsequent port below the bar when it might have been needed as an alternative to a shore crane if the cargo was loaded from lighters, and I suppose that this might have involved Nos. 4 and 5 holds. I do not think that the ship is proved to be unready in the business sense because
- D of the possibility of her not being able to meet this somewhat remote contingency.

In my judgment, a charterer who cancels on the ground that the ship's gear is defective must (in the absence of express or implied provisions about the gear) show that the defects were such that the ship would probably be unready when the time came to play her part in the agreed method of loading, if any, or in giving the necessary co-operation in any reasonable method that might be employed. I do not think that the Case discloses sufficient evidence of unreadiness in this sense. Accordingly, I answer in the negative the question in para. 7 and I uphold the alternative award for £19,607 6s. 1d. in para. 9. I should add that I have not found it necessary to deal, except incidentally, with an interesting submission made by counsel for the shipowners that where there is more than one loading port readiness to load means readiness to carry out the work at the place where the notice of readiness is given and does not involve readiness for work at any subsequent port.

- E *Costs of alternative award contended for by the shipowners upheld with costs of setting down and the argument of the Special Case.*

Solicitors: *Holman, Fenwick & Willan* (for the claimants, the shipowners); *Treasury Solicitor* (for the respondent, the charterer).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

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WEST MERSEA URBAN DISTRICT COUNCIL *v.* FRASER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, J.J.), April 18, 1950.]

*Water Supply—Domestic purposes—Right of owner of premises to demand supply—*  
*—“Premises”—House-boat—Water Act, 1945 (c. 42), sched. III, s. 30 (1).*

The respondent, who was the owner of a house-boat which had been moored in a particular place in a creek since 1944, demanded from the appellants, the water undertakers for the district, a supply of water for domestic purposes. The respondent had complied with all the requirements of s. 40 of sched. III to the Water Act, 1945, but the appellants refused the demand on the ground that the house-boat did not constitute “premises” within the meaning of s. 30 (1) of sched. III to that Act.

HELD: “premises” within the meaning of s. 30 (1), meant property which had a sufficient degree of permanency in the site it occupied; in the present circumstances, this element existed; and, therefore, the respondent was entitled to a supply of water.

[FOR THE WATER ACT, 1945, sched. III, s. 30 (1), see HALSBURY'S STATUTES, Vol. 38, p. 554.]

CASE STATED by Essex justices.

On Sept. 29, 1949, at a court of summary jurisdiction sitting at Colchester, the appellants, who were the water undertakers for the district, were convicted of making default in furnishing a supply of water for domestic purposes to certain premises, namely, a house-boat, contrary to s. 120 of the Public Health Act, 1936, as amended by the Water Act, 1945, sched. IV. The justices rejected the appellants' contention that the house-boat did not constitute “premises” within the meaning of s. 30 (1) of sched. III to the Act of 1945.

*Hines* for the appellants.

*H. G. Garland* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the Essex justices before whom the appellants, the West Mersea Urban District Council, were charged with making default

“in furnishing a supply of water for domestic purposes to certain premises, namely, a house-boat called the ‘Sea Horse,’ Coast Road, West Mersea, . . . the respondent being entitled to demand and having demanded such a supply, contrary to s. 120 of the Public Health Act, 1936, as amended by sched. IV to the Water Act, 1945.”

The justices convicted the appellants and ordered them to pay a fine of £1 and costs.

In my opinion, this appeal fails. By s. 29 (1) of sched. III to the Water Act, 1945, it is provided:

“The undertakers shall lay any necessary mains and bring water to any area within the limits of supply if they are required to do so by such number of owners and occupiers of premises in that area who require a supply of water for domestic purposes [as provides that the resulting water rates are sufficient] . . .”

By s. 30 (1) of the schedule it is provided:

“An owner or occupier of any premises within the limits of supply who has complied in respect of those premises with the provisions of Part X of this schedule with respect to the laying of a supply pipe and payment or tender of the water rate shall be entitled to demand and receive from the undertakers a supply of water sufficient for domestic purposes for those premises . . .”



Section 30 (2) provides for the imposition of a penalty if the undertakers fail to supply the water.

Section 40 of the schedule provides:

A “An owner or occupier of any premises within the limits of supply who desires to have a supply of water for his domestic purposes from the water-works of the undertakers, shall, subject as hereinafter provided, comply with the following requirements:—(a) he shall give to the undertakers fourteen days’ notice of his intention to lay the necessary supply pipe and at, or before, the time of giving such notice shall pay or tender to them such sum as may be payable in advance by way of water rate in respect of his premises; and (b) he shall lay the supply pipe at his own expense, having first obtained, as respects any land not forming part of a street, the consent

B of the owners and occupiers thereof.”

By s. 17 of the Act of 1945 it is provided:

C “(1) Statutory water undertakers may make byelaws for preventing waste, undue consumption, misuse, or contamination of water supplied by them. (2) Byelaws under this section may include provisions—(a) prescribing the size, nature, materials, strength . . . of the water fittings to be used; and (b) forbidding the use of any water fittings which are of such a nature . . . as to cause or permit . . . waste [etc.]”

The respondent had laid a supply pipe which connected with the undertakers’ main and which in all respects complied with the requirements of Part X of sched. III, and there is no suggestion that it did not comply with the byelaws.

D She had also tendered the water rate and had asked for a supply of water. By para. 4 of the Case it is found:

E “(e) that the said house-boat had at all material times lain in a mud berth at Coast Road, West Mersea aforesaid; (f) that the respondent was at all material times the owner of the said house-boat and paid to one, Wyatt, the yearly sum of £20 under an oral arrangement for permission to keep the said house-boat berthed on saltings the property of the said Wyatt; (g) that the said house-boat was formerly a yacht . . . that the said house-boat normally floated at high tide and had in a recent gale moved some twenty yards inland up the creek in which it lay and that the arrangement between the respondent and the said Wyatt merely permitted the said

F house-boat to remain upon the mud in the said creek without prescribing any precise site for it; (i) that the site of the said house-boat had been assessed for purposes of general rate; (j) that the said house-boat was rated as premises for the purposes of a water rate from 1944 to February, 1949, and a water rate was demanded by the appellants and paid during that period.”

G That last finding would not be conclusive against the appellants, though it may throw some light on the subject because, if, in fact, they were not under an obligation to supply water, they could discontinue the supply and defend any proceedings brought against them for not having given a supply. The justices found that the house-boat in those circumstances could fairly be described as “premises” within the meaning of the Act.

H There is no definition of the word “premises” in the Act. Section 59 (1) states that it “includes land,” but the word is not, as used in this Act, a term of art. It means some form of property used as domestic premises, but before the undertakers can be required to provide water to any particular premises there must be some degree of permanency. Here, we find that this house-boat has lain since 1944 at least in this creek. The fact that the respondent did not stipulate with Mr. Wyatt as to the precise site it was to occupy does not seem to me to be conclusive. There must have been mooring in such a way that the house-boat

could rise and fall with the tide, but the fact that it was sometimes so many feet higher and sometimes so many feet lower again is not conclusive. The fact is that it occupied a site where it was moored, and the respondent showed that she intended it to remain in that position because at her own expense she put a supply pipe there, so as to connect the house-boat with the main, and brought it to the point where she wanted it to supply the boat.

I think some stress should be laid on the fact that the respondent is rated in respect of the house-boat, because it shows that the rating authority regards it as a hereditament occupying this particular position. It is true there has to be a flexibility in the water pipe to allow for the rise or fall of the boat, but that fact, again, is inconclusive. It would seem that before this house-boat can be described in law as "premises" within s. 30 (1) of sched. III there must be an element of permanency in the site it occupies. That having been found, and it being also found that the house-boat is used for domestic premises, I think the justices were entitled to hold as they did. The point that seems to have been urged to show that these were not permanent premises was that once, in a recent gale, the house-boat was moved some twenty yards upstream. I do not see that that destroys the element of permanency any more than, if I have a toolshed standing in my garden which is blown into the next field by a heavy gale, it can be said that it is not to be treated as a permanent structure because an act of God has for a time removed it from the position it formerly occupied. For these reasons I have come to the conclusion that this appeal fails.

**MORRIS, J.:** I am of the same opinion. I agree with my Lord that in order that the house-boat should be regarded as coming within the word "premises" it must be shown that there was an element of permanency in the site it occupies. The Case shows that the owner of the house-boat had a right to have the boat remain on the mud in the creek without any precise site being prescribed for it, but, by para. 4 (e) of the Case, it is further shown that the house-boat appears to have occupied a particular site. One other matter has also influenced my mind. It seems to me that the provision in s. 40 of sched. III to the Water Act, 1945, relating to the laying of a supply pipe contemplates that there should be a joinder between "premises", having some degree of permanency and some element of fixation of site, and the water mains of the undertakers who are to deliver the water. The finding in the Case that the provisions of s. 40 had been complied with by the respondent shows that the water suppliers considered that there had been a proper laying of the supply pipe, and to that fact must be added the very significant additional circumstance that between 1944 and February, 1949, the house-boat was rated as "premises" and a water rate was demanded and paid. That, in my judgment, only adds confirmation to the view that there was a compliance with the Act with regard to the laying of a supply pipe, and the very fact that a supply pipe could, and was, adequately laid, in my judgment, itself denotes that there was a degree of permanency and a sufficient element of fixation of site of the "premises."

**FINNEMORE, J.:** I also agree. Under the Water Act, 1945, an owner or occupier of premises within the limits of supply of the water undertaking can, on complying with s. 40 of sched. III to the Act, demand a water supply for domestic purposes. The words which are used are: "An owner or occupier of any premises within the limits of supply," and the argument has turned on the meaning of the word "premises." That word, as I understand it, is not a term of art, and it must be considered in each case according to the subject-matter which is being dealt with. It is to be noted that there is no definition of the word in the Act, but it does say in s. 59 (1) that "premises includes land." It is further provided:

"'land' includes any interest in land and any easement or right in, to or over land."

Those are indications that "premises" in this Act is to be construed in a wide and liberal sense. The purpose of the Act, among other things, is to ensure, to people who need water for domestic purposes, a proper supply. It is not disputed here that the respondent had carried out her duties under s. 40. The only question is whether this house-boat, in the circumstances of this case, is to be included within the term "premises." It seems to me that the three tests which counsel for the appellants indicated may be the proper ones that ought to be considered. First, the premises must be a place where water for domestic purposes is required. That does not arise. Secondly, there must be a reasonable degree of certitude of position. The justices have found that this house-boat at all material times had lain in a mud berth at Coast Road, West Mersea, and it does not seem to me that its up and down movement with the tide is enough to destroy that certitude of position. The third point is whether there is a reasonable degree of permanency. There would appear to be no right to demand a supply of water through a pipe to a yacht which goes out to sea and from time to time comes up the river and berths at a particular place, but the finding here is that for a number of years this house-boat had been in this position on the mud flat, subject only to the fact that it rose and fell with the tide. It seems to me that the finding of the justices that it has lain at this mud berth indicates that for practical purposes it has been permanently moored in a particular place. Our attention was called to the finding in para. (h) of the Case that "Wyatt merely permitted the said house-boat to remain upon the mud in the said creek without prescribing any precise site for it." That may well be, as between the respondent and Wyatt, but in fact, for a number of years, at all material times the boat was moored in a particular place. The only exception is that on one occasion there was a gale which caused the boat to move some twenty yards along the creek. That is an incident which might happen not only to a boat but to any kind of property, and it does not, in my opinion, in any way destroy the view to which I have come—that this boat, moored in this particular way at this particular place, is properly described as "premises." If, therefore, the person who owns or occupies that boat requires water for domestic purposes, she is entitled to have it supplied. I agree that the appeal fails.

*Appeal dismissed with costs.*

Solicitors: *Adam Burn & Son*, agents for *John Fowler, Oldman & Co.*, Brightlingsea (for the appellants); *Bishop & Son* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

## HALL v. ARNOLD AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, JJ.), April 19, 20, 1950.]

*Friendly Society—Accounts of officers—Neglect to deliver—Order by justices to deliver—Decision of justices "final and conclusive"—No appeal by Case Stated—Friendly Societies Act, 1896 (c. 25), s. 55 (2).*

The appellant, an officer of a friendly society, was ordered by justices to deliver money and other property to the respondents, trustees of a branch of the society. On the appellant's application, the justices stated a Case for the opinion of the High Court.

HELD: a Case stated by justices for the opinion of the High Court was in the nature of an appeal, and, as the decision of the justices was final and conclusive by virtue of the Friendly Societies Act, 1896, s. 55 (2), the High Court had no jurisdiction to entertain the matter.



[FOR THE FRIENDLY SOCIETIES ACT, 1896, s. 55, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 557.]

Case referred to:

- (1) *Westminster Corpn. v. Gordon Hotels, Ltd.*, [1906] 2 K.B. 39 ; 75 L.J.K.B. 439; 94 L.T. 521; 70 J.P. 258; *on appeal*, [1907] 1 K.B. 910; 76 L.J.K.B. 482; 96 L.T. 535; 71 J.P. 200; *affirmed* [1908] A.C. 142; 77 L.J.K.B. 520; 98 L.T. 681; 72 J.P. 201; 38 Digest 235, 645.

CASE STATED by Surrey justices.

On June 3, 1949, at a court of summary jurisdiction sitting at Sutton, an order was made against the appellant, an officer of the Independent Order of Rechabites, for the payment of money and delivery up of property of the society within seven days, pursuant to s. 55 (2) of the Friendly Societies Act, 1896. On the application of the appellant, however, the justices stated a Case for the opinion of the High Court whether their decision was right. The facts appear in the judgment of LORD GODDARD, C.J.

*W. Gumbel* for the appellant.

*Curtis-Raleigh* for the respondents.

**LORD GODDARD, C.J.:** A complaint was preferred under the Friendly Societies Act, 1896, by the trustees of a branch of the Independent Order of Rechabites against the appellant, Martha Ellis Hall

"for that she on and since June 6, 1949, at Sutton, Surrey, being the secretary of the 'Good Shepherd' Tent No. 69 of the South London District No. 53 Branch of the Independent Order of Rechabites, Salford Unity Friendly Society, and being an officer thereof having receipt or charge of money, had refused to pay over all sums of money and deliver all property of the said society in her hands or custody pursuant to a notice in writing dated June 3, 1949, in that behalf, contrary to s. 55 of the Friendly Societies Act, 1896."

That complaint was heard by the Sutton justices who made an order against the appellant

"for payment of the sums of money referred to in the said information and complaint and for delivery of the property referred to in the said information and complaint, such payment and delivery to be made within seven days."

They were asked to state a Case because the appellant maintained that she, being an officer of a tent, or sub-branch of a district, was obliged only to render account or deliver documents to the officers of the tent and not to the officers of the district. We have not gone into that matter. The justices stated a Case, and counsel for the respondents has taken the objection that the Case does not lie and that the justices had no power to state it by reason of the provisions of s. 55 (2) under which the proceedings were taken.

Section 55 (2) provides:

"In case of any neglect or refusal to deliver the account, or to pay over the sums of money or to deliver the property in manner aforesaid, the trustees or authorised officers of the society or branch may sue upon the bond or security before mentioned, or may apply to the county court or to a court of summary jurisdiction, and the order of either such court shall be final and conclusive."

Counsel for the respondents says that, the justices having given a decision, that decision is final. The question is whether or not the justices have power to state a Case.

The power of justices to state a Case is given by s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879. Those two

sections must be read together because there is no question that s. 2 of the Act of 1857 treats a Special Case as an appeal. The word "appeal" is not used in the Act of 1879, but where justices state a Case the proceeding is always called an appeal by way of Special Case, and that seems to be right in view of the terms of s. 2 of the Act of 1857. If the present proceeding is an appeal, it would seem that this court cannot entertain it because the Friendly Societies Act, 1896, s. 55 (2), makes the decision of the court of summary jurisdiction final and conclusive. There is an option given because trustees can go to the county court. If the county court judge makes an order, that order can only be questioned by an appeal to the Court of Appeal. That, I think, again, tends to show that this proceeding is an appeal against the decision of the justices.

The court has received assistance from *Westminster Corpn. v. Gordon Hotels, Ltd.* (1). Proceedings had been taken with regard to the disposal of trade refuse under the Public Health (London) Act, 1891, which contains a provision that the decision of the court of summary jurisdiction shall be final. That case was taken to the House of Lords in an effort to get a decision whether, the Special Case having been stated, the courts had jurisdiction to entertain it. LORD LOREBURN, L.C., gave a very short judgment affirming the decision of the Court of Appeal, in which he said ([1908] A.C. 143):

"The Act of 1891 declared that the decision of the magistrate should be final, and I do not think that can be qualified by the earlier Act of 1879 providing for the stating of a Case. If the order of the dates had been inverted, the matter might have borne a different aspect."

In other words, if the Friendly Societies Act, 1896, had preceded the Summary Jurisdiction Act, 1879, it might have been said that the general words of the later Act overrode the limiting words in the earlier Act. Counsel for the appellant has argued that, as the earlier Friendly Societies Act, 1875, which contained these words, was followed by the Summary Jurisdiction Act, 1879, on the reasoning of LORD LOREBURN, L.C., in the House of Lords and also that of COZENS-HARDY, M.R., when the *Westminster Corpn.* case (1) was in the Court of Appeal, it would follow that in 1879 an appeal was given by way of Special Case to a person in the position of the appellant, the words of the Friendly Societies Act, 1875, being overridden, but the Act of 1875 was repealed by the Act of 1896, in which Parliament enacted by s. 55 (2) that the decision of the justices should be final and conclusive.

Accordingly, we feel that we are bound to give effect to the objection that has been taken and to hold that the justices had no power to state a Special Case in this matter and that this court has no power to entertain a Special Case. This appeal must be dismissed.

MORRIS, J.: I agree.

FINNEMORE, J.: I agree.

*Appeal dismissed with costs.*

Solicitors: *Wilkinson, Bowen, Haslip and Jackson* (for the appellant); *Chalton Hubbard & Co.* (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

# ETON RURAL DISTRICT COUNCIL v. RIVER THAMES CONSERVATORS.

[CHANCERY DIVISION (Vaisey, J.), April 18, 19, 1950.]

*Land Drainage—Catchment board—Commutation of obligation to repair—Contractual obligation to keep ditch clean—Land Drainage Act, 1930 (c. 44), s. 9 (1).*

The Land Drainage Act, 1930, s. 9, provides: “(1) It shall be the duty of every catchment board to take steps for the commutation of all obligations imposed on persons by reason of tenure, custom, prescription or otherwise, to do any work (whether by way of repairing of banks, maintaining of watercourses or otherwise) in connection with the main river.”

By an agreement dated Aug. 25, 1908, made between the plaintiffs, of the one part, and the trustees of the will of W., of the other part, the plaintiffs covenanted to keep clean, open and free from obstructions a certain ditch therein described and also every ditch and watercourse connecting that ditch with the River Thames, so that the land bordering the ditch should not become flooded by water which was conveyed by a pipe into the ditch from the plaintiffs' land. It was not disputed that the ditch formed part of the “main river” within the meaning of the Act of 1930 for which the defendants were responsible as the catchment board concerned. The plaintiffs claimed a declaration that the defendants were under a duty under s. 9 (1) to take steps for the commutation of the plaintiffs' obligation under the agreement of 1908.

HELD: section 9 (1) dealt only with obligations arising out of or attaching to land and did not extend to the purely contractual obligation existing under the agreement of 1908.

[AS TO DUTIES OF CATCHMENT BOARDS AS REGARDS OBLIGATIONS TO REPAIR, see HALSBURY, Hailsham Edn., Vol. 30, pp. 77, 78, para. 145; and FOR CASES, see 2nd DIGEST Supp., Sewers and Drains, Nos. 347a-399e.]

ACTION by the Eton Rural District Council claiming a declaration that the defendants, the River Thames Conservators were under a duty imposed by the Land Drainage Act, 1930, s. 9 (1), to take steps for the commutation of the council's obligation, placed on them by an agreement dated Aug. 25, 1908, to keep clean, open and free from obstructions certain ditches and watercourses.

*Milner Holland, K.C., and Hesketh* for the plaintiffs.

*Diplock, K.C., and R. H. Etherton* for the defendants.

VAISEY, J.: The point which arises for consideration is one of construction, and depends on the true meaning of the Land Drainage Act, 1930, s. 9. I have to decide whether a certain agreement dated Aug. 25, 1908, comes within its provisions or not. The defendants are a catchment board within the meaning of the Act, and are subject to the duty imposed on every catchment board by the section in question. If the agreement to which I refer is within the section, there is an absolute duty on the defendants to carry out the statutory direction; if the agreement is not within the section, not only are the defendants under no such duty, but they have no power to carry out the operation which the section indicates.

The agreement is made between the plaintiffs, of the one part, and certain persons, who were the trustees of the will of one Robert Augustus Arthur Wright, of the other part, and, so far as is material for the present purpose, the plaintiffs thereby covenanted to keep clean, open and free from obstructions a certain ditch specified in the agreement and also every ditch or watercourse connecting that ditch with the River Thames so that the land bordering the ditch should not become flooded by reason of the flow of water from a pipe which conveyed



water from certain land vested in the plaintiffs into the ditch. The object of the agreement was to facilitate the disposal by the plaintiffs of effluent from their sewage works, and also the natural surface water from their land. There can, I think, be no doubt that the benefit of, and right to enforce, that covenant is vested in the successors-in-title to the trustees of the will, who are, I believe, a limited company known as Harry and Charles Rochford, Ltd. It is not disputed that the ditch in question forms part of the main river (that is, of the River Thames) within the meaning of the Act, for which the defendants are responsible as the catchment board concerned.

I turn now to s. 9. By sub-s. (1) of that section, a duty is imposed on every catchment board

“ to take steps for the commutation of all obligations imposed on persons by reason of tenure, custom, prescription or otherwise, to do any work (whether by way of repairing of banks, maintaining of watercourses or otherwise) in connection with the main river.”

The question, in brief, is whether the obligation imposed by the agreement of Aug. 25, 1908, is one of the obligations covered by that sub-section. It is, of course, an easy way of handling the matter to say that the words “ or otherwise ” in the first of the two contexts in which those words appear in the sub-section are of general application and mean exactly what they say. If that be the proper way of construing the section, there is an end of the matter, and the obligation by way of covenant which rests on the plaintiffs is one which the defendants are bound under the sub-section to commute. But, looking for the moment at that sub-section alone, I have to inquire for what reason the words “ by reason of tenure, custom, prescription or otherwise ” come into its language, because if “ all obligations ” meant all obligations without qualification, the section would, I should have thought, have contained a reference to all obligations imposed on persons by any means to do such work as is there mentioned. I think that as a matter of construction I am bound to give some weight to the insertion of those words “ by reason of tenure, custom, prescription or otherwise,” and to afford some explanation why those words appear in the sub-section.

It seems to me (and I do not think it can be denied) that the words “ or otherwise ” in that first context ought, to some extent and in some measure, to be construed according to the *ejusdem generis* rule. The problem is to decide what significance I ought to attach to those two words in that context. It is, I think, to be observed that the three words “ tenure,” “ custom,” “ prescription,” all seem to indicate an obligation which attaches to and exists by reference to some particular land, and I am inclined to think that those words exclude by implication merely personal obligations. When the sub-section talks of “ obligations imposed on persons by reason of tenure, custom, prescription or otherwise,” I have a strong suspicion that the meaning may well be that the obligations have to be so imposed for those particular reasons, or on those particular grounds, and not generally. It is curious that the same two words “ or otherwise ” appear, as I have already indicated, twice in this sub-section. In the second context in which they appear it is obvious that the *ejusdem generis* principle of construction must apply, for by the words “ whether by way of repairing of banks, maintaining of watercourses or otherwise ” as words descriptive of work in the main river, the sub-section clearly limits the work to structural works and excludes other operations such as I suggested during the course of the argument—for example, the running of a line of steamers between two or more points on the river.

The matter does not, however, rest there, because the sub-section is only one of eight sub-sections in s. 9 to which the marginal note is: “ Commutation of obligations to repair by reason of tenure, &c. ” Sub-section (2) imposes a consequential duty on the defendants to give notice of proposals to commute any obligation to which the section applies, and I do not think that there is really

much relevance in that sub-section, which, however, enables the Minister of Agriculture to decide whether or not a commutation shall be made. Sub-section (3) is of great importance, and I think it should be read as though sub-s. (2) did not intervene between it and sub-s. 1. Sub-section (3) provides:

"Any capital sum or terminable annuity fixed under this section shall, notwithstanding any agreement to the contrary between the owner and any lessee of the land, be payable by the owner."

A

The draftsmanship of this sub-section does not seem to me to be above criticism. What is meant, I ask, by "the land"? What is meant by "the owner"? But I, at least, get this out of the sub-section, that I am fortified in the preliminary view which I took of sub-s. (1), for I find in it reference to an obligation imposed on land as being at any rate the main subject of the section. It corroborates, I think, the impression which I suggested is given by these somewhat strange words "tenure, custom, prescription or otherwise" which appear in sub-s. (1), and as all three of them are words which are proper to be used in connection with obligations imposed on land, I think that when you come to sub-s. (3) you find that your suspicions were not without foundation. Sub-section (5) in the same way provides:

B

C

"The sum to be paid in respect of the commutation of any such obligation . . . shall be charged on the land in respect of which the obligation existed, and shall have priority over any other incumbrances charged on that land by the owner thereof, whether before or after the passing of this Act . . ."

D

There again there is no hint that the sum to be paid in respect of the commutation is not a sum which can be charged on some land, for sub-s. (5) directs that the amount "shall be charged on the land in respect of which the obligation existed," indicating to me that the draftsman of the whole section contemplated that he was dealing with obligations which were in fact obligations affecting particular land; and both sub-s. (3) and sub-s. (5) seem to me quite inappropriate to, and, indeed, inconsistent with, the application of the section to a merely contractual obligation such as we have in this agreement of Aug. 25, 1908.

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There are other indications in the section which, I think, point the same way, and, indeed, I can find nothing in the other sub-sections which leads to the opposite conclusion, namely, the conclusion that "obligations" in sub-s. (1) means all obligations without qualification. It appears to me that both on the wording of sub-s. (1) as it stands alone, and on the reading of that sub-section in conjunction with the other sub-sections to which I have referred, I am bound to take the view which has been taken by the defendants—that this obligation, which is a purely contractual obligation existing under the agreement of Aug. 25, 1908, is not an obligation for the commutation of which it is their duty to take steps, and, therefore, it is an obligation which they have no right to commute even if they desired to do so. My attention was drawn to a corresponding section (s. 15) in the Sewers Act, 1833, where, in a similar context, instead of the words "by reason of tenure, custom, prescription or otherwise," we find the words "by reason of tenure, frontage, prescription, custom, covenant, or grant." Although I do not think one can properly construe the Act of 1930 by reference to the Act of 1833, it is not without significance that of the words used in the earlier section, only those words which, in my judgment, point to obligations imposed on or created by reference to and as a burden on particular land have been included in the later section, and there is a noticeable omission of the words "covenant or grant." I agree that the section is obscure, but, on the whole, I think that it is reasonably clear that (for what reason I do not pause to inquire) s. 9 of the Act of 1930 deals with

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obligations referable to, charged on, or arising out of, some land. Although that may not have been the intention of the legislature, I can only assume such an intention from the words which I find in the section itself. The section seems to me to point to ancient obligations attaching to land. "Tenure," "prescription," "custom," are all words which are appropriate for those ancient incidents of land tenure the origin of which is frequently lost in the obscurity of history. Those three words "tenure," "custom," "prescription," in my judgment, were not selected arbitrarily or without intentional significance, and, while, if sub-s. (1) stood alone, it would have been very difficult to limit the generality of the words "or otherwise"—although I am not saying that it would have been impossible—I think that the matter is really concluded by the later sub-sections, and the result is that this action fails.

After discussion, the learned judge directed that the action be dismissed with costs, but that if no notice of appeal is served and the judgment stands without appeal, there would be no order as to costs.

Solicitors: Sharpe, Pritchard & Co., agents for G. L. Bridger, Slough (for the plaintiffs); G. E. Walker (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

## LOWNDES v. LOWNDES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 31, April 5, 1950.]

*Divorce—Collusion—Negotiations as to maintenance during pendency of petition—Deposit of £2,000 with stakeholder before trial—Wife to receive money only if she proceeded with petition—Need to disclose to court negotiations for maintenance during pendency of proceedings—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (2) (iii) (as substituted by Matrimonial Causes Act, 1937 (c. 57), s. 4).*

*Divorce—Practice—Application for decree absolute by respondent—Suspicion of collusion—Representation of the King's Proctor—Hearing of evidence in open court.*

A petition for divorce based on the ground of cruelty was filed by the wife, and the husband put in an answer denying the charges and making counter-charges with a cross-prayer for relief. Before the trial the husband, having met another woman whom he desired to marry, withdrew his answer to allow the wife's petition to go through undefended. A decree *nisi* was pronounced, but the wife did not apply for the decree absolute. The husband then applied under r. 40, sub-r. 3, of the Matrimonial Causes Rules, 1947, for a decree absolute, and that application was referred by the registrar to WILLMER, J., who directed a hearing in open court with evidence on oath and requested the King's Proctor to be represented. It was proved that some days before the hearing of the petition, to proceed with which the wife had shown some reluctance, a brother of the husband, acting with his authority as his agent, had deposited £2,000 with a stakeholder and drawn up a written declaration of trust under which the stakeholder was to pay the money to the wife if the divorce went through, and a decree *nisi* was pronounced, but that she was to repay it to the brother if she abandoned the proceedings. After the hearing the stakeholder paid the money to the wife. The husband repaid his brother the £2,000, and he threatened to sue his wife for the return of the money when she declined to apply for a decree absolute.



**HELD:** (i) the arrangement between the husband's brother and the stakeholder was intended and calculated to induce the wife to continue the suit, and, therefore, the petition had been prosecuted in collusion with the husband and the decree *nisi* must be rescinded.

(ii) if negotiations for maintenance have taken place during the pendency of divorce proceedings they must be disclosed to the court.

No provision having been made in the Matrimonial Causes Rules for intervention by the King's Proctor in cases where application is made for the decree absolute by the party against whom the decree *nisi* was pronounced, the court, to ensure that all relevant evidence was brought before it, directed the parties to call the relevant witnesses on each side and requested the King's Proctor to attend by counsel and call such evidence as was thought necessary.

[As TO COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 677, 678, paras. 1,000-1,003; and FOR CASES, see DIGEST, Vol. 27, pp. 333, 334, Nos. 3133-3144 and Digest Supp.]

Cases referred to:

- (1) *Poulden v. Poulden*, [1938] 1 All E.R. 508; [1938] P. 63; 107 L.J.P. 27; 158 L.T. 231; 102 J.P. 155; Digest Supp.
- (2) *Emanuel v. Emanuel*, [1945] 2 All E.R. 494; [1946] P. 115; 114 L.J.P. 60; 173 L.T. 118; 2nd Digest Supp.
- (3) *Churchward v. Churchward and Holliday*, [1895] P. 7; 64 L.J.P. 18; 71 L.T. 782; 27 Digest 334, 3143.
- (4) *Laidler v. Laidler*, (1920), 90 L.J.P. 28; 123 L.T. 208; 27 Digest 336, 3155.
- (5) *Beattie v. Beattie*, [1938] 2 All E.R. 74; [1938] P. 99; 107 L.J.P. 45; 159 L.T. 69; Digest Supp.
- (6) *Malley v. Malley*, (1909), 53 So. Jo. 617; 25 T.L.R. 662; 27 Digest 334, 3139.

**APPLICATION** to make absolute a decree *nisi*.

The wife, after obtaining a decree *nisi* in an undefended petition based on cruelty, did not apply for the decree to be made absolute, but gave information to the King's Proctor regarding a sum of £2,000 which had been deposited with a neutral stakeholder before the trial on trust to be paid to her on the grant of the decree absolute. The husband applied for the decree absolute, and, as no provision exists in the Matrimonial Causes Rules, 1947, regarding the procedure to be followed when a party against whom a decree *nisi* has been pronounced seeks to obtain a decree absolute, WILLMER, J., adjourned the summons into court, heard witnesses, and requested that the King's Proctor should be represented by counsel and should call any relevant evidence. The facts appear in the judgment.

*Colin Duncan* for the King's Proctor.

*Geoffrey Lawrence* and *Scarman* for the wife.

*Theodore Turner, K.C.*, and *Gordon Friend* for the husband.

*Cur. adv. vult.*

**WILLMER, J.**, read the following judgment. This is an application for decree absolute made under the Judicature Act, 1925, s. 183 (3), by the husband against whom the decree *nisi* was pronounced. The matter came before the registrar in pursuance of the Matrimonial Causes Rules, 1947, r. 40, sub-r. (3), and was referred by him to me in chambers, and it then appeared that a situation had arisen which was not covered by the rules. The King's Proctor attended the summons by counsel, and I was informed that the wife, who had obtained the decree *nisi* had disclosed certain information to the King's Proctor which prompted suspicion of collusion. Had it been an ordinary case in which the application for decree absolute was being made by the party in whose favour the decree *nisi* was pronounced, the King's Proctor would, I was informed, have

wished to intervene and show cause against the decree being made absolute. Unfortunately, when s. 183 (3) of the Act was added by the Matrimonial Causes Act, 1937, s. 9, no consequential alteration was made in the rules, and no provision was made for intervention by the King's Proctor in a case such as this, where the application for decree absolute is made by the party against whom a decree *nisi* has been pronounced. In the circumstances, I was invited to give

- A** directions, and I adjourned the matter into court and directed that the evidence of the relevant witnesses be taken *viva voce* in court. I also requested the King's Proctor to attend and afford me the benefit of his assistance. In the events which have happened, there is no procedure laid down by the rules, and we had to invent our procedure as we went along. Under my direction counsel for each party called his own witnesses and counsel for the King's Proctor at my request called certain others, whose evidence it was thought should be before the court. In the result, I feel satisfied that all the relevant evidence has been satisfactorily placed before the court.

- The petition was by the wife who alleged cruelty, and it was filed on Oct. 25, 1948. The parties were married in 1920, and they finally separated in August, 1948. The husband appeared and filed an answer dated Dec. 30, 1948, in which he denied the charges of cruelty, made cross-charges of cruelty, and, on that ground, put in a cross-prayer for relief. About the same time, however, it chanced that he met another woman whom he desired to marry. He was, therefore, additionally anxious that, as the result of the proceedings in this case, he would obtain his freedom so that he could re-marry, and during the spring of 1949 he decided to withdraw his answer and allow the wife's petition to go undefended. In fact, the answer was struck out by order of the court on May 31, 1949. On July 27, 1949, the case came on for hearing as an undefended cause, and a decree *nisi* in favour of the wife was pronounced. After the lapse of the statutory period the wife did not make any application for decree absolute. Instead, in October, 1949, she went to the King's Proctor and disclosed certain information. It is from that that the present application arises.

- The facts brought to the notice of the King's Proctor which have given rise to suspicion of collusion, arose out of the events of the few days immediately preceding the hearing of the cause. At that period the husband was residing in the matrimonial home, and the wife was residing at an hotel a few miles away which was kept by a Mr. and Mrs. Haydock who have given evidence.
- F** There is a large measure of agreement between the witnesses with regard to material facts, many of which are undisputed, and I will deal with so much of the case as is common ground first. The husband told me that it was always his intention to make provision for his wife by his will had the marriage continued. He said that he intended to leave her, first, a legacy of £2,000 or thereabouts, to cover the expense of providing and furnishing a new home, and, secondly, an income of £2,000 a year. When the divorce was pending, he said, he wished to make the same provision for the wife who was divorcing him as he would have done had she been his widow. The yearly income was intended to be secured on debentures issued by a company which he was in process of forming to take over his business as an insurance broker. In fact, in the spring of 1949 he so instructed his solicitor, and proposals to this effect were
- H** put forward by his solicitor to the wife's solicitors. The wife developed a consuming jealousy of the woman who had supplanted her in the affections of the husband. She was also extremely distrustful of the husband and of his intentions in the matter of financial provision for her, and for these reasons, as the date of the trial approached, she adopted the attitude that she was not going to go on with the case. This came to the ears of the husband, who was much alarmed at the prospect, for he had in a sense burned his boats. His own allegations against the wife had been struck out, and the one thing which

he desired was that his wife's petition should succeed and that the divorce should take place so that he might be free to marry the other woman. He refused to see the wife himself, but during July and in the period shortly before the hearing his brother, Mr. Roy Lowndes, went on two, or, possibly, three, occasions to interview the wife on his behalf. There is no question but that Mr. Roy Lowndes went to see the wife with the knowledge and approval of the husband, and I infer that he went with the husband's general authority to act as his representative. When Mr. Roy Lowndes saw the wife he did his best to explain to her what were the husband's intentions as to financial provision for her, but, apparently, she was by no means satisfied. She was suspicious of these debentures on which the annual income was to be secured, and she wanted to see the lump sum of £2,000 in cash. A

In due course, Mr. Roy Lowndes suggested to her that the £2,000 might be held by a stakeholder. I think it is important to observe, in the light of what subsequently happened, that, according to Mr. Roy Lowndes's evidence, it was he who first suggested the idea of a stakeholder. Finally, on his last visit, on July 22, five days before the hearing, Mr. Roy Lowndes gave the wife a post-dated cheque for £2,000, payable on July 29, and drawn on his own account. Even that did not satisfy the wife, and the possibility of the cheque being stopped before its due date was considered. On July 24, Mr. and Mrs. Haydock went over to the husband's house and saw him. In the circumstances I infer that they went to see him with the general authority of the wife to act as her agents. Later there was a telephone conversation between Mr. Haydock and the husband. There is some discrepancy as to what was said at the interview and during the telephone conversation, but it is admitted that the husband agreed to a suggestion put forward by Mr. Haydock that an independent accountant should examine the books of the husband's company to satisfy himself about the debentures, and it is agreed that an appointment was made for the accountant to examine the books on July 26. During the interview the husband reiterated, for the benefit of Mr. and Mrs. Haydock, his intention as to financial provision for the wife if the divorce went through. He said substantially that, if she elected not to proceed with the case, he would make no provision for her, but would leave her to pursue such remedies as she might have, and, to make it more difficult for her, he threatened to go abroad and leave her high and dry. That was the actual expression he used in his evidence. It is agreed that it was contemplated by the husband that all this would be communicated by Mr. and Mrs. Haydock to the wife, and they did communicate it to her when they returned home that evening. B C D E F

On July 26, the interview with the accountant took place. After examining the books he expressed himself as satisfied with regard to the debentures. On that occasion there was a separate conversation between Mr. Roy Lowndes and Mr. Haydock in the course of which Mr. Roy Lowndes produced a document, prepared by himself, which was described as a declaration of trust. This document was executed there and then by Mr. Roy Lowndes, on the one side, and Mr. Haydock, on the other. Its effect was that a sum of £2,000 was to be deposited by Mr. Roy Lowndes with Mr. Haydock, in trust to pay it over to the wife if the divorce went through, but that it should be repaid to Mr. Roy Lowndes if the divorce was not proceeded with. At the same interview Mr. Roy Lowndes handed to Mr. Haydock a banker's draft for £2,000, and with that in his pocket Mr. Haydock went home. Even so, it appears to have remained in doubt whether the wife would actually appear in court the next day. It is in evidence that on the morning of July 27, the day of the trial, Mrs. Haydock telephoned the husband to give him the news that the wife had left for London, but she added: "Whether or not she will get to court God only knows." The wife did go to court, the case was heard, and a decree *nisi* was pronounced in her favour. On July 28 Mr. Haydock, in accordance with the provisions of the declaration G H



of trust, handed the banker's draft to the wife and it was paid into her bank account. Shortly afterwards the husband repaid his brother, Mr. Roy Lowndes, the £2,000 which the latter had furnished.

A There are two other admitted facts which I must mention to complete the agreed background of the case. The first is this. In October, as I have described, the wife was threatening to go to the King's Proctor. This came to the ears of the husband and there was an interview between him and Mrs. Haydock in the course of which he told Mrs. Haydock that he contemplated suing the wife for the return of the £2,000 on the ground that by not applying for the decree absolute she had not fulfilled the conditions under which the money was given to her. The other fact which I think is of some importance is that the husband, in answer to some questions put by me at the conclusion of his evidence, said B that he did not at all agree with the wife's allegations of cruelty. He said that there was an element of truth in what she said in her petition, but that it was badly twisted.

To my mind those facts immediately prompt the suspicion that this petition was proceeded with, not on its own merits, but as the result of a collusive bargain made between the parties or their agents, whereby the husband was to pay C £2,000 in consideration of the wife giving him his freedom. That is the suspicion which clearly emerges from the mere statement of the facts. Before, however, I deal with that, I should deal with another matter as to which the facts were in issue. Both the husband and Mr. Roy Lowndes have told me that the declaration of trust and, indeed, the whole plan to deposit £2,000 with Mr. Haydock as stakeholder, were entirely Mr. Roy Lowndes's own idea and that the husband D knew nothing about it. Indeed, it was said that afterwards, when he found out about it, he was extremely angry. Mr. and Mrs. Haydock, however, have told me that this plan for Mr. Haydock to act as stakeholder was actually discussed between Mr. Haydock and the husband during the telephone conversation on July 24, and they say that the husband personally agreed to the suggestion. I doubt whether it is necessary for me to resolve this issue of fact. E I infer that the husband entrusted his brother, Roy, with general authority to act as his agent in making financial arrangements with the wife in furtherance of the contemplated divorce. In making the arrangements which he did, it appears to me that Mr. Roy Lowndes was acting within the scope of the general authority conferred on him, and that in accordance with the ordinary rules the husband would be bound thereby, whether or not he actually knew all the details F of what Mr. Roy Lowndes did, and whether or not he actually assented to everything that was done. This view is, I think, consistent with that expressed by BUCKNILL, J., in *Poulden v. Poulden* (1). That was a case raising a question of connivance, but I do not think there is any distinction between connivance and collusion so far as the responsibility for the acts of an agent are concerned. As I see the facts, the husband recognised that he was bound by his brother's G acts, first, when he himself repaid to his brother the £2,000, and, secondly, when he threatened to sue the wife for the return of the money. Having heard the evidence, I am satisfied that the husband knew and approved of the plan to hand over this money to a stakeholder. That finding of fact goes to increase the suspicion that this was a case in which collusion was present.

H By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (2) (iii) (as substituted by the Matrimonial Causes Act, 1937, s. 4), a decree is only to be pronounced if the court is satisfied that "the petition is not presented or prosecuted in collusion with the respondent." As was pointed out by DENNING, J., in *Emanuel v. Emanuel* (2) there is a presumption of innocence, but that is only a provisional presumption which is counter-balanced by circumstances which lead to suspicion, as there certainly were in this case. In such cases a party in the position of the husband, who is seeking to have the decree made absolute, is left, as he began, with the legal burden of negating collusion.

He has got to satisfy the court. It is true that he does not have to do so beyond a reasonable doubt, but, at least, he must do so on balance of probabilities, and, if he leaves the matter evenly balanced on the evidence, the legal burden comes into play and requires the court to say that it is not satisfied. I have been referred to a number of authorities on the meaning of collusion. In *RAYDEN ON DIVORCE*, 5th ed., p. 136, para. 11, it is defined as follows:

"Collusion means an agreement or bargain between the parties to a suit, or their agents, whereby the initiation of the suit is procured or its conduct provided for."

On the next page, para. 12, is equally important. It is headed: "Agreements as to maintenance and costs," and it states:

"It is immaterial that the wife has an ultimate right to maintenance or costs; if a promise to pay costs or maintenance is the consideration for a promise relating to the initiation or conduct of proceedings, the suit is collusive."

In support of that proposition *Churchward v. Churchward and Holliday* (3), *Laidler v. Laidler* (4) and *Beattie v. Beattie* (5) are cited. In the last-named case there is a passage in the judgment of SIR BOYD MERRIMAN, P., in which he says ([1938] 2 All E.R. 76):

"In passing, I ought to say that I share the view which McCARDIE, J., took of the decision in *Malley v. Malley* (6) where BIGHAM, P., had said in effect that, if the arrangement related to something—costs, for example, or maintenance—with regard to which the wife had rights which she could enforce, the arrangement was not collusive. I agree with the comments of McCARDIE, J., on that decision in *Laidler v. Laidler* (4). It may or may not be an important factor in deciding whether the arrangement is collusive, but it cannot be decisive that the bargain, if there is a bargain, is one which relates to something which the wife could otherwise get by some process of law . . ."

That statement of SIR BOYD MERRIMAN, P., is of importance in regard to part of the argument addressed to me by counsel for the husband who contended that the definition in *RAYDEN ON DIVORCE* and the passage which I have read are insufficient and incomplete, and that to constitute collusion there must in addition be present an element of corruption or perversion of justice. Counsel for the husband argued that, on any view of the facts of the present case, what was done was in no sense corrupt and did not in any way tend to pervert the course of justice. He referred to the fact that since the Matrimonial Causes Act, 1937, s. 10 (1), it has been legitimate to present claims for maintenance on behalf of the wife at any time after presentation of the petition, and in those circumstances he contended that there can now be nothing improper in conducting negotiations regarding maintenance at any stage of the proceedings. If that is so, he says, the mere fact of an arrangement made between the parties to re-assure the wife as to her financial position, whereby the husband agrees to pay something in respect of maintenance which the wife would be legally entitled to recover, cannot be regarded as tending to pervert the course of justice, and, consequently, to have been collusive.

I do not think it is necessary for me in this case to express any opinion on the question of conducting negotiations for maintenance during the pendency of the proceedings, except to say that, in my view, any such negotiations, if they have taken place, ought clearly to be brought out into the light of day and must be disclosed to the court. It is not suggested that that was done in the present case when the hearing took place, nor, indeed, until the wife herself gave information to the King's Proctor. It is, I think, also important to remember, in connection with the argument for the husband, that the court could not make any

order for maintenance, whether the amount was agreed or not, until after a decree *nisi* has been pronounced. In those circumstances, the question may be asked: What, then, is the purpose of making a payment before decree *nisi*, unless it is meant to be an inducement to the other party to do something which she would not, or might not, otherwise do? Let it be assumed that it is proper, pending trial, to enter on negotiations with regard to maintenance. It remains true, however, in my judgment, that a promise to pay maintenance in consideration of a promise relating to the initiation or conduct of the case makes the suit collusive. *A fortiori*, it seems to me, if an actual payment is made in consideration of the case being proceeded with.

Am I to infer that this payment was made in consideration of the case being proceeded with? It is true that the wife, when she was asked the direct question, did say that, even without the payment of the £2,000, she supposed she would have gone on with the case, and, if I accept that, it goes to negative the suggestion that the payment was intended, or did act, as an inducement. The wife has now changed her mind, and, although she, apparently, did not any longer desire a decree in October, 1949, I am told that she now desires to have one equally with the husband. So, to some extent, her evidence is that of a witness who has an interest in the result of the case. Moreover, having seen her and heard her evidence and having considered her behaviour over a not inconsiderable period, I am extremely doubtful whether she is the sort of woman who at this distance of time would be capable of saying how she would have acted, bearing in mind the way her intentions were fluctuating at the material time. It is clear that both Mr. and Mrs. Haydock, who lived with her and were concerned to see that her interests were protected, certainly thought that she would not go on with the case but for a provision such as this, and equally the husband and his brother were confident that she would not go on with it unless something were done, and they were seriously alarmed about the prospect.

In the circumstances I feel that the only inference I can draw is that the arrangement arrived at between Mr. Roy Lowndes and Mr. Haydock was intended as an inducement to the wife to go on with the case. It was calculated to induce her to go on, and I am unable to say on the evidence that the wife was not, to some extent at least, induced thereby to go on with her petition. In other words, in my judgment, the deposit of £2,000 was intended, and was treated, as being given in consideration of the wife going on with the case. To my mind, such conduct clearly falls within the definition of collusion which I have read and which I accept. I would add this. I have already referred to the argument of counsel for the husband that to constitute collusion there must be present some element tending to pervert the course of justice. I think it is right to add that, in my judgment, that is precisely what we have got in this case. A husband, desirous of obtaining his freedom, induces his wife by a money payment, or more correctly by a deposit of money, to prosecute a petition which he himself describes as badly twisted, if not actually false. That appears to me to amount to no more and no less than an attempt to obtain the judgment of this court, not on the merits of the case, but rather by way of arrangement between the two parties—and an arrangement whereby the husband is to obtain his freedom irrespective of the merits of the case strikes me as being clearly something which tends to pervert the course of justice. In these circumstances I find myself unable to say I am satisfied that this petition was not presented in collusion with the respondent, and my duty, therefore, is to dismiss this summons and to rescind the decree *nisi*.

*Summons dismissed. Decree nisi rescinded. No order as to costs.*

Solicitors: Gordon, Dadds & Co. (for the wife); Ashurst, Morris, Crisp & Co. (for the husband); King's Proctor.

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]



## PYBURN v. HUDSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, JJ.), April 19, 1950.]

*Criminal Law—Loitering with intent to commit a felony—Suspected person—Acts antecedent to the act occasioning the arrest—Vagrancy Act, 1824 (c. 83), s. 4 (as amended by Penal Servitude Act, 1891 (c. 69), s. 7).*

The respondent was charged under the Vagrancy Act, 1824, s. 4 (as amended by the Penal Servitude Act, 1891, s. 7), with being a suspected person loitering with intent to commit a felony. It was proved that on Oct. 31, 1949, at about 12.5 a.m. the respondent was seen looking with apparent interest at the rear of certain business premises, and shortly afterwards he was found on some scaffolding which had been erected in the front of the premises to effect repairs. On arrest he admitted that he had intended to break into the premises. The justices found that the acts of the respondent when he was first observed at the back of the premises were not sufficiently antecedent to those which led immediately to his arrest and were not of such a nature as to place him in the category of a suspected person and bring him within the scope of the section.

HELD: the justices had properly directed their minds to the question whether the respondent had become a suspected person before he committed the act which led to his arrest; there was sufficient evidence to support that conclusion; and, therefore, the justices' findings of fact could not be disturbed.

[AS TO SUSPECTED PERSON, see HALSBURY, Hailsham Edn., Vol. 25, pp. 442, 443, para. 790; and FOR CASES, see DIGEST, Vol. 37, pp. 363-365, Nos. 1651-1662.]

Cases referred to:

- (1) *Ledwith v. Roberts*, [1936] 3 All E.R. 570; [1937] 1 K.B. 232; 106 L.J.K.B. 20; 155 L.T. 602; 101 J.P. 23; Digest Supp.
- (2) *Rawlings v. Smith*, [1938] 1 All E.R. 11; [1938] 1 K.B. 675; 107 L.J.K.B. 151; 158 L.T. 274; 102 J.P. 181; Digest Supp.

CASE STATED by Sunderland justices.

At a court of summary jurisdiction sitting at Sunderland on Oct. 31, 1949, an information was preferred by the appellant, a police constable, under the Vagrancy Act, 1824, s. 4 (as amended by the Penal Servitude Act, 1891, s. 7) against the respondent, charging him, as a suspected person, with having on Oct. 31, unlawfully loitered in High Street West, Sunderland, with intent to commit a felony. The justices held that the events which took place when the respondent was first under observation were not sufficiently antecedent to the events which led to his arrest to bring him within the scope of s. 4 of the Act, and that, as the whole of the events took place within the space of a few minutes and formed part of the same set of circumstances, it could not be said that the acts of the respondent at the rear of the premises were of sufficient duration to bring him within the category of a suspected person. They, therefore, dismissed the information.

*F. H. Lawton* for the appellant.

*Swanwick* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county borough of Sunderland. It raises a question which has often caused difficulty, namely, the application of the provisions of s. 4 of the Vagrancy Act, 1824 (as amended by the Penal Servitude Act, 1891, s. 7), relating to the arrest of suspected persons loitering with intent to commit a felony. If I had been sitting as a justice I am not sure that I should necessarily have come to the same conclusion as the justices did, but it seems to me that they took great care and

trouble with the case. They received perfectly proper advice from their clerk, and they have evidently applied their minds to the right point. Where justices do that, it is not for this court to upset their findings of fact.

A At five minutes past midnight a police constable observed the respondent looking, apparently with interest, at the back of a place called Jopling's Stores. The appellant, a police constable, saw the respondent going round to the back of the premises, and followed him, but he lost sight of him. Shortly afterwards he found the respondent, whom he obviously suspected of being up to no good, up some scaffolding which would have enabled him (the respondent) to break into the place which thitherto he had been observing from the back. The appellant thereupon arrested him. At the time he was arrested, the respondent was only a trespasser on the scaffolding; he had not attempted to break in. B So he was charged with being a suspected person loitering with intent to commit a felony. The respondent admitted that he intended to commit a felony, and said that the reason why he was on the scaffolding was that he was going to break in if he could.

C The true construction and application of the Vagrancy Act, 1824, has given rise to a series of cases. One especially, *Ledwith v. Roberts* (1), has caused a good deal of difficulty to the police and will, I hope, some day be dealt with by legislation. That case laid down that to come within s. 4 of the Act a person must be within the category of suspected persons before he does the act which immediately causes his arrest. I should be sorry to attempt to lay down that the acts which cause him to be a suspected person and the act which causes him to be arrested must be separated by any particular length of time. There have D been many cases in which police have watched men who have gone round visiting car parks or cars left unattended in the street with the object either of driving away a car without the consent of the owner or of helping themselves to property in the cars. If they have acted thus for a length of time, or in such a way that the court thinks that they have by their conduct brought themselves within the category of suspected persons, it matters not whether their acts E have been done a quarter of an hour, or half an hour, or, I would say, even five minutes before another act takes place which causes the constable to arrest them. But there must be some act bringing a man within the category of a suspected person, and that act must have occurred before he commits the act which causes his arrest. That seems to be the effect of *Ledwith v. Roberts* (1), although that case is sometimes believed to have gone beyond that which this F court has laid down it has decided.

G In this case it would be arguable, and the justices might have found, that the interest which the respondent was displaying at five minutes past midnight in the back of Jopling's Stores was enough to bring him within the category of suspected persons, that is to say, that a reasonable person, seeing him doing that, would think that he was there for a suspicious purpose, and that, as he was not arrested until he had climbed up the scaffolding and was found thereon, the offence was complete. The justices, however, have found that the fact that the respondent was taking an interest in the back of these premises at the time mentioned was not enough to bring him within the category of suspected person. I cannot say that the justices were necessarily wrong in that. They may have H said: "Here is a young fellow going home at night, and the fact that he looks up at the back of Jopling's Stores—perhaps in the hope that he may one day have enough money to buy his girl a present, is not enough to make him a suspected person. It is true he was a suspected person as soon as he was found swarming up the scaffolding with the idea of getting in. True, he would have been guilty of attempted felony if he had started to open the window, but we cannot say that at the time he got up the scaffolding he was a suspected person." It is a question of degree. The justices, who obviously applied their minds carefully to the facts of the case and show by their findings that they have

appreciated what it was necessary for them to find, have stated that "the act of the respondent at the rear of the premises was not of such a nature as to bring him within the category of a suspected person." The justices may not have been prepared to say that that in itself was a suspicious act. I think we can find no fault with the conclusion to which the justices have come, and this appeal must be dismissed.

MORRIS, J.: I agree.

FINNEMORE, J.: I agree that the justices appear to have applied their minds with considerable care to the matter which they had to decide. It was conceded by counsel for the appellant that the legal position was accurately stated to them. They were advised that "the suspicion which made the respondent a suspected person must be a suspicion arising from acts antecedent to the act occasioning the arrest." That is because the Vagrancy Act, 1824, s. 4 (as amended), deals, not with any person who loiters with intent to commit a felony, but with "every suspected person or reputed thief," and it has been held that before the act is committed which causes the person to be arrested he must have made himself a suspected person.

In *Rawlings v. Smith* (2) LORD HEWART, C.J., said ([1938] 1 All E.R. 15):

"... there must be the necessary ingredient of antecedent facts giving rise to suspicion which brings the offender, or the alleged offender, into the category of suspected persons. He may not be put into the category of suspected persons solely by the act which causes him, upon arrest, to be charged with loitering as a suspected person with intent to commit a felony."

In dealing with that question, the justices said that, in their view, having heard the evidence, the events "were not sufficiently antecedent to the events which led to the arrest of the respondent to bring him within the scope of the said section." As my Lord has pointed out, it is impossible and undesirable to lay down any sort of time or duration for these antecedent acts, but they must be antecedent. I think that also is a question of fact, and I think that on the facts stated here the justices were entitled to come to the conclusion to which they came.

The second point on which, again, they were properly directed was "that the antecedent acts must be of a character that brought the respondent into the category of a suspected person." Applying their minds to that, they found that "the act of the respondent at the rear of the premises was not of such a nature as to bring him within the category of a suspected person." That seems to me to be a finding of fact, and there was evidence on which the justices could come to it. They directed themselves properly with regard to the law, and, therefore, it is not open to this court to set aside their finding.

*Appeal dismissed with costs.*

Solicitors: *Ward, Bowie & Co.*, agents for *Richard Reed*, Sunderland (for the appellant); *Taylor, Jelf & Co.*, agents for *Hutton, Quenet & Funnell*, Sunderland (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]



*Re SELBY-BIGGE (deceased).*

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), April 20, 1950.]

*Will—Attestation—Attestation clause—Validity—Omission of statement that witnesses “subscribed their names as witnesses”—Wills Act, 1837 (c. 26), s. 9.*

A A codicil was attested in the following form: “Signed by the testatrix in our presence and attested by us in the presence of her and of each other.”

B HELD: the word “attest” in its ordinary meaning was wide enough, when employed in connection with a will, to include the word “subscribe,” and, therefore, the attestation clause was sufficient to comply with the requirements of the Wills Act, 1837, s. 9, and an affidavit of due execution of the codicil ought not to be required under the Probate Non-Contentious Rules, r. 4.

[AS TO MODE OF ATTESTATION, see HALSBURY, Hailsham Edn., Vol. 36, pp. 62-66, paras. 78-83; and FOR CASES, see DIGEST, Vol. 44, pp. 266-272, Nos. 951-1044.]

Cases referred to:

- C (1) *Burdett v. Spilsbury, Skynner v. Spilsbury*, (1843), 10 Cl. & Fin. 340; 6 Man. & G. 386; 8 E.R. 772; 17 Digest 199, 93.  
 (2) *In the Goods of Thomson*, (1846), 4 Notes of Cases, 643; 44 Digest 264, 926.  
 (3) *In the Goods of Maddock*, (1874), L.R. 3 P. & D. 169; 43 L.J.P. & M. 29; 30 L.T. 696; 38 J.P. 631; 44 Digest 272, 1037.  
 D (4) *In the Goods of Sharman*, (1869), L.R. 1 P. & D. 661; 38 L.J.P. & M. 47; 20 L.T. 683; 33 J.P. 695; 44 Digest 276, 1091.

SUMMONS for a declaration that the form of attestation clause in a codicil made by Joan Selby-Bigge on May 7, 1949, was sufficient for the purposes of the Wills Act, 1837, s. 9.

E *Sir Walter Monckton, K.C.*, and *Ifor Lloyd* for the applicants, the persons named in the will as executors and trustees.

*Victor Russell* for the Attorney-General.

HODSON, J.: By the Probate Non-Contentious Rules, r. 4:

F “If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 7 Will. 4 & 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution were in fact complied with.”

G In this case, the codicil was lodged in the registry in common form, and was not rejected, but was held back under r. 4, on the ground that the attestation clause was insufficient, for the production of an affidavit from at least one of the subscribing witnesses. The clause reads as follows: “Signed by the testatrix in our presence and attested by us in the presence of her and of each other.” The matter is one which is not without importance, because it appears from an affidavit which has been sworn by two partners of the firm of solicitors engaged in this case that this particular form of attestation clause has been in continuous use in their office for at least fifty-seven years, and that there are many hundreds of wills outstanding—probably about eight hundred in their office alone—in which the same form of words appears. It would obviously be a matter of considerable difficulty and inconvenience, and, possibly, expense, if steps had to be taken to regularise all the wills in the office by expanding their attestation clauses. Therefore, in this case the court has been asked to declare that this clause is sufficient.

Section 9 of the Wills Act, 1837, provides:

"No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

It is common knowledge that in the matter of the execution of wills, as in the matter of the execution of other documents, reliance can be placed on the maxim *omnia praesumuntur rite esse acta*, but the safeguard in the matter of wills where there is no contest but where merely common form grants are concerned is provided by r. 4. Therefore, it is necessary carefully to consider whether that rule has been satisfied.

The point taken by the official who dealt with the matter was that there was no reference to subscription in the attestation clause, and it was not sufficient merely to rely on the use of the word "attest," the argument being that "attest" and "subscribe" are different words and that "attest" does not include "subscribe," so that, although the presumption might apply in the last resort, yet the attestation clause could not be regarded as sufficient since it did not cover the ground envisaged by the section in spite of the words "no form of attestation shall be necessary." It is clear that it is unnecessary to cover, by the attestation clause, the whole process envisaged by s. 9. That has been recognised for a very long time, and no book of precedents gives an attestation clause which covers every word of the section. I have had read to me the form in the *ENCYCLOPAEDIA OF FORMS AND PRECEDENTS*, 3rd ed., vol. 18, p. 589, and I have also seen the forms which are in *KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING*, 14th ed. There are two forms in the latter work (vol. 2, p. 953). The longer form reads as follows:

"Signed by the above-named testator as . . . his last will in the presence of us, both present at the same time, who, in his presence at his request and in the presence of each other, have hereunto subscribed our names as witnesses";

and the shorter form reads:

"Signed by the above-named testator in the joint presence of us who in his presence and that of each other have hereunto subscribed our names as witnesses."

It is to be observed that the word "attest" is not used in either of those forms, the effect of the section being reproduced by the language "subscribed our names as witnesses," and no one has, so far as I know, contended that language of that kind is not sufficient to constitute an attestation clause which will pass r. 4.

It is difficult to recollect the exact form of words which is used by practitioners in particular cases, and naturally, in order to save labour and for the sake of neatness, every skilful practitioner desires to reduce the number of words to the minimum. The solicitors in the present case have, in their view, achieved that object and are anxious to maintain that position. It is true that, if the contention of the applicants is correct that the word "attest" by itself, without the addition of the word "subscribe," is sufficient, it would appear that the word "subscribe" in the statute is otiose. Counsel on their behalf pointed out to me that, although one expects to give effect to every word in a statute, yet in this case, in any event, part of the section is otiose because it is provided that the signature is to be made "by the testator in the presence of two or more witnesses," and the section goes on to provide that "such witnesses shall attest and shall subscribe," so the word "attest" is unnecessary. But recognising the necessity, if possible, to give effect to, or, at any rate, to cover, every word that is in the statute, he seeks to get over the difficulty by tracing the history of

the word "subscribe" as far back as he can, and he traces it back to the Statute of Frauds. He also referred me to BLACKSTONE'S COMMENTARIES, 4th ed., vol. 2, p. 260:

"The last requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses*; though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed."

A BLACKSTONE goes on to describe the history of modern deeds. At the end of the paragraph, beginning with a reference to the reign of Henry VIII, he adds (*ibid.*, 261):

"... which was also the era of discontinuing it [*i.e.*, the particular form] in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed."

"Attestation" in its primary meaning, as the dictionaries show, involves witnessing, and witnessing only, but when it is applied to documents the dictionaries show, and the authorities also, that it involves writing. I need not refer to many of the dictionaries, which appear to be quite consistent on the topic. The first one I was referred to was SWEET'S LAW DICTIONARY, published in 1882, where (p. 73) the heading "Attest—Attestation" is followed by this definition:

"To attest is literally to witness any act or event, but the term is now exclusively applied to the signature or execution of a document. When A executes a deed in the presence of B, and B signs his name on the document as a token of his having witnessed A's execution, B is said to attest the execution. The term is even more commonly applied to wills than to deeds. A clause called an attestation clause is generally written at the foot of the instrument as a declaration by the attesting witness that the instrument was signed or executed in his presence."

It is to be observed that in the dictionary, it is stated categorically that "the term is now exclusively applied to the signature or execution of a document." The dictionaries of the English language, in contrast with legal dictionaries, give the more general meaning of the word "attest" first. The NEW ENGLISH DICTIONARY gives the meaning first, "To bear witness to, affirm the truth or genuineness of; to testify, certify"; and there is added this: "formally (*a*) by signature, (*b*) by oath." So that, on the face of it, at any rate, there seems to be nothing against the proposition that a reasonable construction of the word "attest," when applied to a document, necessarily involves, or, at any rate, includes, a reference to writing. I do not propose to refer to any other of the dictionaries.

I have been referred by counsel for the applicants to two statutes. One is the Bills of Sale Act (1878) Amendment Act, 1882, s. 10, which provides:

"The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto ..."

The form of a bill of sale is set out in the schedule to the Act, at the foot of which appears the words

"In witness, &c. Signed and sealed by the said A.B. in the presence of me E.F. [*add witness' name, address, and description*]."

It is clear that in that Act, at any rate, the word "attest" is used as including the act of writing. The Merchant Shipping Act, 1894, s. 694, leads one to the same conclusion.

In the third place, having referred me to dictionaries and Acts of Parliament, the applicants referred me to occasions when judicial reference has been made to "attestation." Examples were given of the use of the word by judges as showing



quite clearly that they were using the word "attestation" as including writing. One case to which I was referred was *Burdett v. Spilsbury* (1), which was heard in the House of Lords in 1843. I need not refer to the facts of the particular case, but the language of LORD LYNTHURST, L.C.; and also that of LORD CAMPBELL, I think, supports the applicants' argument. Referring to some old cases which were under review, LORD CAMPBELL said (10 Cl. & Fin. 416):

"But in those cases there is not a mere simple attestation by witnesses, that is, the subscription of their names, but there is an imperfect history of the transaction."

He is there using the words "attestation" and "subscription" as if they were synonymous. He also said (*ibid.*, 417):

"The very common expression we have, of 'attesting witness' to a deed, explains this. What is the meaning of an attesting witness to a deed? Why it is a witness who has seen the deed executed, and who signs it as a witness. He is a good attesting witness, although there should not be upon the deed itself, a memorandum saying that it is signed, sealed, and delivered in his presence."

After the conclusion of the speeches, LORD LYNTHURST added a few more words (*ibid.*):

"The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness."

Turning to a case very slightly later in date, *In the Goods of Thomson* (2), one finds SIR HERBERT JENNER FUST using parallel language. He said (4 Notes of Cases 644):

"... when a paper is produced by a testator to witnesses with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time, this is a sufficient acknowledgment of his signature ..."

SIR HERBERT JENNER FUST cannot be accused of using language loosely, and he refers to attestation by subscription. Similar language was used by SIR JAMES HANNEN in *In the Goods of Maddock* (3) and LORD PENZANCE in *In the Goods of Sharman* (4). I have been referred to several instances, but I do not think it necessary to make any reference to the judgments.

Counsel who has assisted the court on behalf of the Attorney-General has been unable to find any case which supports the contrary view, and, so far as I am aware, there is none. If the word "attest" in its ordinary meaning is sufficiently wide in connection with a document such as a will to include the word "subscribe," this attestation clause is sufficient, and I base my conclusion that it is so sufficient on that, and I think it is unnecessary to go further. It has been argued that the attestation clause, coupled with the position of the names on the document, is sufficient of itself to produce the required effect, so that the presumption can be called into play having regard to the language of the rule. I prefer to base my opinion on the first ground. It has also been said that the argument for the applicants ought to be accepted because there is a long-standing practice which supports the validity or sufficiency of this particular clause. There again, I prefer not to rest my judgment on that ground, because, although there may be such a practice, there is no evidence before me except that of the solicitors, which, of course, I treat with respect, but which only applies to their particular firm, and naturally does not extend over a wider field. On the first ground put by the applicants, namely, that the word "attest" is wide enough to cover the word "subscribe," I think that this attestation clause is sufficient, and I make the declaration asked for.

*Declaration accordingly.*

Solicitors: *Farrer & Co.* (for the applicants); *Treasury Solicitor.*

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

## WILLIAM HILL (PARK LANE), LTD., v. HOFMAN.

[CHANCERY DIVISION (Roxburgh, J.), April 20, 1950.]

*Gaming—Deed executed for illegal consideration—Betting debt secured by deed of charge—Covenant to repay—Claim to repayment under bare covenant—Gaming Act, 1835 (c. 41), s. 1—R.S.C., Ord. 55, r. 5A.*

A By a deed of charge, dated July 16, 1948, the defendant, described therein as “the borrower,” covenanted with the plaintiffs, a firm of bookmakers, described therein as “the lender,” to pay on June 30, 1949, the sum of £7,451 19s. 1d., which represented the amount of the defendant’s losses to the plaintiffs as a result of betting transactions. On Nov. 10, 1949, the plaintiffs took out an originating summons under R.S.C., Ord. 55, r. 5A, claiming the payment of all moneys due to them under the deed of charge. The defence being raised that the document in question was a security given for money won by gaming and, under the Gaming Act, 1835, s. 1, was to be deemed to have been executed for an illegal consideration, the plaintiffs sought to maintain that the covenant to repay was severable from the charge and that they were entitled to recover as bare covenantees.

C HELD: (i) it was not open to a party seeking, under R.S.C., Ord. 55, r. 5A, to recover payment of moneys secured by a mortgage or charge, to claim at the hearing that the moneys were payable only under a bare covenant.

D (ii) it was open to the court to look behind the false recitals in the deed, and the document, which must be treated as a single whole, was executed for an illegal consideration and was void.

[AS TO SECURITIES GIVEN FOR GAMING CONSIDERATIONS, see HALSBURY, Hailsham Edn., Vol. 15, pp. 488, 489, para. 887; and FOR CASES, see DIGEST, Vol. 25, pp. 416, 417, Nos. 195-205.]

E AS TO APPLICATIONS BY ORIGINATING SUMMONS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 106-112, paras. 209-218; and FOR CASES, see DIGEST, Practice, pp. 732, 733, Nos. 3159, 3160.]

F ORIGINATING SUMMONS issued under R.S.C., Ord. 55, r. 5A, for the payment of all moneys due to the plaintiffs under a deed of charge, dated July 16, 1948, and made between the defendant, of the one part, and the plaintiffs, of the other part.

G The deed recited, *inter alia*, that the defendant was justly and truly indebted to the plaintiffs in the sum of £7,451 19s. 1d. for value received as the defendant thereby acknowledged and admitted, and the defendant covenanted with the plaintiffs that he would, on June 30, 1949, pay to the plaintiffs the sum of £7,451 19s. 1d. An affidavit, sworn by the defendant on Jan. 7, 1950, contained the following statements:

H “(i) The plaintiffs are bookmakers. By July 16, 1948, as the result of bets with the plaintiffs on horse-racing my losses amounted to £7,451 19s. 1d., and on that date, in response to pressure from the plaintiffs, I signed the document dated July 16, 1948 . . . . . Clauses 1 and 2 of such deed read: ‘1. The borrower hereby covenants with the lender that the borrower will, on June 30, 1949, pay to the lender the sum of £7,451 19s. 1d. 2. As security for the payment hereinbefore covenanted to be made the borrower hereby charges with payment to the lender of the said sum of £7,451 19s. 1d. the shares specified in the schedule hereto.’ (ii) Accordingly, the document in question is a security given for money won by gaming and by reason of the Gaming Acts, 1710, 1835, and 1845, was executed for an illegal consideration, alternatively for no consideration. (iii) I am advised and verily believe that I am entitled in the circumstances to an order that the said document

and shares be delivered up to me forthwith and I claim accordingly such relief and any further relief which to this Honourable Court may seem fit and the costs of these proceedings."

The facts and the relevant section of the Gaming Act, 1835, are set out in the judgment.

*H. E. Francis* for the plaintiffs.

*A. L. Gordon* for the defendant.

A

**ROXBURGH, J. :** By a deed dated July 16, 1948, and made between Charles Gustavus Hofman, of the one part, and William Hill (Park Lane), Ltd., of the other part, it is recited:

"Whereas (1) the borrower is justly and truly indebted to the lender in the sum of £7,451 19s. 1d. for value received as the borrower hereby acknowledges and admits (2) the borrower has deposited with the lender the shares in the company known as the Hofman Tool and Engineering Co., Ltd., more particularly specified in the schedule hereto as security for the payment of the said sum of £7,451 19s. 1d. and has agreed to enter into these presents in the manner hereinafter appearing Now this deed witnesseth as follows:—1. The borrower hereby covenants with the lender that the borrower will on June 30, 1949, pay to the lender the sum of £7,451 19s. 1d. 2. As security for the payment hereinbefore covenanted to be made the borrower hereby charges with payment to the lender of the said sum of £7,451 19s. 1d. the shares specified in the schedule hereto."

B

C

On Nov. 10, 1949, William Hill (Park Lane), Ltd., took out this summons:

D

"Let Charles Gustavus Hofman (the borrower under the charge hereinafter mentioned) within eight days . . . cause an appearance to be entered for him to this summons which is issued upon the application of William Hill (Park Lane), Ltd., whose registered office is situate at 225/30 Piccadilly (the lender under the charge hereinafter mentioned), for the following relief: payment of all moneys due to the plaintiff company under a deed of charge dated July 16, 1948, and made between the defendant of the one part and the plaintiff company of the other part."

E

That summons was admittedly issued in reliance on R.S.C., Ord. 55, r. 5A, which provides:

"Any mortgagee or mortgagor, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say—Payment of moneys secured by the mortgage or charge . . ."

F

G

Pausing there, it is plain to my mind that this application was intended to be an application by a mortgagee or chargee for payment of moneys secured by a mortgage or charge, and plainly the defendant so understood it because, on Jan. 7, 1950, he swore an affidavit to this effect and the facts in this affidavit are not in dispute. The word "pressure" in the affidavit is to be treated as referring to lawful pressure. The affidavit states:

H

"(i) The plaintiffs are bookmakers. By July 16, 1948, as the result of bets with the plaintiffs on horse-racing my losses amounted to £7,451 19s. 1d. and on that date, in response to pressure from the plaintiffs, I signed the document dated July 16, 1948."

The defendant then sets out portions of the deed and continues:



"(ii) Accordingly, the document in question is a security given for money won by gaming and by reason of the Gaming Acts, 1710, 1835, and 1845, was executed for an illegal consideration, alternatively for no consideration. (iii) I am advised and verily believe that I am entitled in the circumstances to an order that the said document and shares be delivered up to me forthwith and I claim accordingly . . . relief . . ."

A There is no power to counterclaim under R.S.C., Ord. 55, r. 5A, and, in so far as the defendant claims delivery up of the document, he is not entitled to that relief in these proceedings.

The nature of the defence, however, is made very clear by the affidavit. By s. 1 of the Gaming Act, 1835:

B "... every note, bill, or mortgage which, if this Act had not been passed, would, by virtue of the said several lastly hereinbefore mentioned Acts or any of them, have been absolutely void shall be deemed . . . to have been made, drawn, accepted, given, or executed for an illegal consideration . . ."

C I interpose to say that one of the Acts thereinbefore mentioned was the Gaming Act, 1710, and there can be no doubt that the document in question would have been absolutely void under s. 1 of that Act. The section continues:

D "... and the said several Acts shall have the same force and effect which they would respectively have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration . . ."

E Faced with that serious defence, counsel for the plaintiffs argues that, although it is said in the summons that the plaintiffs are the lenders under a deed of charge and although the proceedings are brought under a rule which is not available unless the plaintiffs claim to be mortgagees or chargees or persons akin to mortgagees or chargees, there is a covenant to pay this sum. The covenant, he says, is severable from the charge and the plaintiffs are really claiming as bare covenantees payment of the sum of money secured by a bare covenant. It seems to me that there are two answers to that argument. In the first place, it is not, I think, open to a person who elects to bring proceedings under R.S.C., Ord. 55, r. 5A, on the footing that he is claiming payment of moneys secured by a mortgage or charge, to turn round at the hearing and say that he is claiming payment of moneys which are not secured by a mortgage or charge but are only payable under a naked covenant. That seems to me to be a fatal objection to this proceeding by originating summons.

G H I was minded at one time to stop there and say that that was enough to dispose of the case, but counsel for the plaintiffs pressed me to decide the further question. I am told, no doubt rightly, by counsel for the defendant that, notwithstanding that the Gaming Act, 1835, was passed one hundred and fifteen years ago, there is no authority on the point. In my judgment, when the Act of 1835 says: "every note, bill, or mortgage . . . shall be deemed and taken to have been made, drawn, accepted, given, or executed," it is referring to the instrument and not merely to one or other provision contained in the instrument. When it says "every note" it means, in my judgment, a document properly described as a note; when it says "every bill" it means, in my judgment, a document properly described as a bill; and when it says "every mortgage given or executed" it means, in my judgment, every instrument properly described as a mortgage which is given or executed. Therefore, in my view, this document, which is properly described as a mortgage, must be treated as a whole and must be deemed to have been executed for an illegal consideration.

It is open to me to look behind the false recital contained in the document and take note of what is admittedly the truth. I have done so, and it seems to me plain that the instrument was executed for an illegal consideration, and is, therefore, void. On that ground also this proceeding fails. I, accordingly, dismiss the summons with costs.

*Summons dismissed.*

Solicitors: *Hardcastle Sanders & Co.* (for the plaintiffs); *Weller & Birrell* (for the defendant).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

## EATON v. COBB.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Jones, JJ.), March 31, 1950.]

*Highway—Interruption of free passage—Cyclist struck by driver opening door of stationary motor car—"Wilful obstruction"—Highway Act, 1835 (c. 50), s. 72.*

The appellant, who was the driver of a motor car opened the door on the off-side of the car while it was stationary and struck a cyclist who was passing. He was charged under the Highway Act, 1835, s. 72, which makes it an offence "in any way wilfully" to "obstruct the free passage of any . . . highway." The justices found that the appellant, before he opened the door, looked in the internal mirror reflecting the view through the rear window of the car, but did not see the cyclist who was hidden from his view by the car.

HELD: the essence of the offence charged was that the obstruction of the highway must be intentional; on the evidence the appellant had not "wilfully" obstructed the free passage of the highway; and, therefore, he was not liable to conviction.

[FOR THE HIGHWAY ACT, 1835, s. 72, see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 77-81.]

CASE STATED by Ipswich justices.

The appellant, the driver of a motor car, was charged at a court of summary jurisdiction sitting at Ipswich on Sept. 26, 1949, with having obstructed "the free passage of a certain highway . . . by opening the off-side door of a motor car standing thereon, thereby impeding the progress of a motor cycle." For the appellant it was contended that as, before opening the door, he had looked in an internal mirror reflecting the view through the rear window and had not seen any vehicle approaching, and had thus been unaware that the cyclist was about to pass, he was not guilty of wilful obstruction. The appellant was convicted and fined £1.

*Skelhorn* for the appellant.

*Boreham* for the respondent.

HUMPHREYS, J.: This is a Case stated by justices for the county borough of Ipswich who convicted the appellant of an offence which was charged in these terms,

" . . . for that he on Sept. 3, 1949, at Ipswich, in the county borough first aforesaid, wilfully did obstruct the free passage of a certain highway, there called Eagle Street, by opening the off-side door of a motor car standing thereon, thereby impeding the progress of a pedal cycle . . . "

The justices were of opinion that the appellant did wilfully obstruct the free passage of the highway. The facts which they found show that the appellant's motor car was

“ . . . on its correct side of the road when the appellant opened the off-side door very slowly and to an extent of not more than twelve inches; that when the appellant commenced to open the door of his car a passing cyclist . . . was by the off-side rear of and passing the stationary car and while doing so was struck by the edge of the opening door, was knocked down, and received injury to his lip; that the [cyclist] was riding a racing type of bicycle with his head down . . . ”

Since the cyclist had his head down, he did not see, as soon as he might have done otherwise, that the door was being opened. The justices also found

“ . . . that prior to commencing to open the door of his car, the appellant looked in an internal mirror reflecting the view through the rear window, but did not see any vehicle approaching, and was not at any time prior to the door hitting the said cyclist aware that the cyclist was either about to pass or in the course of passing the said motor car.”

As I understand that finding, the justices intended to say that the appellant acted reasonably in looking in his mirror to see if there was anybody passing the motor car, and through no fault of his failed to see the person who was about to pass the car, but who was hidden by it. In other words, the justices found every possible fact indicating that there was nothing wilful, using the word in its ordinary sense, in the act of obstruction.

The question of law raised in this case is whether such an act amounts to wilful obstruction. In my opinion, “wilfully obstruct” in a statute which makes such obstruction a criminal offence means wilfully to obstruct. On the facts of this case there was no evidence on which the justices could come to the conclusion that the appellant wilfully obstructed the free passage of the highway. It is true that he wilfully opened the door, and, if it were an offence to open the off-side door of a motor car, he would have committed it, but the offence here is wilfully obstructing the free passage of a highway. That is made an offence by s. 72 of the Highway Act, 1835, a very long section in which a number of things is prohibited, all indicating that the test whether or not a person can be convicted of the offence of which the appellant has been convicted is whether or not the obstruction was intentional. In my view, there was no evidence on which the justices could say that the appellant wilfully obstructed the highway, and, therefore, the conviction ought to be quashed.

**LORD GODDARD, C.J.:** I agree, and would only add that the offence does not depend on whether or not an accident takes place. If the justices were right, everybody who gets out on the off-side of his car would be committing an offence under s. 72 of the Act of 1835, and that cannot have been the intention of the section.

**JONES, J.:** I agree.

*Appeal allowed.*

Solicitors: *A. J. A. Hanhart*, agent for *Fison & Co.*, Ipswich (for the appellant); *Sharpe, Pritchard & Co.*, agents for *J. G. Barr*, town clerk, Ipswich (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

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ASHER v. SEAFORD COURT ESTATE <sup>Applied.</sup> BECK v. NEWBO  
[1952] 2 All E.R. 412.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord MacDermott and Lord Reid), February 15, 16, 20 and 21, April 27, 1950.]

*Rent Restriction—Permitted increase—Transfer of burden—Covenant by landlord to provide service previously supplied voluntarily—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 2 (3).*

In 1935 a flat, which was subject to the Rent Restrictions Acts, was let at a rent of £175 a year. The tenant undertook to pay the charges for electricity and gas and to keep the premises in repair, and the landlords undertook to pay the rates and taxes. In fact, the landlords kept the exterior of the premises in repair, maintained the supply of hot water for the flat, and kept clean and lighted the stairs to the flat which the tenant shared with the tenants of the other flats in the building. The flat was vacated by the tenant in 1939. On Sept. 29, 1943, the flat was let to the present tenant at a rent of £250 a year. The tenant undertook to keep the interior of the flat and the fittings in repair, and the landlords undertook to pay all outgoing, including gas and electricity, to keep the exterior in repair, to keep the common stairway of the building clean and light, and to provide the flat with hot water. At the time when the parties agreed to the terms of the lease of 1943, neither was aware of the terms of the earlier lease. In proceedings by the landlords to recover arrears of rent, the tenant contended that they were not entitled to claim more than the standard rent of the flat, viz., £175 a year, since between 1935 and 1939 they had voluntarily undertaken the services for which they were now legally responsible, and, therefore, there had been no transfer to them of a "burden or liability previously borne by the tenant" within the meaning of s. 2 (3) of the Rent and Mortgage Interest (Restrictions) Act, 1920.

HELD: (i) "liability" in s. 2 (3) meant legal liability; although, between 1935 and 1939 the landlords had effected the external repairs, the tenant was liable under his covenant to do those repairs; and so, under the agreement of 1943, the liability previously borne by him was transferred to the landlords within the meaning of the sub-section.

(ii) (LORD MACDERMOTT, dissenting), although, under the agreement of 1935, the tenant was not liable to provide hot water, he was under the practical necessity of doing so, and, therefore, the "burden" (which had a wider meaning than "liability") of doing so was one which had been "previously borne by the tenant" and had been transferred to the landlords under the agreement of 1943.

(iii) notwithstanding that the respondents had not consciously related the increase of rent to the assumption by them of a specific burden, nevertheless, the increase could properly be said to be "in respect of" the transfer of the burden within the meaning of s. 2 (3), and, therefore, the respondents were entitled to increase the rent by the value of the transferred burden.

(iv) accordingly, the landlords were entitled to increase the rent of the premises, and the case must be remitted to the county court to value the transferred burden and liability.

The provisions of the Rent Restrictions Acts which require notice to be given of an increase of rent do not apply to increases under s. 2 (3).

*Winchester Court, Ltd. v. Miller* ([1944] 2 All E.R. 106), approved.

*Observations of LORD GODDARD, C.J., and DENNING, J., in First National Housing Trust, Ltd. v. Chesterfield R.D.C.* ([1948] 2 All E.R. 661), disapproved.

*Decision of the COURT OF APPEAL* ([1949] 2 All E.R. 155), affirmed.

[AS TO TRANSFER OF BURDENS, see HALSBURY, Hailsham Edn., Vol. 20, p. 326, para. 387 and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 31, p. 566, No. 7135 and Supplements.]

Cases referred to:

- (1) *Winchester Court, Ltd. v. Miller*, [1944] 2 All E.R. 106; [1944] K.B. 734; 114 L.J.K.B. 152; 171 L.T. 150; 2nd Digest Supp.
- A (2) *Regional Properties, Ltd. v. Oxley*, [1945] 2 All E.R. 418; [1945] A.C. 347; 114 L.J.K.B. 473; 173 L.T. 201; *affmg.* [1944] 2 All E.R. 510; [1944] K.B. 733; 171 L.T. 129; 2nd Digest Supp.
- (3) *Engvall v. Ideal Flats, Ltd.*, [1945] 1 All E.R. 230; [1945] K.B. 205; 114 L.J.K.B. 249; 172 L.T. 134; 2nd Digest Supp.
- B (4) *Property Holding Co., Ltd. v. Clark*, [1948] 1 All E.R. 165; [1948] 1 K.B. 630; [1948] L.J.R. 1066; 2nd Digest Supp.
- (5) *First National Housing Trust, Ltd. v. Chesterfield R.D.C.*, [1948] 2 All E.R. 658; [1948] 2 K.B. 351; 112 J.P. 413; 2nd Digest Supp.

C APPEAL from a decision of the Court of Appeal (LORD GREENE, M.R., ASQUITH and DENNING, L.JJ.), dated June 1, 1949, and reported [1949] 2 All E.R. 155, allowing the appeal of the respondents from an order of His Honour JUDGE DALE, made at Bloomsbury County Court on Dec. 14, 1948.

D By a lease, dated Sept. 29, 1943, the respondents let a flat to the appellant at a rent of £250. In proceedings by the respondents to recover £62 10s., being one quarter's rent payable on June 24, 1948, the appellant contended that the respondents were only entitled to rent at the rate of £175 a year, which was the standard rent of the flat, and he counterclaimed £68 15s. as rent overpaid. The respondents contended that by the lease of 1943 there was a transfer to them of burden or liabilities previously borne by the appellant, within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), and that, therefore, they were entitled to the extra rent. The county court judge held that the respondents were not entitled to increase the rent above the standard rent and that the appellant was entitled to recover the excess rent which he had paid. The Court of Appeal reversed this decision, and sent the case back for the county court judge to determine how much of the excess over the standard rent was fairly attributable to a transferred burden or liability.

E *Heathcote-Williams, K.C.*, *John Stephenson* and *Corley* for the appellant.  
*Charles Henderson, K.C.*, *James MacMillan* and *Michael Hoare* for the respondents.

The House took time for consideration.  
 April 27. The following opinions were read.

G LORD PORTER: My Lords, this is an appeal from an order of the Court of Appeal dated June 1, 1949, setting aside a judgment of the learned county court judge in the Bloomsbury County Court, dated Dec. 14, 1948, and remitting the action to him. That judgment was given in favour of the appellant on the claim and for the sum of £68 15s. 0d. on a counterclaim for rent alleged to have been overpaid and to be recoverable under the Rent Restrictions Acts, 1920 to 1939.

H The respondents are the owners of a block of flats known as Seaford Court, No. 222, Great Portland Street, W.1., in the county of London, and the appellant is the statutory tenant of Flat No. 2 in that block. The flat was originally let by an agreement in writing of Sept. 23, 1935, made between the respondents' predecessors in title and one William Griffith Edwards, for a period of three years from Sept. 29, 1935, at a rent of £175 payable in advance quarterly. Its terms, so far as they are relevant to the matter now in dispute, may be tabulated as follows: (1) The tenant agreed (a) to pay the rent and to pay for all electricity and gas supplied to the premises; (b) to keep the premises in proper

and sufficient and complete tenantable and decorative repair and condition (fair wear and tear and damage by fire excepted) and at the expiration or determination of the tenancy to deliver up the premises to the landlords in such repair and condition as aforesaid (except as aforesaid). (2) The landlords, by cl. 14, agreed to pay all rates and taxes in respect of the said premises except charges for electric light and gas. The tenant under this agreement held over after the expiry of the term of the lease until December, 1939, when he vacated the premises and the flat was then vacant until September, 1943. By a lease in writing made on Sept. 29, 1943, between the respondents and the appellant, the respondents let the flat to the appellant from Sept. 1, 1943, for the term of five years and twenty-eight days at a rent of £250 inclusive reducible to £175 per annum until three months after the cessation of hostilities between England and Germany, to be paid without any deduction (except for landlords' property tax) by equal quarterly payments in advance. Under this lease (1) the appellant covenanted: (a) by cl. 2 to keep the interior of the flat in good tenantable repair and condition together with all fixtures and fittings in and about the same and to deliver up the same at the end or sooner determination of the term in such good tenantable repair and condition (fair wear and tear and damage by accidental fire excepted); (b) by cl. 3 to abide by and conform to the general regulations contained in the schedule, *i.e.*, to provide bins for the removal of the ordinary refuse of the flat, and to deposit the bins on the lift not later than 9 a.m. every day (except Sunday). (2) The respondents covenanted: (a) by cl. 1 during the said term to pay all existing and future rates, taxes, assessments, impositions and outgoings whatsoever for the time being payable in respect of the flat; (b) by cl. 2 at all times during the said term to keep the main walls and timbers, roof, drains, pipes and exterior of the said messuage and premises and the staircase, hall, lifts, passages and such other internal parts thereof as should from time to time be used by the landlords in common with the other tenants of the landlords in good and substantial repair and in clean and proper order and condition and properly lighted, and also will arrange for the removal of the ordinary domestic refuse of the flat in bins on every day except Sundays; (c) to provide and maintain a proper supply of hot water for the use of the flat, but not to be liable to the tenant for any failure in the supply of hot water that should happen from any cause not under their control. It is common ground (i) that the rateable value of the flat is and at all material times was £62 a year; (ii) that the flat is a dwelling house to which the Rent Restrictions Acts, 1920 to 1939, apply; (iii) that the standard rent of the flat is £175 a year; (iv) that while Mr. Edwards occupied the flat the respondents or their predecessors in title repaired the exterior of the flat, supplied hot water free of charge, and provided the other amenities now undertaken by the landlords under the terms of the later lease; (v) that the respondents either did not know of or had forgotten the existence of the lease of Sept. 23, 1935, when they entered into the lease of Sept. 29, 1943.

From this statement of facts it is apparent that the rent has been increased from the standard figure of £175 to £250 per annum, and the question for your Lordships' decision is whether the landlords were entitled to exact this or some other increase provided it leaves the terms on which the flat is held not less favourable to the tenant than the previous terms. The question is governed by the provisions of s. 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:

"Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased, and any



increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act: Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent."

A

The learned county court judge held that the respondents were not entitled to make the increased demand, or, indeed, any increase. The Court of Appeal reversed this decision, and sent the case back in order that it might be determined what, if any, increase was justified.

B

The provisions of s. 2 (3) of the Act of 1920 are plainly intended to keep the balance even between landlord and tenant. On the one hand, the landlord cannot increase the rent beyond the standard rent. If, however, that were the only limitation of his powers which the Act imposed he might increase the burden on the tenant by stipulating for terms more onerous than had been agreed in the tenancy by which the standard rent is calculated, provided he

C

did not increase the rent. The earlier provisions of the sub-section are inserted to meet this danger. On the other hand, if the landlord and the original or any future tenant agree that the landlord shall undertake liabilities greater than those imposed by the former tenancy, the Act provides that the landlord shall be entitled to recoup himself for the additional amenities granted to the tenant by charging a higher rent without being deemed to increase it. If this statement

D

of the purpose of s. 2 (3) of the Act is correct, as I think it is, it appears that a comparison must be made between the letting under which the standard rent is fixed and the letting which adds to or diminishes the rent to the tenant. The Court of Appeal so decided in *Winchester Court, Ltd. v. Miller* (1), and, in my view, were right in so deciding. The question, therefore, for your Lordships' determination in the present case is whether the admitted increase of rent has been

E

made in respect of a transfer to the respondents of any burden or liability previously borne by the appellant. If the terms of the two lettings are alone to be looked at, the landlord has manifestly undertaken certain liabilities or burdens for which he was not responsible under the earlier lease. Under that lease the tenant had been liable to keep the premises in proper and sufficient and complete tenantable and decorative repair, and to pay for all electricity

F

and gas. Under the later lease the respondents became liable for the payment of the charges for electricity and gas, to do all external repairs, and to supply hot water. Some additional liability seems also to have been imposed on the landlord with regard to the removal of refuse and the cleaning and lighting of the portion of the premises used by the tenants of the flats in common. Nevertheless, it is said on behalf of the appellant that, though certain additional

G

liabilities have been placed on the landlord, yet they have not been transferred from the tenant nor were they previously borne by him or his predecessor.

So far as the two main problems are concerned, namely, the outside repairs and provision of hot water, it is said on behalf of the appellant that the landlord, in fact, previously undertook these tasks and, therefore, they were not previously borne by the tenant. If the only question was what, in fact, had

H

been done, there would be truth in this contention, but, in my view, the question is not who, in fact, executed the work, but who was liable to do it even though someone else actually performed it. Under the earlier lease the tenant was liable at least for the outside repairs of his own flat. Although the landlord may in the past have fulfilled that obligation it has to be borne in mind that at any moment he might have called on the tenant to perform his contractual duty, and it follows that the liability was always on the tenant though its performance was never, in fact, demanded. In these circumstances the burden

was throughout *his* burden, and, in my opinion, previously borne by him, and so borne none the less though the landlord gratuitously performed it and had not insisted on the tenant carrying out his contractual obligations. To my mind, it stands very much in the same position as the right of a landlord, who has been charging a statutory tenant less than the standard rent, to increase it at any time and thereafter to recover the standard rent in full. The rights of the parties are not altered by a gratuitous forbearance on the part of the landlord. A

With regard to the hot water, however, the appellant has a further argument. Under the earlier lease the landlord, it is true, was under no liability to provide hot water, whereas under the new tenancy that provision is imposed on him, but it is maintained on the part of the appellant that no liability or burden was imposed on the tenant by either lease in this respect. A tenant, it is said, might under the earlier letting have provided hot water for himself, or, if he wished, have done without it. No doubt, the landlord had undertaken a fresh burden, but that burden had not been transferred from the tenant or previously borne by him. If the section has reference only to legal obligations, the argument presented on behalf of the tenant is a formidable one, but I suggest to your Lordships that the Court of Appeal were right in thinking that it was not so confined. In truth and in fact, in the case of premises of the character of those now under discussion a tenant would normally and naturally supply hot water himself if it were not supplied to him by his landlord. Indeed, the very fact that it is stipulated for in the lease is an indication of its practical requirement. Under the earlier tenancy, as the learned county court judge has determined, there was no obligation on the landlord to provide hot water. Now he is obliged to do so. I agree with the Court of Appeal in thinking that this is not accurately described as a transfer of a liability. Liability, in my opinion, has reference to legal obligations and legal obligations only, but the word "burden" has been super-added to "liability" and, as I think, embraces a wider meaning. The practical necessity of providing hot water, in my view, was a burden which the tenant had to bear under the old lease, and under the new his burden has been transferred to the landlord. Such an interpretation of the section, to my mind, follows both the wording and intention of the Act. It enables the landlord to add something to the standard rent without that addition being deemed to be an increase, just as the tenant on his part would be entitled to have the amount of his rent reduced if the landlord, after contracting under an earlier lease to supply hot water, were to be freed from that obligation by a later one. In such a case it could not, I think, be said that a fresh burden had not been imposed on the tenant because it was his choice whether he would supply himself with hot water or be content to do without it. B C D E F

One further argument was presented on behalf of the appellant. It was said that, as the respondents had forgotten or were ignorant of the earlier lease, the increase of rent was not made in respect of the transfer of any burden to them but was so made without consideration of the fact that any fresh burdens had been undertaken by them. My Lords, I do not think that this argument can prevail. In my view, the question is not what the landlord knew or intended, but what he was justified in doing by the terms of the Act. The rent, in my opinion, is increased by the landlord "in respect of" the transfer of a burden or liability where a greater burden or liability has been imposed on the landlord by the terms of a particular letting than was imposed on him by the terms of the letting under which the standard rent is ascertained. It is that change by which the increase of rent is justified and in respect of which it is rightly made. G H

For these reasons I think that the Court of Appeal were right in determining to send back the case for re-consideration by the learned county court judge. In so doing I do not attempt to determine what increase of rent is justified by the additional liabilities and burdens undertaken by the landlord. That is a

A question of fact which must be determined in the county court, presumably by a reference before the registrar. When that reference is held it will be for the court to determine what the monetary value is of the additional obligations of the landlord in respect of (i) repairs, (ii) amenities, and (iii) hot water. So far as your Lordships are concerned, I suggest that the proper order is that with these expressions of opinion in view the appeal be dismissed with costs and the action be remitted to the county court judge.

B LORD NORMAND: My Lords, I agree with the opinion of my noble and learned friend on the Woolsack, and I shall say no more on any of the questions debated except that related to the supply of hot water to the appellant's flat. No recapitulation of the facts need be attempted, but in order that the limits of the issue should be defined, I would remind your Lordships that the appellant accepted without reserve the finding of the learned county court judge that there was under the old lease of Sept. 23, 1935, no contractual obligation binding the then landlord to supply hot water to the then tenant's flat and that it was not argued that the rent paid by the tenant under that lease covered a charge for the supply of the hot water.

C The issue turns on s. 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which has been read to your Lordships. ASQUITH, L.J., has stated the general effect of the sub-section in four propositions which were not challenged by either party and which are, in my respectful opinion, accurate. He says ([1949] 2 All E.R. 159):

D "In order to bring the increase of rent within the relevant part of the sub-section so that it can be 'deemed' not to be an unpermitted increase, the landlords must establish four propositions: (i) that '*the terms on which [the] dwelling-house is held, though changed, are 'not less favourable to the tenant'*' than they were before the increase of rent; (ii) that the change in the terms is the 'result' of a '*transfer to [the] landlord of [a] burden or liability*'; (iii) that this '*burden or liability*' was before the transfer '*borne by the tenant*'; (iv) that the increase in the rent is an increase '*in respect of [the] transfer*' in question."

E The word "terms" gave rise to some discussion. I think that it means the legal rights and obligations of parties as determined by the provisions of the contract or by law. Among the terms are, I think, the rent. What the courts have to do is to weigh the whole terms of the old lease of Sept. 23, 1935, against F the whole terms of the new lease of Sept. 29, 1943. No increase of rent can be recovered unless on balance the terms of the new lease "are not less favourable to the tenant" than terms of the old lease, but the effect is not that, if the landlord has undertaken in the new lease a burden or liability borne by the tenant under the old lease but has added too much to the rent in respect of G the transferred burden or liability, he cannot recover any increase of rent. He can recover so much of the increase as represents the annual value of the transferred burden or liability. There are two stages in this procedure. First, the stage now reached where it has to be determined whether, apart from the rent, the conditions for some increase of rent are, apparently, satisfied, and, secondly, the stage where it has to be determined whether the increase of rent or any part of the increase is a fair assessment of the annual value of the transferred H burden or liability. If the increase is too large, the landlord cannot recover the excess, but he can recover the rest. So, at this stage, the rent in each lease can for the purpose of the comparison be ignored, and, if the landlord establishes that, on a comparison of the terms of the two leases (excluding the rents) the present lease is not less favourable to the appellant than was the lease of 1935 to the then tenant, and if he also establishes the other three propositions enunciated by ASQUITH, L.J., the case must go back to the county court which will then have the duty of valuing the transferred burden or liability and of determining



whether the whole or what part, if any, of the increase of rent is unpermitted. In the present instance it is plain that the terms of the present lease (apart from the rent) are not less favourable to the appellant than were the terms of the 1935 lease (apart from the rent) to the then tenant, for no additional liability or burden except the increase of rent has been placed on the shoulders of the appellant. The real question is whether the respondents have established the remaining three propositions to which I now turn.

It is certain that the respondents have assumed under the new lease a legal liability to provide hot water which did not rest on the landlord under the old lease. It is also certain that there was no legal liability on the tenant under the old lease to provide himself with hot water. There was, therefore, no transfer to the landlord of a legal liability which was before the transfer borne by the tenant, but that does not end the matter. For, though I think that the word "liability" in the sub-section means "legal liability," I also think that the word "burden" is not pleonastic and that it has a looser meaning and a wider denotation than "liability." A liability is a burden, but a burden is not necessarily a liability. As soon, however, as one departs from strictly legal rights and obligations, it becomes difficult to define what "burden" connotes. To say that it must include some *de facto* inconvenience or disadvantage as well as legal liabilities is true, but inadequate. The Court of Appeal has held that "burden" may include "a thing which the tenant as such reasonably desires to have provided for his benefit and for the provision of which he has no legal right of recourse against anyone else": *per* LORD GREENE, M.R., ([1949] 2 All E.R. 157); or "the practical necessity . . . of providing a service for himself": *per* ASQUITH, L.J. (*ibid.*, 160); or the burden "as a matter of practice" of providing something for himself: *per* DENNING, L.J. (*ibid.*, 164). I do not reject any of these paraphrases of "burden," but I would with respect qualify them. There is a difference between what may be called the amenities which go with different dwelling-houses. This was a flat equipped for the supply of hot water. No landlord in 1935 could expect to find a tenant willing to occupy such a flat without the use of hot water, and the supply of hot water was a practical necessity. The landlord had control of the furnace, and it was necessarily he who must fuel and stoke it and carry out the required service. The only practical question was whether the landlord or the tenant was to pay for this. It is the cost of supplying the hot water which was the "burden," because it was a cost which both the landlord and the tenant of such a flat must have contemplated would as a matter of practical necessity be incurred, but the landlord, in fact, bore this cost during the currency of the old lease, and, therefore, it is said, it was not *de facto* a burden borne by the tenant under the old lease, nor was it *de facto* transferred to the landlord under the current lease, nor did the change in the terms result from a *de facto* transfer of burden since there was no *de facto* burden to transfer. This argument fails to satisfy me. The cost of supplying hot water was under the old lease a burden which lay on the tenant and was borne by him because he could call on no one else to bear it. The fact that the landlord bore it for him did not make it any the less the tenant's burden. On any day the landlord by his own volition could have ceased from heating the water unless the tenant agreed to pay the cost. I, therefore, demur to the description of the burden as a contingent burden, which describes, or, at any rate, suggests, a burden dependent on a casual event. The burden existed as a tenant's burden throughout the period when the landlord was, in fact, supplying the hot water and it was not merely a burden which would have come into existence if the landlord had stopped the supply. Counsel for the appellant said that, if a landlord, not being under liability to supply hot water, does so at his own cost, and then stops the supply for a day and insists on an increase of rent before renewing it and the tenant agrees, there might be a transfer of a burden, but, if the landlord, before

stopping the supply, demands an increase of rent for the continuance of the supply and the tenant agrees, there is no transfer of the burden. That is the logical consequence of treating the burden as a burden arising only on the occurrence of a contingency, but it appears to me to result in a *reductio ad absurdum*. I would prefer to express no opinion about a burden contingent on the occurrence of a casual event, as in a case in which the landlord agrees to pay the cost of supplying hot water until the price of coal reaches a certain figure and in a subsequent lease agrees to supply hot water unconditionally.

A In such a case the substitution at the date of the new lease of a more economical system of heating than by coal, or even a continuous downward trend of the price of coal from the date of the old lease, might or might not be relevant to the question whether there was a transfer of burden. No question of that sort arises here and it is enough to say that a practically necessary service of the

B kind I have tried to describe, which the tenant cannot compel the landlord to bear, is still the tenant's burden though the landlord or a third party *ex voluntate* bears it for him. That burden was transferred to the landlord by the current lease, and the change in the terms on which the flat is held is the result of the transfer of that burden.

C It remains to ask whether the increase of rent is "in respect of" the transfer. The appellant's contention is that, since the parties were at the time when they entered into the new lease unaware of the terms of the old lease, the words "in respect of" are not satisfied. To this contention I respectfully adopt the answer of ASQUITH, L.J., which is, to my mind, conclusive. The conclusion that each of the four propositions laid down by ASQUITH, L.J., has been

D satisfied seems to me in accordance with good sense, and to preserve that equilibrium which SCOTT, L.J., in a case to be mentioned presently held was the purpose of the sub-section. The appellant's argument would have the inequitable result that a statutory tenant in the like position with the appellant's would pay no more than the rent due under the old lease and yet he would be entitled to hold the landlord to his obligation to supply the hot water.

E This is the effect of s. 15 (1) of the Act of 1920 where the words "original contract of tenancy" refer to the contract by which the statutory tenant was holding before he became a statutory tenant, as was held by LORD GREENE, M.R., in *Regional Properties, Ltd. v. Oxley* (2). This construction was accepted when that case came before this House on appeal. Consistently with this construction, the Court of Appeal decided that when a tenancy agreement provides that the

F landlord shall supply hot water to the tenant of a flat, the tenant on becoming a statutory tenant is entitled to the benefit of the obligation. *Engvall v. Ideal Flats, Ltd.* (3).

The view which I have formed is, I think, supported by *Winchester Court, Ltd. v. Miller* (1), and is, at least, not inconsistent with *Property Holding Co. v. Clark* (4). In *Winchester Court, Ltd. v. Miller* (1) the terms of the first

G lease included a full repairing covenant by the tenant. The terms of the contrasting and later lease included a tenant's undertaking to do repairs, fair wear and tear excepted. The Court of Appeal held that though there was no undertaking by the landlord in the later lease to carry out fair wear and tear repairs, there was, nevertheless, a transfer of a burden from tenant to landlord, for if a tenant ceases to be liable for repairs the property will lose value unless

H the landlord does the repairs. SCOTT, L.J., said ([1944] 2 All E.R. 109):

"I think the sub-section creates certain rights for redressing an unfair alteration of the equilibrium which underlies the legislative perpetuation of the standard rent. The language of the sub-section is pointedly free from limiting restrictions. 'Any transfer to a tenant of any burden or liability . . . shall be treated as an alteration of rent' and the increase of burden is treated as a forbidden increase of the standard rent, and made recoverable from the landlord. So, on the other hand, an increase of

rent to counterbalance a transfer of burden from the tenant to the landlord is made recoverable from the tenant. The language of the sub-section which contains this statutory recognition of the fundamental principle of equilibrium ought, in my opinion, to be liberally construed so as to give effect to that principle, if its words permit that construction, and I think they do. For these reasons I would construe the word 'transfer' as a synonym for 'shifting,' because the emphasis of the section is on the fact of a change in the equilibrium; it is the shifting of the burden that matters, not how or by whom it is brought about."

It was said by counsel for the appellant that there was no need in that case to apply a liberal construction of the sub-section because the express provisions of sub-s. (5), properly understood, fitted the case and made the argument for a liberal construction unnecessary. I think that the argument for the preservation of equilibrium between the landlord and the tenant by a reasonable construction of s. 2 (3) is none the less cogent and that it justifies a liberal construction of "burden" as well as of "transfer." The proper limits of construction are not exceeded where the words are ambiguous by giving them a meaning, if they are capable of bearing it, which, without creating the mischief of a new injustice, effects the intent of the statute as gathered from the other provisions and from the mischief which they purport to remedy. On this principle it is legitimate to construe "burden" and "transfer" so as to preserve the "equilibrium" which SCOTT, L.J., has described as the fundamental principle of the enactment.

In *Property Holding Co., Ltd. v. Clark* (4) the question whether a burden had been transferred arose under the first branch of s. 2 (3). I find no inconsistency between it and *Winchester Court, Ltd. v. Miller* (1). SCOTT, L.J., was a party to the decision and made no comment on *Winchester Court, Ltd. v. Miller* (1), though it was cited. It is referred to only by EVERSHED, L.J., and he cites it for the proposition that the words of the sub-section are to be generously construed. It is unnecessary to enter into the details of the case and all that need be said is that it is impossible to suppose that it was intended to question either the decision or the reasoning of SCOTT, L.J., in *Winchester Court, Ltd. v. Miller* (1). The two cases have been reconciled by ASQUITH, L.J., in the present case and he was himself a party to the decision of *Property Holding Co., Ltd. v. Clark* (4).

In *First National Housing Trust, Ltd. v. Chesterfield R.D.C.* (5), the owner of a house appealed against a notice served on him by the local authority under s. 75 (1) of the Public Health Act, 1936, requiring him to provide for a house let by him a covered dustbin of a certain size, weight and construction. The court of summary jurisdiction held that the requirement was unreasonable and allowed the appeal. An appeal was then taken to the Divisional Court where it was argued for the local authority that the decision of the court of summary jurisdiction contravened s. 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by transferring to the tenant a burden previously borne by the landlord. LORD GODDARD, C.J., held ([1948] 2 All E.R. 661) that that was not so because "burden" in the sub-section meant a contractual burden. DENNING, J., agreed and said (*ibid.*):

"In my opinion, the words 'burden or liability' in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), refer to a burden or liability imposed by a contractual term or a term imported by statute, such as in s. 2 (5). They do not refer at all to, or affect, the landlord's power to discontinue a privilege, a facility or a benefit which the tenant has previously enjoyed so long as it is not part of the terms on which the tenant holds."

These observations are contradictory of the construction of "burden" by the



Court of Appeal in the present case. Neither *Miller's* case (1) nor *Clark's* case (4) were cited. In my opinion, the observations of LORD GODDARD, C.J., and DENNING, J., should be disapproved. It is not a necessary consequence that *First National Housing Trust, Ltd v. Chesterfield R.D.C.* (5) should be held to have been wrongly decided, for there was an alternative ground of judgment that the court of summary jurisdiction had not placed any burden on the tenant because, in fact, it had not decided that the tenant must bear the expense of providing the bin.

I think that this appeal must be dismissed subject to a modification of the order of the Court of Appeal so that the county court judge may clearly understand what matters he is directed to consider.

**LORD MACDERMOTT:** My Lords, the second limb of s. 2 (3) of the Act of 1920 provides as follows:

“ . . . and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act.”

In this sub-section I think the words “in respect of” must be read as equivalent to “attributable to” and not as signifying that the landlord has consciously related the increase of rent, or some part of it, to the assumption by him of a specific burden or liability. To hold otherwise would, in effect, be to restrict the operation of the sub-section to cases where the landlord is aware of the terms of the tenancy with reference to which the standard rent is fixed, and I cannot read the sub-section as thus limited. As ASQUITH, L.J., observes ([1949] 2 All E.R. 163) “‘in respect of’ is a very comprehensive expression” and I do not think this construction does violence to the language of the enactment. As for the word “transfer” I agree with the view expressed by SCOTT, L.J., in *Winchester Court, Ltd. v. Miller* (1) when he says ([1944] 2 All E.R. 109):

“I would construe the word ‘transfer’ as a synonym for ‘shifting,’ because the emphasis of the section is on the fact of a change in the equilibrium; it is the shifting of the burden that matters, not how or by whom it is brought about.”

The expression “burden or liability,” as used in the sub-section, is apt to embrace more than the word “liability.” It, I think, must connote a legal liability, an obligation enforceable by someone other than the person subject to it. “Burden,” on the other hand, is a word of broader meaning, capable, indeed, of describing various liabilities, but extending beyond this to include what has to be done or provided voluntarily by the landlord or tenant himself for the reasonable protection or enjoyment of his interest in the premises. There is, however, one qualification of this meaning of “burden” which, in my opinion, the context necessitates. The word “terms” in the sub-section must, I think, mean—as in s. 15 (1)—the terms of the contract of tenancy, either expressed or implied, but if a burden which never becomes a liability shifts from tenant to landlord, or from landlord to tenant, the terms of the tenancies which fall to be compared will not be affected “as the result of such transfer” and the sub-section will not apply thereto. It, therefore, seems that a “burden” within the sub-section must be one which in the course of transfer either starts or ends as a liability. This is not to say that “burden” and “liability” come to the same thing for the purposes of this enactment. For example, if the tenant of the first tenancy supplies his own hot water, there being no duty on either him or his landlord to do so, and the landlord of the second tenancy covenants to perform this service, then, as I understand

the sub-section, there has been the transfer of a burden but not of a liability.

These considerations suffice to dispose of the appeal in so far as it relates to the repair or maintenance of the flat. By cl. 2 of the lease of 1935 the tenant agreed to keep the demised premises "in proper sufficient and complete tenable and decorative repair and condition." By the lease of 1943 the appellant, as tenant, agreed to keep the *interior* of the premises "in good tenable repair and condition together with all fixtures and fittings in or about the same" and the respondents, as landlords, agreed to keep "the main walls and timbers roof drains pipes and exterior of the said messuage and premises . . . in good and substantial repair . . ." This last covenant relates to the building of which the flat in question forms a part, but it seems necessarily to place on the landlords a liability in respect of the external or structural maintenance of the demised premises which under the earlier lease was on the tenant. Was this, then, a "liability previously borne by the tenant" if, as would appear to be the fact, the previous tenant did not do these repairs? I think it was as, in speaking of a liability in respect of a past period, the person who was subject to it may well be said to have borne it irrespective of whether he had to do or pay anything because of it. There has thus been a transfer within the meaning of the sub-section to the respondents of a certain liability in respect of repairs. The county court judge will have to put a value on this and determine how much of the excess of £75 over the standard rent may fairly be attributed to it.

By cl. 14 of the 1935 lease the then landlords agreed to pay "all rates and taxes" in respect of the demised premises except charges for electric light and gas. By their first covenant in the 1943 lease the respondents, as landlords, agreed to pay, in respect of the same premises "all existing and future rates taxes charges assessments impositions and outgoings whatsoever." In terms this is a wider obligation, but there is nothing in the case to show what charges, assessments, impositions, and outgoings other than "rates and taxes" the tenant was in law liable to pay during the period of the earlier lease. If he was under any liability in this respect, then there has been a transfer of that liability within the meaning of the sub-section and the county court judge will have to determine how much of the excess of £75 ought to be attributed thereto, but an increase of rent cannot be justified under the sub-section by mere verbiage, and I think the first step for the county court judge to take in regard to this item will be to ascertain whether any liability of this nature previously rested on the tenant.

The matters remaining for consideration relate to the respondents' obligations under the 1943 lease to provide (a) for a supply of hot water, and (b) for the removal of refuse. I need not refer in any detail to the latter. The facts regarding it are extremely scant and counsel for the respondents conceded that he could not bring (b) within the sub-section unless he was entitled to apply it to (a). The facts relating to the provision of a supply of hot water for the demised premises are as follows. During the earlier tenancy the landlords supplied the flat with hot water. The 1935 lease makes no mention of this service and the county court judge has found that the landlords were under no contractual liability regarding it. Then, as now, the flat was let as a private residence and I think it must be assumed that this service was of value to the tenant. In the 1943 lease the respondents, as landlords, covenanted in these terms:

" . . . and also will provide and maintain a proper supply of hot water for the use of the flat but the landlords shall not be liable to the tenant for any failure in the supply of hot water that may happen from any cause not under their control."

The respondents have thus assumed an obligation which rested on neither of the parties to the earlier lease. There has not, therefore, been any transfer

of a liability, and the question which arises and must now be determined is whether there has been a transfer of a burden within the meaning of the sub-section.

My Lords, had the tenant himself supplied this service during the earlier tenancy I think the sub-section would, undoubtedly, apply if the views I have already expressed regarding its construction are correct. In such case, a burden previously borne by the tenant would have shifted from him so as to fall on the landlord as a liability and make the terms of the respective tenancies different in a material respect, and, in my opinion, the same result would follow if the tenant, being left to perform the service for himself, had chosen to do without it, for in the case of a burden which is not a liability and which connotes what a tenant would need to do for the reasonable enjoyment of his premises, I think the words "any burden . . . previously borne by the tenant" must be applied on an assumption of normal habit, otherwise the eccentric who, for example, prefers cold water for all domestic purposes, might gain a privileged position under the sub-section for himself and his successors by reason only of his eccentricity. These considerations, however, do not touch the present position. The problem here is whether the words just quoted can be said to apply where the landlord, and not the tenant, has, in fact, previously borne the day to day burden of performing the service in question. The difficulty, as I see it, lies not so much in what the word "burden" may import when regarded alone, as in the scope to be ascribed to the crucial phrase in which it occurs and, in particular, the degree of significance to be attached to the word "borne." Can it be said that the tenant under the earlier lease bore the burden of supplying hot water which the respondents have now assumed as a contractual obligation? I do not think it can unless the words "previously borne by the tenant" are to be read in a special sense which is certainly not their natural meaning. The view taken by the Court of Appeal was that, as the landlords in the 1935 lease were under no obligation to continue the supply of hot water, the tenant might at any time have had to supply it for himself, and was, therefore, bearing what was called a contingent burden in respect of that service, and that, it was held, had been transferred to the respondents by the 1943 lease. On this construction of the sub-section the result in this case would be the same whether it was the previous tenant or the previous landlords who in point of fact had provided a supply of hot water, for in either case a "burden . . . previously borne by the tenant" would have shifted to the respondents. I think an interpretation which makes these words do this double duty and apply to two so completely different situations cannot be accepted as the intention of the legislature, unless for some very compelling reason to be derived from the nature and content of the whole legislation. The primary objection to this construction, however, remains the difficulty of reconciling it with the language of the sub-section, which seems to demand an inquiry as to how transferred burdens which were not liabilities have actually been borne in the past. In the common usage of language a contingent burden in this sense cannot well be borne until the contingency happens. It is contingent because it is not, and may never have to be, borne. DENNING, L.J., indeed, recognises the difficulty for he says ([1949] 2 All E.R. 164):

"I confess that, according to the ordinary meaning of the word 'burden,' the tenant was under no burden previously to provide hot water."

Later he adds:

"I cannot help feeling that the legislature had not specifically in mind a contingent burden such as we have here. If it had, would it not have put it on the same footing as an actual burden? I think it would."

My Lords, I cannot but think that the principles applicable to the interpretation of statutes as enunciated in the judgment of DENNING, L.J., and followed by



him in reaching this conclusion are stated rather widely. If, however, I were satisfied that this legislation, when considered in its entirety, manifested an intention which necessitated reading "burden . . . borne" as including a burden which would have had to be borne had an event occurred which in fact never took place, then I would be prepared to agree in the result, but I am unable to discover such an intention. It cannot be found merely in the undoubted increase in the cost of providing services, for the policy of the legislature was, I think, clearly to stabilise rents, within certain limits, at the expense of landlords faced with mounting charges. Nor, with the word "burden" appearing in both limbs of the sub-section as well as "liability," can it be assumed that Parliament was only concerned with the legal responsibilities of those who were landlords and tenants when the rents, later to become the standard rents, were agreed. It is, no doubt, true that, if the appellant is correct in his submissions, he will have obtained without additional payment the right to demand a service costing the respondents more than it cost the previous landlords. On the other hand, the intention to base the permitted rent on what had been negotiated in a free market is plain, and the legislature may well have assumed that a landlord who was content, in the absence of restrictions, to render his tenant a particular service voluntarily and at his own cost had calculated the rent on that basis and with his own expenditure in mind. Such an assumption would, I think, reflect the reality of the situation in instances such as the present, for it can hardly be doubted that residential flats in a building equipped for the supply of hot water on a communal system and owned by a landlord who in practice supplied hot water would command better rents in a free market than they would if not so equipped, or if the landlord was not in fact ready and willing to use the equipment for the benefit of his tenants.

There is, therefore, some degree of hardship involved whichever of the rival contentions prevails. In one case the appellant gets a new right for nothing. In the other the respondents get an increase of rent on the basis of providing a service as though it had not been provided before, whereas, in fact, it was previously enjoyed by the tenant at the landlords' expense and may be taken as allowed for to some extent in the original rent. The legislature has provided no middle course applicable to this case, such as an increase of rent to cover increased charges, and there is no choice of construction open which will avoid all difficulty or maintain an exact equilibrium. On the whole, and judging from the language of the legislation, it seems to me the better view that the legislature attached importance to the *de facto* position respecting the previous tenancy and was not prepared to allow a landlord who had then been willing to shoulder a burden without obligation to improve his position by contracting to bear the same burden and thus gain an advantage over other property owners who had been content to bind themselves contractually throughout, but, however that may be, there is no greater certainty about the contrary view and the proper course in such circumstances is, in my opinion, to give effect to the natural meaning of the relevant words and to hold that the burden which was previously borne in fact by the landlords was not a "burden . . . previously borne by the tenant."

For these reasons I would affirm the order of the Court of Appeal, but subject to the exclusion therefrom of any reference back in respect of the respondents' obligations as to the supply of hot water and the removal of refuse.

**LORD REID:** My Lords, the respondents own a block of flats in Great Portland Street, London. One of these flats is occupied by the appellant. It is a dwelling-house within the meaning of the Rent and Mortgage Interest Restrictions Acts. This flat was not subject to rent control immediately before the passing of the Act of 1939, but, as its rateable value did not exceed £100, s. 3 (1) of the Act of 1939 applied to it. It was then let for a rent of £175 which

is, therefore, the standard rent. After standing empty for some years the flat was let to the appellant for five years from Sept. 29, 1943, for a rent of £250. There are also other terms of the lease to the appellant which do not correspond with those of the earlier lease. The respondents' obligations are more onerous and the appellant's less onerous than were the landlords' and tenant's obligations in the lease current in 1939. This appeal turns on the question whether and to what extent the respondents are entitled on that account to charge more than the standard rent.

The Rent Acts do not prevent a landlord who lets his house to a new tenant from undertaking different obligations from those undertaken by him in the lease which determined the standard rent. This lease may have imposed onerous obligations on the landlord with the result that the rent was high.

Apart from s. 2 (3) of the Act of 1920 there is nothing in the Acts to prevent the landlord from making a valid bargain with a new tenant under which the tenant pays the full standard rent but does not get the favourable conditions contained in the last tenant's lease. Conversely, the lease which determined the standard rent may have imposed onerous obligations on the tenant with the result that the rent was low. The landlord could, of course, give a new

tenant more favourable conditions, but, apart from s. 2 (3), he would not on that account be entitled to raise the rent. An agreement by the tenant to pay more in return for the alteration of terms would be unenforceable and money paid under such an agreement would be recoverable. Section 2 (3) of the Act of 1920 goes some way to remove these difficulties. It does not apply to every case where the terms of a new lease are more favourable or are less favourable

to the tenant than were the old terms, but it does provide for those cases where the tenant is in a more or a less favourable position as a result of the transfer to the landlord or tenant of any burden or liability previously borne by the tenant or landlord. In the former case an increase of rent in respect of such transfer is permitted. In the latter case the rent must be reduced.

The most important question in this case arises out of the supply of hot water. There was in 1939, and there still is, in the block of flats a system of hot water pipes fed from a central boiler. Throughout the tenancy of the previous tenant of the appellant's flat the landlord maintained that system and supplied hot water to the flat, but he was under no obligation to do so. It is not disputed that the landlord would have been entitled at any time he chose to stop the supply. In fact, he chose to continue the supply and he made

no charge for it. Under the appellant's lease the landlord is now bound to provide and maintain a proper supply of hot water. In this respect the terms on which the flat is now held are undoubtedly more favourable to the tenant than they were before, and that by reason of a new obligation now borne by the landlord. So far, the requirements of s. 2 (3) are satisfied, but that is not enough. There can be no increase of rent unless the benefit to the tenant is

the result of a transfer of a burden or liability previously borne by him. There was in 1939 no liability or legal obligation on the tenant to provide hot water for himself. There could not be as a man cannot be under a legal obligation to himself, but it is admitted that, in a flat of this character, a supply of hot water was a practical necessity. Someone had to incur the trouble and expense necessary to provide it. So, if burden is synonymous with liability

there was neither burden nor liability on anyone in 1939, but, if burden is an apt word to denote the cost of supplying a practical necessity, then there certainly was a burden on someone. It is generally to be assumed that if the legislature adds one word to another it does not intend both to mean the same thing. There may, of course, be some reason for holding that the two words are synonymous, but here I think that everything points to the word "burden" being intended to have a wider meaning than "liability." It is not readily to be assumed that the legislature meant that a landlord could charge for under-

taking to do something which the tenant was previously bound by law to do, but could not charge for undertaking to do something which the tenant was previously bound by necessity to do. I think that the meaning of "burden" is such that the landlord is entitled to charge in the one case as he is in the other, and that the supply of hot water was a burden on someone.

The more difficult question is to determine by whom the burden was borne during the previous tenancy. It was the tenant's burden in the sense that he had to shoulder it except in so far as someone else was kind enough to bear it for him, but, in fact, someone else did bear it for him throughout the tenancy. The statute requires that there shall be a "burden or liability previously borne by the tenant." If someone else were gratuitously to discharge a continuing liability which legally fell on the tenant, it might not be so difficult to hold that, nevertheless, the liability continued to be borne by the tenant. It is, I think, more difficult to reach that result if the word "burden" is taken by itself, but, taking the whole phrase, I have come to the conclusion, not without some hesitation, that a burden which someone else gratuitously bore for the tenant can be regarded as having been borne by the tenant if there is good reason for adopting that interpretation rather than the more natural and literal meaning. I think that there is good reason here because the literal meaning would lead to some strange results. To take one example, suppose that this landlord had decided during the last tenancy that he could no longer afford to carry the tenant's burden. If he had been high handed he could have cut off the hot water, allowed the tenant to carry the burden for a short time, and then agreed to resume the supply on payment of extra rent. There could then be no doubt that the burden was borne by the tenant before the extra rent was charged, and, therefore, to charge extra rent would be permissible. A reasonable landlord, however, would not have done that. He would have told the tenant that, unless he was paid for the hot water, he would have to cut it off. An agreement to pay extra rent would then be reached without the burden having, in fact, been transferred to the tenant's shoulders. On the literal interpretation of the words "previously borne by the tenant" that agreement would not comply with the requirements of s. 2 (3) and would not be valid. I do not think that one is driven to that result. I have come to the conclusion that the burden of supplying hot water can properly be regarded in this case as having been previously borne by the tenant. I have not discussed the authorities which were cited in argument as I do not think that the conclusion which I have reached is inconsistent with any of these decisions. I should add that there are two other matters of less importance with regard to which the terms of the appellant's lease also place him in a more favourable position than that of the previous tenant—obligations to repair and as to the disposal of refuse. I agree that they must also be taken into account.

There is one other argument that I should notice. The statute requires that the increase of rent shall be "in respect of" the transfer of burdens. In this case when the parties agreed to the terms of the appellant's lease, neither of them realised that there was a standard rent or know what were the terms of the previous lease. It is said that an increase of rent can only be "in respect of a transfer" if the parties when negotiating know the amount of the increase and what burdens are being transferred and accept the one as the counterpart of the other. It would be most unusual that the validity of an agreement should depend on what took place when it was being negotiated and I do not think that that is the meaning of this phrase. "In respect of" is not a phrase of very precise meaning and I do not think that it need have the meaning sought to be attributed to it. It was also argued that a notice giving particulars of the increase had to be given before the increase could take effect. It is true that ordinarily an increase of rent under the Acts must be preceded by such a notice, but s. 2 (3) enacts that an increase of rent in respect of a transfer of



a burden or liability shall be deemed not to be an increase of rent for the purposes of the Act. Accordingly, those provisions of the Acts which require notice of increases of rent have no application to increases under s. 2 (3). I, therefore, think that if there has been a transfer of burdens and if the increase of rent is now found to be not more than the equivalent of this transfer, then the statute is satisfied and the increase is recoverable. In this case it has not yet been decided whether the increase of £75 is justifiable or is excessive.

A I agree that inquiry into this is necessary and that if it is found that the increase is excessive only that part of it which is justified is payable by the appellant.

*Appeal dismissed with costs.*

Solicitors: *Kennedy, Ponsonby & Prideaux* (for the appellant); *Griffinhoofe & Brewster* (for the respondents).

B [Reported by J. D. PENNINGTON, Esq., *Barrister-at-Law.*]

## C HESKELL v. CONTINENTAL EXPRESS, LTD., AND ANOTHER.

[KING'S BENCH DIVISION (Devlin, J.), December 16, 19, 20, 21, 1949, February 21, 22, 23, 24, April 3, 1950.]

*Shipping—Bill of lading—Negligent issue of bill of lading—Goods not received at dock—Liability of loading broker.*

D *Carrier—Failure to despatch goods to ship—Discovery delayed by negligent issue of bill of lading—Shipper's resultant liability in damages to purchaser for failure to deliver goods—Measure of damages.*

*Detinue—Demand for delivery—Instructions to despatch goods to specified destination.*

E In October, 1946, H., an export and shipping merchant, agreed to sell goods to a Persian buyer. The price agreed on was not inclusive of insurance and freight, and the total amount shown on the invoice, which was ultimately rendered, set out the cost of packing, insurance and freight separately. On Nov. 8, 1946, H., without entering into a contract of carriage, registered cargo space for them through his forwarding agents in a ship in a dock in Manchester port and received a permit from the shipowners' loading brokers, F S. Ltd., to send the goods to the dock. On Nov. 19, 1946, having received shipping instructions from his forwarding agents, H. instructed C.E. Ltd., the company warehousing the goods, to pack them and despatch them to the ship. C.E. Ltd. negligently failed to despatch them or to inform H. of their failure. In ignorance of this failure, H. applied through his forwarding agents for, and received from S. Ltd., a bill of lading which G was negligently issued, the goods never having been received. On Jan. 2, 1947, H. forwarded it to the Persian buyer, and received payment. On Feb. 23, 1948, C.E. Ltd. wrote to H. notifying their failure to despatch the goods, and in November, 1949, H. paid £1,319 damages to the Persian buyer, covering loss of profit resulting from non-delivery. The fall in value of the goods from December, 1946, to February, 1948, the date of their ultimate delivery to H., with other small amounts, was £175. H. claimed H damages from S. Ltd. and C.E. Ltd.

HELD: (i) whether or not the contract with the Persian buyer could properly be called c.i.f., it was an essential term thereof that H. should procure the shipment of the goods to Teheran.

(ii) H. could not recover from S. Ltd. (a) for breach of a contractual duty because neither in issuing the bill of lading nor in notifying the reservation of shipping space were S. Ltd. acting or offering to act in con-

tractual relationship with H. so as to give rise to any particular duty owing to him; (b) for breach of any duty owed to the public because the issue of the bill of lading seemed to amount to no more than a negligent misstatement, and, in any event, such issue was not itself the subject of any general duty (*Le Lievre v. Gould* ([1893] 1 Q.B. 491) and *Scholfield v. Londesborough (Earl)* ([1896] A.C. 514), *applied*); (c) for breach of warranty of authority because in the absence of a contract of carriage the bill of lading was a nullity, and the fact that it was issued without the authority of the shipowners robbed it of no virtue.

(iii) the instructions to C.E. Ltd. to despatch the goods were not a demand for delivery up of the goods, and, therefore, a claim in detinue against C.E. Ltd. could not be maintained.

(iv) the detention of the goods by C.E. Ltd. and their failure to inform H. of the whereabouts of the goods was a continuing breach of duty by C.E. Ltd., and while it was true that the issue of the bill of lading was a cause contributing equally to H.'s loss up to the time of the final delivery to him, the breach of contract by C.E. Ltd. was sufficient to carry judgment for damages in respect of the loss in that period.

*Ranson v. Platt* ([1911] 2 K.B. 291), *Coldman v. Hill* ([1919] 1 K.B. 443) and *Reischer v. Borwick* ([1894] 2 Q.B. 548), *applied*.

*Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport* ([1942] 2 All E.R. 6), *considered*.

(v) although a carrier should recognise the serious possibility of sub-sales by a consignor or consignee, in order to recover from C.E. Ltd. more than the value of the goods at the place of delivery, H. must show that C.E. Ltd. had knowledge, actual or imputed, of something that made the ordinary measure of damages inadequate, and, as H. had not shown such knowledge, it was unnecessary to consider whether the fact that the claim for additional damages was in respect of damages paid to a sub-buyer and not loss of profit would affect the question of the liability of C.E. Ltd.

*The Arpad* ([1934] P. 189) and *Horne v. Midland Railway Co.* (1873) (L.R. 8 C.P. 131), *applied*.

[AS TO MIS-STATEMENT IN A BILL OF LADING, see HALSBURY, Hailsham Edn., Vol. 30, pp. 373-378, paras. 547-549; and FOR CASES see DIGEST, Vol. 41, pp. 377-381, Nos. 2227-2268.]

AS TO DAMAGES FOR BREACH OF CONTRACT AND REMOTENESS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 103-109, paras. 130-136; and FOR CASES, see DIGEST, Vol. 17, pp. 103-106, 117-120, Nos. 173-195, 267-289.]

Cases referred to:

- (1) *British Columbia Saw Mill Co. v. Nettleship*, (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 41 Digest 556, 3820.
- (2) *Le Lievre v. Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 35 Digest 28, 187.
- (3) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (4) *Old Gate Estates, Ltd. v. Toplis & Harding & Russell*, [1939] 3 All E.R. 209; 161 L.T. 227; Digest Supp.
- (5) *London Joint Stock Bank v. MacMillan and Arthur*, [1918] A.C. 777; 119 L.T. 387; 3 Digest 172, 293.
- (6) *Scholfield v. Londesborough (Earl)*, [1896] A.C. 514; 65 L.J.Q.B. 593; 75 L.T. 254; 6 Digest 384, 2518.
- (7) *Collen v. Wright*, (1857), 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209; 120 E.R. 241; 1 Digest 665, 2795.
- (8) *Oliver v. Bank of England*, [1902] 1 Ch. 610; 71 L.J.Ch. 388; 86 L.T. 248; *affmd. sub nom.*, *Starkey v. Bank of England*, [1903] A.C. 114; 72 L.J.Ch. 402; 88 L.T. 244; 26 Digest 228, 1784.

- (9) *Richardson v. Williamson and Lawson*, (1871), L.R. 6 Q.B. 276; 40 L.J.Q.B. 145; 35 J.P. 728; 1 Digest 663, 2784.
- (10) *Bloomenthal v. Ford*, [1897] A.C. 156; 66 L.J.Ch. 253; 76 L.T. 205; *revsg. S.C. sub nom., Re Veuve Monnier et ses Fils, Ltd., Ex parte, Bloomenthal*, [1896] 2 Ch. 525; 35 Digest 45, 406.
- A (11) *Scarf v. Jardine*, (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 36 Digest 382, 581.
- (12) *Stephens v. Junior Army and Navy Stores, Ltd.*, [1914] 2 Ch. 516; 84 L.J.Ch. 56; 111 L.T. 1055; 31 Digest 94, 2350.
- (13) *Ranson v. Platt*, [1911] 2 K.B. 291; 80 L.J.K.B. 1138; 104 L.T. 881; 3 Digest 77, 164.
- B (14) *Coldman v. Hill*, [1919] 1 K.B. 443; 88 L.J.K.B. 491; 120 L.T. 412; 43 Digest 520, 581.
- (15) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719; [1947] K.B. 250; [1947] L.J.R. 700; 176 L.T. 164; 2nd Digest Supp.
- (16) *Burrows v. March Gas and Coke Co.*, (1870), L.R. 5 Exch. 67; 39 L.J.Ex. 33; 22 L.T. 24; *affmd.*, (1872), L.R. 7 Exch. 96; 41 L.J.Ex. 46; 26 L.T. 318; 36 J.P. 517; 36 Digest 25, 124.
- C (17) *Smith, Hogg & Co., Ltd. v. Black Sea and Baltic General Insurance Co., Ltd.*, [1940] 3 All E.R. 405; [1940] A.C. 997; 109 L.J.K.B. 848; 163 L.T. 261; Digest Supp.
- (18) *Monarch S.S. Co., Ltd. v. A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1; [1949] A.C. 196; [1949] L.J.R. 772.
- (19) *Reischer v. Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 29 Digest 206, 1650.
- D (20) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport*, [1942] 2 All E.R. 6; [1942] A.C. 691; 111 L.J.K.B. 512; 167 L.T. 349; 2nd Digest Supp.
- (21) *Ocean S.S. Co. v. Liverpool and London War Risks Insurance Association, Ltd.*, [1946] 2 All E.R. 355; [1946] K.B. 561; 115 L.J.K.B. 437; 175 L.T. 318; *varied in part and affmd. in part*, [1947] 2 All E.R. 586; [1948] A.C. 243; [1948] L.J.R. 304; 177 L.T. 623; 2nd Digest Supp.
- E (22) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528.
- (23) *Stroms Bruks Akt v. Hutchison*, [1905] A.C. 515; 74 L.J.P.C. 130; 93 L.T. 562; 17 Digest 78, 4.
- F (24) *The Arpad*, [1934] P. 189; 103 L.J.P. 129; 152 L.T. 521; Digest Supp.
- (25) *Horne v. Midland Rly. Co.*, (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 8 Digest 140, 918.
- (26) *Patrick v. Russo-British Grain Export Co.*, [1927] 2 K.B. 535; 137 L.T. 815; 39 Digest 670, 2575.

G ACTION for damages for breach of contract against the first defendants, and for breach of contract, negligence and breach of warranty of authority against the second defendants.

The plaintiff was an export and shipping merchant who had become liable to a Persian firm for damages through his failure to ship goods to Teheran under a contract of sale and had paid £1,319 in settlement of the claim. He sought to make liable the first defendants, Continental Express, Ltd., who had warehoused the goods and had failed to carry out his instructions to despatch them to S.S. Mount Orford Park at No. 9 shed, No. 9 dock, port of Manchester, and had not notified him of their failure, and the second defendants, Frank C. Strick & Co., Ltd., the loading brokers of the shipowners, who had negligently prepared and issued a bill of lading in respect of the goods although they had never been received. The second defendants admitted negligence, but denied owing any duty to the plaintiff. The plaintiff contended that there was a



contractual relationship between himself and the second defendants who, as loading brokers, had been guilty of a breach of duty under it; that the second defendants were also in breach of a duty owed to the public at large not to put into circulation false and worthless documents of title such as the bill of lading; and that they had been guilty of a breach of warranty of authority in issuing the bill of lading in reliance on which the plaintiff had acted to his detriment. The first defendants admitted the breach of contract, but pleaded that there had been no foreseeable loss consequential thereon, since the long delay in discovering the failure to ship the goods was due to *novus actus interveniens* in the issue of the bill of lading up to the date of which there had been no fall in the value of the goods. The plaintiff contended that the liability to the Persian buyer was foreseeable because the mere shipping of the goods to Teheran was sufficient to inform the company instructed to despatch them that they were for re-sale, and the failure to despatch was a sufficient cause of the loss. A B

*Eric Sachs, K.C., and Boileau* for the plaintiff.

*Lloyd-Jones, K.C., and T. J. F. Hobley* for the first defendants, Continental Express, Ltd.

*Sir William McNair, K.C., and Mocatta* for the second defendants, Frank C. Strick & Co., Ltd. C

*Cur. adv. vult.*

Apr. 3. **DEVLIN, J.**, read the following judgment. In November, 1946, the plaintiff, an export and shipping merchant, wanted to ship from Manchester to the Persian Gulf three bales of poplin which he had sold to a Persian firm called Mishan. On Nov. 19, he instructed the first defendants, whom I shall refer to as Continental Express, in whose warehouse at Manchester the goods then were, to despatch them to S.S. Mount Orford Park at No. 9 shed, No. 9 dock, in the port of Manchester. Continental Express through their admitted negligence overlooked these instructions and the goods were not sent down to the dock. The Mount Orford Park was chartered to Strick Line, Ltd. The second defendants, whom I shall call "Strick," are an associated company of Strick Line, Ltd., and act as their managers and, at Manchester, as their loading brokers. They had allocated to the plaintiff cargo space for the three bales. By their admitted carelessness they issued, on Dec. 5, 1946, a bill of lading in respect of the bales notwithstanding that they were never received at the dock and were not shipped. The ship arrived in the Persian Gulf without the goods. Because of the bill of lading it was naturally assumed they had been shipped and either lost or misdelivered, and it was not until after prolonged search had been made that in March, 1948, it was discovered that they had never left the warehouse. Mishan then claimed a substantial sum from the plaintiff covering mainly the loss of profit he would have made on a re-sale of the goods; and the plaintiff paid him £1,319 to settle. He now claims against one or both of the two defendants. Continental Express admit liability for breach of contract and the main question so far as these defendants are concerned is the quantum of damage. Strick admit carelessness in the issue of the bill of lading, but deny that they owed any duty to the plaintiff, either in contract or in tort. Strick Line, Ltd., the shipowners, have not been sued because of the ordinary rule that the master or broker cannot bind the owner or principal by signing bills of lading for goods which were never shipped at all. Alternatively, therefore, Strick are sued for breach of warranty of authority. The main answer to this is that the breach of warranty has caused no damage, since, it is said, if the owner were liable on the bill of lading as warranted, the plaintiff would still have recovered nothing. D E F G H

The case against Strick has taken up the larger part of the trial and involves questions of principle and practice of some importance. I shall, therefore, take it first and begin by stating the general principles that are applicable and also

the effect of the evidence I have received about the functions and duties of loading brokers.

A A contract of carriage is rarely made with any formality. Sometimes it is done by means of the engagement of shipping space, but in many cases the shipper, having learned from an advertisement or otherwise of a date and place of sailing, sends forward his goods and no contract is concluded until the goods are loaded or accepted for loading. The bill of lading is a receipt for the goods and document of title to them. It is not the contract, for that has already been made, but it usually—I suppose almost always when there is no charterparty—contains its terms. When a shipment is made, as in this case, by a regular line, there are usually agents on each side intervening between the shipper and the shipowner. The shipper frequently employs a forwarding agent and the shipowner a loading broker. The forwarding agent's normal duties are to ascertain the date and place of sailing, obtain a space allocation if that is required, and prepare the bill of lading. The different shipping lines have their own forms of bill of lading which can be obtained from stationers in the city, and it is the duty of the forwarding agent to put in the necessary particulars and to send the draft stamped to the loading broker. His duties include also arranging for the goods to be brought alongside, making the customs entry and paying any dues on the cargo. After shipment he collects the completed bill of lading and sends it to the shipper. All the regular shipping lines operating from the United Kingdom appear to entrust the business of arranging for cargo to a loading broker. He advertises the date of sailings in shipping papers or elsewhere, and generally prepares and circulates to his customers a sailing card. It is his business to supervise the arrangements for loading, though the actual stowage is decided on by the cargo superintendent, who is in the direct service of the shipowner. It is the broker's business also to sign the bill of lading, and issue it to the shipper or his agent in exchange for the freight. His remuneration is by way of commission on freight, and that is doubtless an inducement to him to carry out his primary function, at any rate when shipping is plentiful, of securing enough cargo to fill the ship. Under ordinary conditions shippers may send cargo to the quay without notifying the broker, though the broker much prefers to know of it, but during the war and in the post-war period this was impossible. The docks would have become cluttered up with cargo for which no room could be found. Therefore, there was introduced a registration system, which was still in force in 1946. The cargo could not be sent down to the docks unless the loading broker had been notified and his permission obtained in the appropriate form. The form is in two parts which are detachable. They have been called respectively the black form and the red form. The shipper or his agent sends both parts to the loading broker. After space has been allocated, the red form is sent back to the shipper with instructions about sending the cargo forward. The shipper then returns the red form to the loading broker accompanied by the draft bill of lading. The loading broker and the forwarding agent thus appear to discharge well-defined and separate functions, but in practice the same firm is often both the loading broker and the forwarding agent, though the two sets of dealings may be kept in separate compartments of the business. The firm generally acts as loading broker only for one line and does all that line's business, so that it is free in respect of other business to act as it will, but, even in the case of the same transaction, it appears to be customary for the firm to act both as loading broker and as forwarding agent. Strick did both, and that the practice is general is shown by the form of freight account that Strick use and which is similar to those of other firms. Items for preparing bills of lading, canal tolls, agency, customs clearance charges, etc., which all fall within the scope of forwarding agency, are added to the freight and collected as one sum.

I shall now set out the particular facts of this case. On Sept. 26, 1946, the plaintiff obtained a sample of poplin from Sasha & Co., Manchester merchants,

which early in October he showed to a Mr. Senehi, a partner in the firm of Mishan, with whom the plaintiff had frequently done business before. The result was that a contract was made orally in Manchester early in October between the plaintiff and Mishan, whereby Mishan bought 6,105½ yards at 3s. 6d. per yard, making a total price of about £1,068. It was arranged that, in accordance with the usual course of business, the plaintiff should see to the packing and shipment of the goods to Teheran, make the necessary disbursements, insure the goods for a sum which was to be specified by Mishan when the amount of freight was ascertained, and charge for the whole on the invoice. He was then to receive payment against documents. The plaintiff says that this was a c.i.f. contract. Counsel for Strick contends that the contract was complete and that the property passed on the appropriation of the goods in Continental Express's warehouse, and that the shipment formed no part of it, but was a collateral arrangement. It is true that the price agreed on was not inclusive of insurance and freight, and that the total amount of £1,157 on the invoice that was ultimately rendered by the plaintiff sets out the cost of packing, insurance and freight separately. But I do not think that the transaction can fairly be split up into separate parts. The plaintiff received no separate remuneration as agent or otherwise for arranging the shipment. No demand for payment in respect of the goods themselves was made in October or November when, on counsel's view, the property passed. No invoice was rendered until Jan. 9, 1947, when it was sent with the bill of lading and other documents and payment was made against it. The fact that payment was made against documents, and not earlier or otherwise, is, in my judgment, an important factor. It is worth noting that the plaintiff took out the bill of lading in his own name. It would be unusual for a seller to part with property before he got payment; and unusual also for an importer into another country to make his bargain independently of shipment. I should expect both these parties to want a form of contract in which the plaintiff would be protected against the risk of parting with his property without payment and Mishan against the risk of having to pay for goods which he could not ship. Whether it can properly be labelled c.i.f. or not, I am satisfied that it was an essential term of this contract that the plaintiff should procure the shipment of the goods. A B C D E

On Oct. 22, the plaintiff bought from Sasha & Co. at the price of 3s. 2d. per yard the necessary quantity of poplin to fulfil his contract with Mishan and on Nov. 6 Sasha & Co. instructed Continental Express, in whose warehouse the goods were, to accept all instructions for the disposal of the goods from the plaintiff. On Nov. 7, the plaintiff wrote to Continental Express giving packing instructions and saying that he hoped to be able to give definite shipping instructions in a very short time, and also that the bales had been registered with his shipping agents for Teheran. On Nov. 8, the plaintiff addressed to his forwarding agents, Boyd Boyd, Ltd., of London, a consignment note requesting them to register for shipping space to Teheran three bales of cotton poplin. It will be observed that Boyd Boyd, Ltd.'s consignment note provides in the ordinary way for instructions to them to collect or receive the goods. It was presumably because the plaintiff intended to give shipping instructions to Continental Express direct that his instructions to Boyd Boyd, Ltd., were confined to registration for shipping space. This division of functions proved disastrous; if the same person had been made responsible both for delivering the goods alongside and for obtaining the bill of lading, the singular misfortune which overtook the venture could not have occurred. On Nov. 8, 1946, Boyd Boyd, Ltd., filled in the red and black forms. The red form used in this case has been lost. It must have been returned to Boyd Boyd, Ltd., probably about Nov. 18. It would have contained instructions to forward the cargo to S.S. Mount Orford Park loading at No. 9 shed, No. 9 dock, Salford, Manchester; and also instructions to see that all customs papers were in order, that bills F G H



of lading should be lodged with the loading brokers and that "this permit" (that is the red form) should be attached to the bills of lading. Boyd Boyd, Ltd., accordingly, sent back the red form with the draft bill of lading. On Nov. 18, Boyd Boyd, Ltd., sent to the plaintiff shipping instructions, telling him to despatch the goods to No. 9 shed. Boyd Boyd, Ltd., had not at that time an office in Manchester, and so they arranged for Strick to pay certain canal tolls which had to be paid by the cargo owner and also to lodge the customs entry for them. On Nov. 19, the plaintiff wrote to Continental Express saying that he had obtained shipping space and instructing Continental Express to pack the goods and to despatch the poplin as soon as possible to S.S. Mount Orford Park at No. 9 shed. He gave similar instructions in respect of four cases of poplin which he had also bought. The instructions were carried out in relation to the cases, but in relation to the bales they were overlooked.

The way in which the bill of lading came to be issued was this. No. 9 shed is the property of the Manchester port authority, the Manchester Ship Canal Co. This company, whom I will call the dock-owners, are employed by the loading brokers to receive the cargo and check it, and their stevedores do the loading into the ship. In so employing them, Strick are acting for the ship, and the charge that is made by the dock-owners for loading, storing and receiving is a disbursement that is debited to the shipowner. The loading brokers have ready prepared in their office a cargo book, in which are entered all the consignments for which space on the ship has been allocated. As the cargo arrives at No. 9 shed the dock-owners' checker records the receipt of the goods on a receiving pad. The sheets are torn off and sent to the loading brokers and a circle is made round the number of each consignment in the cargo book that is noted as received. Bills of lading are then prepared in respect of these consignments, and as each bill of lading is passed a stroke in addition to the circle is made through the number. The bill of lading is then passed out for the freight to be calculated and for it to be signed by the responsible official as opportunity arises. It is then retained in the office until the ship has completed its loading. When the loading is finished there is prepared from the cargo left on the quay a list of goods shut out or shipment of which has been stopped. The bills of lading relating to the consignments on this list are taken out of the pile of signed bills, and the remainder are issued. There is also prepared by comparison between the receiving sheets and the cargo book a list of goods advised and not received: this is doubtless intended as a further check. The relevant entry in the cargo book in this case has been produced, and it shows that the plaintiff's consignment, numbered 44, has got no circle but has got a stroke. This means that someone prepared a bill of lading before he ought to have done, that is, before there was any notification that the goods had been received. This was the first error. The second error was that the bill of lading for consignment 44 was issued notwithstanding that consignment 44 was on the list of goods not received. On Dec. 30, 1946, Strick rendered a freight account to Boyd Boyd, Ltd., which included the small charges for the canal tolls and the customs clearance. Boyd Boyd, Ltd., paid it and got the bill of lading, which they sent with their account to the plaintiff on Jan. 2, 1947. On Jan. 9, 1947, the plaintiff sent the bill of lading and other documents to Mishan's bank and received payment. On Feb. 28, 1947, Mishan re-sold the poplin to Meir & Morteza, merchants in Teheran, at about 10s. 9d. a yard. Freight and insurance had added comparatively little to the cost and Mishan's profit was very high indeed. This was because there was at that time a great scarcity of these goods and a high demand in Teheran. The plaintiff was apparently exhorted by the British government not to attempt to make large profits on goods sold for export, so the profit fell to be made by Mishan. By the beginning of April, Mishan was already writing to the plaintiff inquiring about the non-delivery of the goods and asking that a claim should be made

on underwriters. The plaintiff claimed on underwriters, but, as he notified Mishan on June 13, they refused to entertain the claim unless there was a letter from the ship stating that the goods were short-landed. On July 10, Strick & Co. (Bazra) Ltd., who were then handling the matter, confirmed that the bales were short-landed and said they were issuing tracers to all the ports where the ship had called. On Aug. 30, they said they could not issue a short-landed certificate until they had received replies. It was not until Nov. 5, 1947, that they confirmed that the bales could not be traced, and they then issued a short-landed certificate to Mishan. The underwriters to whom the claim had been presented then claimed on Strick who, on Feb. 6, 1948, said that they could find no record of the bales having been placed on board the steamer or even received at the docks. They asked for the receipt for their acceptance. Accordingly the plaintiff wrote on Feb. 17, 1948, to Continental Express asking for the receipt; and Continental Express wrote on Feb. 23, regretting that the instructions had been overlooked. The plaintiff endeavoured to get Mishan to take the poplin up, and made other unsuccessful attempts to dispose of it for export. Eventually, in 1949, he sold it in the home market at 3s. 4d. per yard. In November 1949, he settled Mishan's claim for loss of profit at £1,319.

I am now in a position to consider the legal issues raised by the claim against Strick, and I shall begin with the claim that they owed a duty to the plaintiff not to issue to him a bill of lading for unshipped goods. As I have said, this claim is put both in contract and in tort—that is to say, the duty is said to arise out of a contractual relationship existing between the plaintiff and Strick as loading brokers, and also to be a duty owed by Strick to the public at large not to put into circulation false and worthless documents of title. I shall consider first the alleged contractual relationship.

A firm which acts both as loading broker and forwarding agent in relation to the same transaction will, of course, owe duties to both sides, but it is not suggested that I need concern myself here with those small duties normally appertaining to forwarding agency which Strick in this case discharged, I suppose as sub-agents for Boyd Boyd, Ltd. What is suggested is that Strick in their capacity as loading brokers owed a duty to the plaintiff. Some sorts of brokers are, no doubt, middlemen who owe duties to both sides, but the duties of a loading broker, as I have set them out earlier in this judgment, seem to me of their nature to be undertaken solely for the shipowner. Evidence was called before me to establish that, by trade custom, a loading broker was regarded as acting solely for the shipowner. I do not think I need decide whether there is a trade usage in this matter. It is sufficient that the evidence affords strong confirmation of the inference that I am in any event prepared to draw from the nature of the duties as they have been described to me. In particular, I think that, in matters connected with the issue of a bill of lading, the broker is acting on behalf of the owner, for it is as the owner's agent and under his instructions and authority that he must issue or withhold the bill. It is said that the draft bill is the shipper's property and that he is entitled to have it back if the goods are not shipped; and that this leads to the conclusion that the broker must be the shipper's agent to return the bill if the goods are not shipped and under a duty to the shipper to do so. I do not think that this follows. The draft bill is, I think, sent to the broker as agent for the shipowner, so that the broker may, if the necessary conditions are fulfilled, complete and sign it on behalf of the shipowner. No doubt, anyone who sends a draft contract to the other side is entitled to have his draft back if the contract is not concluded, but that does not make the person to whom he sent it his agent. The point may be tested by leaving out intermediaries and assuming that the draft was sent direct by the shipper to the shipowner. I do not think it could be suggested that the shipowner would hold the document as the shipper's agent, or that the duty to return it if the contract was not concluded would be a duty

arising out of agency, or that if, for example, the shipowner handed it to his clerk for custody, the clerk would become the agent of the shipper for any purpose. I think that the duty, whatever it may be, to return a draft bill of lading is a duty owed by the shipowner to the shipper and that he alone is responsible for the acts or omissions of the broker in relation to it.

The plaintiff relies on the return of the red form as fulfilling a double function.

- A It is, he says, a notification of shipping space, and as such is made by Strick as agents; it is also an offer to act as loading brokers, and as such, when accepted, brings the shipper into contractual relationship with the brokers as independent contractors. There is certainly not in the form any express offer to the shipper to act as loading brokers, and since the whole form is subscribed by Strick "as agents," I can see no justification for reading into it an offer to act in some
- B other capacity. Moreover, an offer to act as loading brokers is meaningless, unless there is some evidence (which in this case there is not) of some duty which by the nature of his calling a loading broker undertakes for a shipper. My attention was drawn to the clause on the back of the red form which provides that: "In the event of the goods being shut out or the steamer withdrawn, no liability whatsoever is accepted by Frank C. Strick & Co., Ltd.,
- C steamer, and/or agents": and it was argued that this was inconsistent with agency. If it were necessary for me to decide it, I should treat the signature "as agents" as being the dominant feature; and put the presence of the clause down to a layman's fears about the limits of an agent's liability rather than to an intention to alter the signatory's character. But in any event the clause would, I think, on the argument of counsel for the plaintiff relate to that part
- D of the form which is a notification of shipping space, and that is admittedly sent as agent.

A further way of putting the point makes it necessary to consider at what stage a contract of carriage would have been made in this case if events had taken their ordinary course. It has not been suggested that the red and black forms created any contract with the shipowner. As I have already noted, the

E contractual relationship suggested by the plaintiff is one between himself and the broker. Counsel for Strick, while submitting that it was unnecessary to determine the exact moment, said that in the ordinary course the contract would not have been made until the goods were received by the ship or put under her tackle. On this, the plaintiff submitted that since the handling from No. 9 shed was under the supervision of the loading brokers, they must owe a

- F duty to the shipper to see that the goods tendered were put on board, and correlative to that, to see that no bill of lading was issued until the goods were on board. In my view, the dock-owner who actually received the goods for shipment at No. 9 shed was the servant or agent of the shipowners to receive and handle them. He was paid for his services by the shipowners through their loading brokers, and, no doubt, the shipowners recouped themselves by
- G means of the freight. Accordingly, in the circumstances of this case, and assuming the engagement of cargo space to be non-contractual, I think that the contract of carriage would normally be made when the goods were delivered at No. 9 shed and accepted there by the ships' agents, and that there would be no need for the shipper to take any further steps: see *British Columbia Saw Mill Co. v. Nettleship* (1), per BOVILL, C.J., and BYLES, J. (L.R. 3 C.P. 500, 502).
- H There is, therefore, no need to assume that in supervising the handling and loading of the goods the loading brokers were discharging any duty towards the shipper.

In my judgment, therefore, the plaintiff has not established any contractual relationship with Strick giving rise to any particular duty owing to him. In putting forward the wider proposition that Strick owed a duty to the public not carelessly to circulate a document of title knowing it would be used as such, counsel for the plaintiff acknowledged the difficulty he encountered because of



*Le Lievre v. Gould* (2), and other similar decisions which make it plain that negligent mis-statement can never give rise to a cause of action. An attempt to have the rule reversed in the light of *Donoghue v. Stevenson* (3) failed in *Old Gate Estates, Ltd. v. Toplis & Harding & Russell* (4). The rule has not earned the admiration of jurists. Counsel for the plaintiff submits that it ought to be applied sparingly, and not extended to the issuing of a document of title which is the doing of an act rather than the making of a statement. A bill of lading, which is in the popular sense a negotiable instrument, is a document on the accuracy of which much commerce may depend, and carelessness with regard to it is surely something, counsel argues, for which the law can find a remedy. On the commercial aspects of this argument, I shall say a word later. On the legal issues, my views are confined by the authorities. The reason why a bill of lading is a document of title is because it contains a statement by the master of a ship that he is in possession of cargo, and an undertaking to deliver it. It is not easy to see why carelessness in making this sort of statement should be distinguished from negligent mis-statement generally. In any event, I think that the authorities show that the issuing of a document of title or negotiable instrument is not of itself the subject of any general duty. Carelessness in the drawing of a bill of exchange has frequently been considered by the courts. A customer of a bank owes a duty to his bank in this respect, but it is a duty based on contract: see *London Joint Stock Bank v. MacMillan and Arthur* (5). The drawer or acceptor of a bill owes no such duty to the public at large: see *Scholfield v. Londesborough (Earl)* (6). In the latter case, LORD MACNAGHTEN described the proposition which the House negatived in the following terms ([1896] A.C. 543):

"My Lords, CHARLES, J., and LOPES, L.J., are both of opinion that a person who accepts a bill of exchange intending that it should be put into circulation owes to everyone who may become the holder a duty which they define or describe as the duty 'not to be negligent with regard to the form of the instrument'."

I turn now to the claim for breach of warranty. Having regard to the well-known rule that a broker has no implied authority to sign a bill of lading for unshipped goods, the case was opened and conducted on the assumption that the lack of Strick's authority would not be disputed. At the conclusion of all the evidence, counsel for Strick submitted that the plaintiff had not proved that in the circumstances of this particular case, and having regard to the indemnity clause in the time charterparty, Strick had no authority. The existence of authority is fundamentally a question of fact. There was evidence that it is well known in the trade that a broker has no authority to sign for unshipped goods. I think that that constitutes a *prima facie* case; and in the absence of any evidence on the point from the shipowners, the captain, or the brokers themselves, I am not prepared to draw any inference to the contrary from the terms of the charterparty. There was some discussion about the extent of the rule which makes an agent liable for breach of warranty of authority. The plaintiff's case is that, believing the issue of the bill of lading to be authorised, and that, therefore, it was a good document of title, he tendered it to his customer with results leading to the subsequent damage of which he complains, whereas, if he had known it to be unauthorised, he would presumably have had the goods sent by the next ship and procured another bill of lading which, I suppose, might have satisfied the contract. For Strick it is contended that in order to make them liable, they must purport to have authority either to contract with the plaintiff, as in *Collen v. Wright* (7), or to make a request or demand which the plaintiff is under a statutory duty to fulfil, as in *Oliver v. Bank of England* (8). It is argued that, since the bill of lading is not itself a contract, Strick were not by issuing it purporting to contract with anyone; nor were they requesting or demanding that anyone should act on it. I think that the rule is wider than this argument would allow. I take it from the

following statement of VAUGHAN WILLIAMS, L.J., in *Oliver v. Bank of England* (8) ([1902] 1 Ch. 627):

"The rule, as I have stated, in *Collen v. Wright* (7) is merely that, if a man professes to be an agent and gets another to act in matters of business upon that profession, and that acting is to the detriment of the person who is so induced to act, the law raises an implied warranty of the averred authority of the agent."

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I think that Strick in this case must have appreciated, when they issued the bill of lading, that it would result in the plaintiff acting as a matter of business on the authority that they professed to have and that he might thereby act to his detriment by transmitting it to third parties as a document of title. Whether in this particular case the plaintiff did act to his detriment depends on whether, if he had known the true position, he could have procured another shipment and tendered another bill of lading within the contract, or whether he was not in any event irretrievably in breach. This topic is, I think, more conveniently examined when I come to consider what damage, if any, flowed from the breach of warranty. As I have said, the main argument advanced on behalf of Strick was that no damage had been caused.

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For the breach of warranty of authority, the damage will be what the plaintiff has suffered from not being able to sue the shipowner: see *Richardson v. Williamson & Lawson* (9), per BLACKBURN, J. (L.R. 6 Q.B. 279). Counsel for Strick contends that, as the plaintiff never delivered the goods to the ship, he could not have recovered anything from the shipowner: in the hands of the shipper the bill is no more than *prima facie* evidence of shipment, and it would be open to the owner to prove that he never in fact received the goods. The plaintiff replies that the assumption of the shipowner's liability involves the assumption of shipment. The shipowner will not be liable on the bill unless the broker has authority to sign it, and, counsel argues, if you are assuming that the broker had authority, you must also assume the existence of the condition, namely, shipment, which conferred that authority on him. This is, I think, fallacious.

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An agent who warrants that he has authority need warrant no more than the bare fact. In the absence of special circumstances, he makes no warranty or representation about how he got his authority, whether it is express or implied, specific or general. Still less does he warrant that an event, on which the proper exercise of a general authority may depend, has in fact taken place. The bill of lading, of course, contains a representation that the goods have been shipped, and I shall consider in a moment to what extent that assists the plaintiff, but it is quite distinct from the representation or warrant of authority. So far as the latter is concerned, there is no more reason for assuming that the goods have been shipped than there is for assuming that the owner gave specific instructions to the broker that he was to issue bills of lading for all the cargo in the cargo book, whether it was shipped or not. The right way of testing the matter is, I think, to treat the bill of lading as if it had been signed personally by the owner and issued personally by him.

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On that supposition how does the matter stand? In considering this, it seems to me of the first importance to remember that the bill of lading is not itself a contract of carriage and that it is not contended that any contract of carriage was ever made. The carelessness of Strick played no part in this.

H

Whether they had acted with or without authority, there would still have been no contract of carriage. The reason why it was not made was because of a fault or breakdown on the plaintiff's side. He did not assume himself nor did he entrust to his forwarding agents the general duty of superintendence and of seeing that no hitch in tendering the goods occurred and as between himself and Strick the failure was his. On this basis, therefore, that there was no contract of affreightment, what would be the nature of the plaintiff's claim against the shipowner if the owner had himself personally signed and issued the bill

of lading? In order to save the constant repetition of this hypothesis, in the next paragraph of this judgment I deal with this case as if it were a claim against the shipowner on a bill signed by him.

The bill of lading in the hands of Mishan gave him a choice of remedies. He could sue the shipowner for non-delivery, and the owner would be prevented from alleging non-shipment by the Bills of Lading Act, 1855, s. 3. Alternatively, he could sue the plaintiff on the contract of sale. Under this contract, the plaintiff undertook to put the goods on board the ship, and to procure a contract of affreightment and a bill of lading as evidence of it; and he clearly broke this contract. With these two remedies open to him, Mishan chose the latter and the plaintiff had, I think, no alternative but to pay whatever sum Mishan could properly claim as damages. When the plaintiff discharged his liability to Mishan he might, I suppose, have taken the benefit of Mishan's right of action against the shipowner. But I am concerned only with the claim made by the plaintiff in his own right and in his own name. To sustain that claim, he must show, first, that some wrong was done to him by the shipowner, and, secondly, that his liability to Mishan arose as a consequence of that wrong. As I have said, the reason why the plaintiff had to pay damages was because he failed to make a contract of carriage. It was not because the ship did not deliver the goods: he never undertook that she would. It is difficult to see how the plaintiff can contend that his own failure to make a contract flowed from anything that the shipowner did or omitted to do. But the plaintiff's difficulties begin earlier than that, as soon as he tries to formulate his cause of action against the shipowner. It does not help him to say that the bill of lading contains a representation that the goods had been shipped. Even if he could rely on that as an estoppel, it would not give him a cause of action. To get that, the plaintiff must show some breach of duty. I have already held that there is no general duty not to issue a bill of lading for unshipped goods. If a contract of affreightment had been made, whereby the owner undertook to load the goods, and if the circumstances showed that the shipper had no means of knowing whether the goods were actually shipped or not, it might well be an implied term of the contract that the owner would not issue a bill of lading unless and until the goods were shipped. But I need not consider this, since here there was in fact no contract of carriage. Is it open to the plaintiff to contend that the bill of lading estops the shipowner from denying that there was a contract of carriage? This would, on any view, be a difficult contention, since a person must usually be taken to know with whom he contracts. It is said, however, that the only person who had knowledge that the goods had not been delivered to the ship was Continental Express, and, as they were independent contractors, their knowledge was not the knowledge of the plaintiff. Further, it is said that in estoppel it is actual knowledge, and not constructive knowledge, that is relevant; and that if the plaintiff believed and acted on the representation, it is immaterial that by inquiry he might have found it to be untrue: see *Bloomenthal v. Ford* (10) ([1897] A.C. 168). I think it unnecessary to go into this point because I think that, on a broader ground, the case presented in this way must fail. A man cannot in one breath invoke both the truth and an estoppel; he must make his choice: see *Scarf v. Jardine* (11), per LORD SELBORNE, L.C., (7 App. Cas. 350). He cannot, in presenting a case against a defendant, mix fact and fiction in the proportions which suit him best. So, in this case, the plaintiff cannot say against the shipowner:—"By issuing a bill of lading you represented that you had shipped the goods and so are estopped from denying a contract of carriage: but by issuing a bill of lading when in fact you had not shipped the goods you broke the contract you are estopped from denying." The whole truth of this matter is that, in the absence of a contract of carriage, the bill of lading is a nullity, and it would have been none the less so even if it had been issued at a board meeting of Strick Line,



Ltd., or passed by a resolution of the company in general meeting. The fact that it was issued without authority robbed it of no virtue. It could never have been more than a bit of paper purporting to record a bargain that had never been made. The plaintiff's liability to Mishan arose because he failed to make a contract of carriage. He cannot allege that that failure was a consequence of any breach of duty which the shipowner committed. Accordingly, he would  
 A have no claim against the shipowner, and so can recover no damages against the broker.

I cannot leave the case against Strick without commenting on some of the more general aspects of it to which counsel for the plaintiff drew attention. He said it would be a very grave matter, as, indeed, it would, if brokers could issue with impunity worthless bills of lading which would thereafter circulate  
 B as documents of title and be relied on as such in the mercantile world. And he contended, as I have already recorded, that the rule in *Le Lievre v. Gould* (2) was a defect in our jurisprudence which ought not to be extended. I do not think that this case affords an illustration of any defect in our system relating to the law of negligent mis-statement. A bill of lading contains not only or primarily a statement of fact, but a promise to deliver goods. The issue of a  
 C cheque may imply a representation that the drawer has funds in the bank wherewith it may be met, but the drawer's immunity from suit for a negligent mis-statement to that effect causes no inconvenience. The cheque is an order to pay, and non-compliance with it gives a right of action irrespective of negligent representation. Just as a man does not lightly draw cheques containing promises to pay, so a shipowner or broker will not lightly issue bills of  
 D lading containing promises to deliver. It is true that if the shipowner can prove that the goods have not been shipped, his promise may not bind him as against the shipper; but that is hardly saying more than that the drawer of a cheque will not be liable to the drawee if he can prove no consideration. In both cases the makers of the document will be liable to indorsees. It is also  
 E a peculiar feature of this case that no contract of carriage was ever made with the shipowner. I have not had to decide what the shipowner's liability would be if there had been such a contract.

The causes of action alleged against Continental Express are detainue and breach of contract. The former, in my judgment, is not made out. There was no demand. The instructions to despatch, which are relied on for this purpose, are not a demand for delivery up of the goods. Continental Express did in  
 F fact accept them, but they were not obliged to do so; and they could have ignored them without thereby failing or refusing to deliver up on demand. In short, Continental Express never set up any adverse title. I need not go into this point in any detail, for counsel for the plaintiff has said that before me he cannot contend that the damages obtainable for detainue would be any higher than those obtainable for breach of contract, and the breach is admitted.  
 G It is, however, important to determine at the outset what sort of a breach of contract has been committed. I do not think that it is strictly right to say that the failure to deliver as instructed is a continuing breach. Continental Express were required to deliver within a reasonable time, which expired certainly not later than Dec. 5, 1946. When they failed to deliver by that time, the breach was complete: thus a covenant to build by a certain date  
 H can be broken only once: see *Stephens v. Junior Army & Navy Stores* (12) ([1914] 2 Ch. 523). Continental Express were not after December 5 still under a duty to deliver the goods at No. 9 shed,—indeed it would have been absurd if they had done so without fresh instructions; and without a continuing duty there cannot be a continuing breach. But this is not to say that their wrongdoing ceased on Dec. 5. They were then continuing to hold the goods in breach of the instructions which they had received. In this respect they were like bailees who, in breach of their mandate, hold the goods in some place other

than that which the contract or bailment requires. They were therefore guilty of detention of the goods, which, while it may not have been adverse so as to constitute the tort of detinue, was wrongful in that it was in breach of the contract of bailment. Furthermore, they were, I think, under a continuing duty to seek fresh instructions for the disposal of the goods, or at the least to report to the plaintiff their failure to deliver. It could hardly be contended that, if some accident had prevented delivery and excused Continental Express from any fault in the matter, they could have left the plaintiff in ignorance of what had happened to his goods: the duty of a bailee to notify his bailor of such circumstances would be in accordance with the principle laid down in *Ranson v. Platt* (13) and *Coldman v. Hill* (14). I cannot think that the duty can be less if delivery has been prevented by the bailee's own negligence or that he could rely on his own culpable ignorance of his own fault as an excuse for not informing the bailor of it. In my judgment, the detention of the goods by Continental Express and their failure to inform the plaintiff of their whereabouts was a continuing breach of duty.

The plaintiff claims to include in the damages he can recover the sum which he has become liable to pay to Mishan. This was strongly contested, and it is convenient, therefore, to consider how the matter stands if that element of loss is disregarded. Subject to the defence advanced by their counsel and conveniently described as *novus actus interveniens*, Continental Express are liable for the ordinary measure of damage for delay in delivery, namely, the fall in the market value of the goods between December, 1946, and February or March, 1948, when the detention ceased. I think that during that period the value fell from 3s. 6d. a yard to about 3s. 1d. or 3s. 2d. The plaintiff did not in fact sell the goods until November, 1949, and then he obtained 3s. 4d. a yard; the higher price was obtainable because he had then got a licence to sell in the home market. I accept the contention of counsel for the plaintiff that that should be disregarded; and that the appreciation or depreciation of the goods after February, 1948, was his own affair. I accept also the contention that something should be added as compensation in respect of the period for which the plaintiff was out of his money or lost the commercial use of the goods, whichever way one likes to put it. I think also that the plaintiff is entitled to be paid the sum of £10 which he expended in an endeavour to trace the goods, since that loss flows from the failure of the first defendants to tell him where they were. I assess the whole of what may be called the first head of damage at £175.

The defence of *novus actus interveniens* is based on the issue of the bill of lading. In the ordinary course, it is said, the non-delivery would have been discovered by Dec. 5. But the false bill of lading of that date stifled inquiry or rather directed it into the wrong channels, and so was the cause of the loss after Dec. 5. If this is sound, it eliminates the first head of damage, for it is not suggested that there was any fall in market value by Dec. 5. Its effect on the second head (the claim for £1,319 paid to Mishan) is problematical, for the breach at any rate prevented the shipment in the Mount Orford Park. I shall consider in the first place whether the defence affords an answer on the first head of the claim. Counsel for Continental Express puts the point in two ways. First, he says that delay beyond Dec. 5 was not a foreseeable consequence of the first defendants' breach, since foresight would have said that the non-delivery would be discovered by Dec. 5, as it would have been if Strick had not been careless as well. Secondly, he says that whatever might have been foreseen, the issue of the bill of lading intervened and was in fact the dominant cause of the delay after Dec. 5. The answer to both ways of putting the point is, I think, rooted in the conclusion I have already reached that Continental Express were guilty of a continuing breach of duty. The foreseeable consequences of an omission to deliver by a particular date may well be limited, but the consequence of continuing detention is obviously continuing delay, and it is not disputed that

the foreseeable consequences of continuing delay include a drop in value during the period of delay. That really disposes of the first way of putting the point. The second is more formidable. It is not enough that loss or damage should be a foreseeable consequence; it must also be actually caused by the breach. There are many cases where a loss is foreseeable but does not in fact occur because some act intervenes, as a piece of good fortune for the wrongdoer, to prevent the natural and probable consequences of his wrong from operating. Likewise, the intervening act, while not destroying the wrong as a causative event, may contribute to the damage that occurs; the damage is then caused both by the wrong and by the intervening act. That is, I think, what happened here. The issue of the bill of lading could not extinguish the first defendants' breach of duty as a causative event; the breach being continuing is a continuous source of damage. But the two were equally operative causes in that if either had ceased the damage would have ceased. If Continental Express had done their duty by informing the plaintiff that they had the goods and by releasing them the falsity of the bill of lading would have been discovered. Similarly, if it had not been for the false bill of lading and its continuing power of misleading those in whose hands it was, the non-delivery by Continental Express would at once have been discovered.

Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant: see *Minister of Pensions v. Chennell* (15) ([1946] 2 All E.R. 721) *per* DENNING, J. In the case of breach of contract the position is not so clear. In *Burrows v. March Gas & Coke Co.* (16), the defendant gas company, in breach of their contract, supplied a defective pipe, gas escaped, and a third party went negligently to investigate with a lighted candle. The defendant gas company was held liable. In the Exchequer Chamber, the decision went on the ground that there was a breach of contract and that the damage was the direct consequence of the breach. In the court below, there was some difference of view as to whether the action was in contract or in tort. Those who took the latter view, such as KELLY, C.B., were content to find that the wrong was a concurring or co-operating cause; while those who took the former view, put the breach as the dominant or direct cause. FIGOTT, B. (L.R. 5 Exch. 73), expressed some doubt about the position if it had to be decided in contract. In *Smith, Hogg & Co., Ltd. v. Black Sea & Baltic General Insurance Co.* (17) this sort of point was discussed by LORD WRIGHT ([1940] 3 All E.R. 409) where he gave his opinion that if unseaworthiness (which was the breach of contract alleged) was a cause of the damage, that was sufficient, whether it was the dominant cause or not. LORD ATKIN agreed with this opinion. LORD PORTER and LORD ROMER held (*ibid.*, 415) that unseaworthiness was the cause of the loss and thought it unnecessary to decide what the position would have been if the loss were attributable partly to unseaworthiness and partly to some other cause and both were substantial causes. VISCOUNT MAUGHAM agreed (*ibid.*, 406) with the opinions both of LORD WRIGHT and of LORD PORTER, and did not make it clear which view he preferred on this particular point.

It would be easy to solve the problem by saying, of course, that, a breach of contract and a tort both being wrongs, the principles of causation applicable to them should be the same. *Smith, Hogg & Co., Ltd. v. Black Sea & Baltic General Insurance Co., Ltd.* (17) shows that the point cannot be settled in that easy way. LORD WRIGHT clearly regarded the principle which he was enunciating as being applicable, if not because of the character of unseaworthiness as a breach, at any rate because he was there dealing with a fundamental breach. He discusses the matter again in *Monarch S.S. Co., Ltd. v. A/B Karlshamnns Oljefabriker* (18) ([1949] 1 All E.R. 15-17). It may be that his view of unseaworthiness is that, where it is present, it must of its nature always be the dominant cause. But



I do not think that I have to deal here with a breach of contract which by the operation of some other cause is reduced to a cause of lower efficacy. It may be that the term "a cause" is, whether in tort or in contract, not rightly used as a term of legal significance unless it denotes a cause of equal efficacy with one or more other causes. Whatever the true rule of causation may be I am satisfied that if a breach of contract is one of two causes, both co-operating and both of equal efficacy, as I find in this case, it is sufficient to carry judgment for damages. *Reischer v. Borwick* (19) establishes that for the purposes of a contract of insurance it is sufficient if an insured event is, in this sense, a co-operating cause of the loss. I do not think that *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport* (20) with its insistence on the ascertainment of "the cause," disapproved this principle. The case decided that the cause of a loss has to be ascertained by the standard of common sense of the ordinary man. Common sense is a blunt instrument not suited for probing into minute points, and I cannot believe that if the ordinary man thinks that two causes are of approximately equal efficacy, he cannot say so without being interrogated on fine distinctions. I note also that since *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport* (20) was decided, SCOTT, L.J., in *Ocean Steamship Co. v. Liverpool and London War Risks Insurance Association, Ltd.* (21) ([1946] 2 All E.R. 363) treated the rule laid down in *Reischer v. Borwick* (19) as still effective. I think, therefore, that Continental Express are responsible in law for the damage which the plaintiff sustained by the fall in value of the goods over the whole period from November, 1946, to March, 1948.

I turn now to the second head of damages. I was naturally referred to the recent cases of *Monarch S.S. Co., Ltd. v. A/B Karlshamns Oljefabriker* (18) and *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (22). It is suggested that these two cases, the former by its insistence, particularly by LORD WRIGHT ([1949] 1 All E.R. 13) on the necessity for judging each state of facts in its own light, and the latter with its clear and comprehensive re-statement of fundamental principles, have liberated judges of first instance from the bondage of the earlier authorities. This is, perhaps, putting the argument of counsel for the plaintiff more rhetorically than he put it himself, but he must, if he is to succeed, point to an avenue of escape from the position that among the cases cited to me there is none in which the liability of a carrier has been assessed by reference to the contractual obligations of the consignor or consignee. Continental Express knew that the goods were to be shipped to Teheran, but they had no actual knowledge of the purpose for which they were being sent. It is argued that everyone should be taken to know that it is "on the cards" (to use the colloquialism ([1949] 1 All E.R. 1003) suggested by ASQUITH, L.J., in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (22)) that goods intended for shipment will be or will become subject to a contract of sale and that the time of shipment will be of the essence of such a contract. I think that a distinction may fairly be drawn, as counsel for the plaintiff contends, between carriage by land and carriage by sea. In the former case, the movement of goods for purposes unconnected with sale, perhaps for stocking or some similar purpose, or even unconnected with business at all, is not uncommon. In the latter case, export and import is generally conducted by means of a sale; and the type of contract generally used, c.i.f. or f.o.b., usually requires shipment by a particular ship or at a particular time. Accordingly, counsel for the plaintiff invites me to hold that Continental Express should have known that the process of exporting or importing would probably involve a contract of this type, and to say that, if Continental Express knew that, it would follow that they must appreciate that a failure on their part to carry out their delivery instructions might well result in the plaintiff becoming liable to a third party. LORD MACNAGHTEN in *Stroms v. Hutchison* (23) ([1905] A.C. 524) seems to think that this degree of knowledge should be imputed to the carrier as an ordinary business man. I

think that the decision in *The Arpad* (24) and the earlier authorities referred to in it, preclude me from taking this view of a carrier's liability. I am, for my part, willing to hold that a carrier should recognise sub-sales by a consignor or consignee as a serious possibility, but that is not enough, as the leading case of *Horne v. Midland Rly. Co.* (25) shows. In *The Arpad* (24) MAUGHAM, L.J., said ([1934] P. 230):

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"I suppose most vendors of goods and most carriers might be taken to know that if the purchaser or consignee is a trader the goods will probably be sold, or are bought for sub-sale, but the authorities seem to show conclusively that something more than that is necessary to enable the damages to be assessed by reference to a contract of sub-sale entered into before the date of delivery."

B

Under the ordinary rule the carrier is taken to know that the consignor will lose by non-delivery the value of the goods at the place of delivery, and I suppose that under ordinary market conditions that would compensate the consignee for any loss he incurs by purchases made at the place of delivery in order to fulfil any sale he may have made. To make the carrier liable for any higher measure of damages it seems to me to be necessary that he should have knowledge, actual or imputed, of something that makes the ordinary measure inadequate. Such knowledge may be derivable from the terms of the sub-contract, or, possibly, from the market conditions at the place of delivery. The reason why, as noted by ASQUITH, L.J., in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (22) ([1949] 1 All E.R. 1001) the law is more ready to allow loss of profit as an item of damage against a vendor than against a carrier is because of the nature of the vendor's business. This is more likely to give him knowledge of the probable terms of a sub-contract or of the market conditions. I do not think that either this authority or *Monarch S.S. Co., Ltd. v. A/B Karlshamns Oljefabriker* (18) can be regarded as criticising the soundness of the principles on which the liability of a carrier for damages in relation to contracts of sub-sale has hitherto been assessed. In the latter case LORD PORTER said ([1949] 1 All E.R. 8) that, if the claim had been for loss of profit in the respondents' business, he would have thought that it ought to have been disallowed; and LORD WRIGHT said (*ibid.*, 13) that, if the respondents had been claiming special and peculiar loss due to interference with their business, such damage might *prima facie* be too remote.

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I have dealt with the plaintiff's claim in this case as if it were a claim for loss of profit under a sub-sale, as that is the topic on which most of the relevant authorities are to be found, but had I held the claim to be within the principle of these authorities, I should have had to direct my mind to the point that it is, in fact, a claim for damages paid to a sub-buyer. SALTER, J., in *Patrick v. Russo-British Grain Export Co., Ltd.* (26) ([1927] 2 K.B. 540), after holding that the finding of the arbitrator that the parties contemplated that the wheat would probably be re-sold was sufficient to support the claim for loss of profit on re-sale, added:

G

"It might well have been insufficient to support a claim for costs incurred in litigation with a sub-buyer or for penalties or damages paid to him."

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Finally on this point, it would not follow, even if the plaintiff had been successful in principle, that he could have recovered the whole loss of profit which his sub-buyer actually sustained. This was due, as I have said, to temporary and abnormal conditions in Persia, and was unusually high. *Horne v. Midland Rly. Co.* (25) is again here in point.

There remains a final point taken by the plaintiff on the assumption that the correct measure of damage is based on market value at the place of delivery. It is said that Continental Express knew that the goods were for shipment to

Teheran and knew that the result of non-delivery or delay on their part would be that the ship would be missed, and, accordingly, that the place of delivery for the purpose of assessing the damage should be taken to be, not Manchester, but Teheran at the end of the voyage. This is an attractive argument, but I need not examine it in principle because on the facts I do not think that it helps the plaintiff. I have not sufficient evidence of the relevant market value at Teheran at the material time. What has been tendered as the only evidence of it is the price at which Mishan re-sold the goods in February, 1947. I accept that, on the authority of *The Arpad* (24), a sub-sale can in a proper case be used in this way; but I do not think that this particular sub-sale is of any value in determining the market price which I have to consider. A market for this purpose means more than a particular place. It means also a particular level of trade. Retail prices differ largely from wholesale prices, and in wholesale prices there are differences at different ends of the chain. In times of scarcity these differences may be very great indeed. There may be ultimate buyers who are willing to pay fanciful sums for a particular class of goods, and the middleman who is in a position to enter and exploit such a market may be able to make enormous profits. The price at which he re-sold would then be no evidence of the scale of prices operating between himself and the person from whom he bought. In this case I am concerned with the market price as between an exporter and an importer at Teheran. There is no evidence that that price changed at all during the voyage of the Mount Orford Park or for any appreciable time thereafter. The far larger price obtainable in Teheran is no evidence of it, since exporters in England were apparently not at any time attempting to demand any share in the large profits that were then to be made in the Persian markets. Accordingly, I can award to the plaintiff no more than the sum which I have assessed above. There will, therefore, be judgment for the plaintiff against Continental Express for £175, and judgment for Strick against the plaintiff.

*Judgment for the plaintiff against the first defendant for £175, with costs (not including the second defendants' costs). Judgment for the second defendants (Frank C. Strick & Co., Ltd.) with costs.*

Solicitors: *Lea & Lea* (for the plaintiff); *Bulcraig & Davis* (for the first defendants); *William A. Crump & Son* (for the second defendants).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

## MINISTRY OF HEALTH v. FOX AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), April 25, 1950.]

*National Health Service—Hospital—Transfer of property and endowment—“Held by trustees solely for the purposes of that hospital”—Power of trustees to divert property and endowment to other charitable purposes—National Health Service Act, 1946 (c. 81), s. 6 (1), s. 7 (4).*

The National Health Service Act, 1946, s. 6, provides : “ (1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister [of Health] by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being



rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof . . ." By s. 7: "(4) All endowments of a voluntary hospital to which the last foregoing section applies . . . being endowments held immediately before the appointed day, shall on that day be transferred to and vest in the Minister by virtue of this Act free of any trust existing immediately before that day."

A By a deed dated Feb. 5, 1924, the W. council conveyed to trustees a plot of land on trust that there should forthwith be erected thereon a maternity home. The trustees were to have entire and absolute control of the said land and the buildings for the time being thereon and the management, regulation, repair and care thereof. The trustees were further  
B given power, *inter alia*, to build on, let, mortgage, sell, pull down, re-build or alter and otherwise deal with the premises and any erections or buildings for the time being thereon in such manner as they should think fit. They were directed by the deed to apply any moneys arising from any such sale, mortgage or other disposition "either for the general purposes of the maternity home aforesaid or for such other public charitable purpose and in such manner as the trustees" should think fit. By a conveyance  
C dated May 4, 1926, the W. council conveyed a further plot of land to the trustees on trusts similar to those contained in the deed of Feb. 5, 1924. By a deed of Sept. 29, 1926, supplemental to the previous deed, J.F. and G.F., as settlors, vested in the trustees certain investments, the settlors being desirous (as was recited) "of endowing the said maternity home"  
D in the manner thereafter appearing. The deed of September, 1926, provided that the trustees should out of the income of the endowment in the first place "defray the cost of maintaining the structure and interior of the said maternity home and of any annex or other buildings which may from time to time be erected in connection therewith in good condition and repair and of insuring the same." The trustees were given power  
E to apply the income as capital of the endowment for the purpose of making such alterations, improvements and additions to the structure and equipment of the maternity home as they should think fit, and by cl. 7 "the trustees shall if and when they think fit sell the said shares or other the investments for the time being representing the endowment and apply the proceeds of such sale for such other charitable trust and in such manner as they shall think fit." Immediately before July 5, 1948, ("the appointed  
F day") the trustees were administering the buildings erected on the land as a maternity home, and the endowment funds were being used for the purposes of the home. The question arose whether the trustees' interests rights and liabilities in respect of the maternity home and the endowment funds were transferred to the Ministry of Health on the appointed day.

G HELD: on the true construction of the Act, the words "held by trustees solely for the purposes of that hospital" in s. 6 (1) and s. 7 (10) referred to the purposes for which the property, interests, or endowments were, in fact, being held immediately before the appointed day, and, therefore, notwithstanding that the deeds of 1924 and 1926 empowered the trustees to divert the property or endowments to other purposes, as they were being  
H used on the relevant date for the purposes of the maternity home, they passed to the Minister under s. 6 (1) and s. 7 (4) respectively.

[FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6 and s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 339-345.]

#### ACTION.

The Ministry of Health claimed a declaration that the defendants' interests, rights and liabilities in respect of certain premises at Wellington, Somerset,

which the defendants, as trustees, conducted as a maternity home, and all investments forming the endowment of that home, were transferred to the Minister of Health by virtue of the National Health Service Act, 1946, s. 6 (1) and s. 7 (4).

*The Attorney-General (Sir Hartley Shawcross, K.C.), Pearson, K.C., and Walter Gumbel for the Ministry of Health.*

*Sir Andrew Clark, K.C., and Newsom for the defendants, the trustees of the maternity home.*

**WYNN-PARRY, J.:** This is an action brought by the Ministry of Health against the two defendants as trustees of a maternity home at Wellington, in the county of Somerset, asking for a declaration that the defendants' interests, rights and liabilities in those premises, and in all investments forming the endowment of the Wellington Maternity Home, were transferred to the Minister of Health under the National Health Service Act, 1946, s. 6 (1) and s. 7 (4), on July 5, 1948, the appointed day under that Act. The facts are not in dispute.

By a deed made on Feb. 5, 1924, between the urban district council for the parish of Wellington, Somerset, of the one part, and certain persons as trustees, of whom the defendants are the two surviving trustees, of the other part, the urban district council conveyed to those trustees a piece of land described in the deed, and delineated on the plan annexed thereto. I shall have to refer in some detail later to the terms of the deed. The trustees in due course erected on the land in question the maternity home which is known as the Wellington Maternity Home. By a subsequent conveyance made on May 4, 1926, between the urban district council and the trustees, a further piece of land was conveyed to the trustees on trusts substantially similar to those to be found in the earlier deed. By a later deed dated Sept. 29, 1926, the defendant, John Howard Fox, and another of the trustees, Gerald Fox, as settlors vested in the trustees certain investments on the trusts declared by the deed, the object being expressed in the recital of the deed to constitute an endowment for the maternity home.

I must now turn to the relevant provisions of the National Health Service Act, 1946. The Act is entitled:

"An Act to provide for the establishment of a comprehensive health service for England and Wales, and for purposes connected therewith."

Under s. 1 it is provided that:

"(1) It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service . . ."

Sections 6 and 7 appear under the heading: "Transfer of hospitals to the Minister." Section 6, which is of considerable importance in this case, provides:

"(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section. (2) Subject to the provisions

of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority . . . (4) All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day . . . (5) Regulations may provide (a) for the apportionment, as between the Minister and the other persons concerned, of interests in premises used partly for the purposes of any hospital to which this section applies and partly for other purposes and, in the case of a leasehold interest, for the severance thereof, and for vesting in the Minister and the other persons concerned the appropriate interests, and for the apportionment of rent payable in respect of any such severed lease . . .”

Section 7 deals with endowments of voluntary hospitals. It provides, *inter alia*:

“(4) All endowment of a voluntary hospital to which the last foregoing section applies, other than a hospital to which the foregoing provisions of this section apply, being endowments held immediately before the appointed day, shall on that day be transferred to and vest in the Minister by virtue of this Act free of any trust existing immediately before that day . . .

(9) Regulations may provide—(a) for the apportionment of any property held by the governing body of a voluntary hospital to which this section applies partly for the purposes of that hospital and partly for other purposes, being property which would, if it were held solely for the purposes of the hospital, constitute an endowment of that hospital, and for vesting the appropriate shares in the Minister or (in the case of a teaching hospital) the Board of Governors of that hospital, or (in the case of an endowment which would be transferred to a Hospital Management Committee) that Committee, and the other persons concerned . . . (10) In this section the expression ‘endowment,’ in relation to a voluntary hospital, means property held by the governing body of the hospital or by trustees solely for the purposes of that hospital, being property of the following descriptions . . .”

Then follow in four sub-paragraphs descriptions of the property in question. Finally, by s. 79 (1), the interpretation section, it is *inter alia* provided:

“‘the governing body,’ in relation to any voluntary hospital, includes any body, whether corporate or unincorporate, having the control and management of the hospital or any part thereof or otherwise carrying on the business of the hospital or any part thereof.”

In approaching the construction of such an Act as this, I have been proffered various and somewhat conflicting invitations. On the one hand, I was urged by the Attorney-General to bear in mind what he described as the overriding object of the Act, and to interpret the relevant sections bearing in mind that overriding object and with a view to assisting in the achievement thereof. On the other hand, I was invited by counsel for the defendants, treating this Act, as an expropriation Act, as indeed it is, to apply the same strict construction to which, it is said, taxing Acts are subjected. I think the true view was that finally urged on me by Mr. Pearson for the plaintiffs, who, in reply, pointed out that there really was little between the two points of view when one remembers the guidance which one is given by the House of Lords—to discover the intention from the language which is used in the Act and from no other source. I,



therefore, approach the construction of these sections without any inclination either to struggle to help to achieve what may be the overriding object of the Act in favour of the Crown, on the one hand, or to apply to the language such a strict construction, on the other hand, as may result to the benefit of the subject, and I shall endeavour to interpret the relevant sections merely by the application of the ordinary rules of construction, which are daily applied by this court.

Turning back to s. 6 (1), it is to be observed that there is a number of conditions which must obtain before a voluntary hospital is transferred to and becomes vested in the Minister by virtue of the Act. What is to be transferred is interests in the premises which either formed part of the voluntary hospital or are used for the purposes thereof, and movable property used in connection with such places. Then the nature of the interests which are being dealt with by the sub-section are described. They must be interests held immediately before the appointed day; they must be held by the governing body of the hospital or by trustees; they must be held either by that body or by the trustees solely for the purposes of that hospital. The real debate has centred round the phrase "being interests held . . . by trustees solely for the purposes of that hospital."

The conflicting views are as follows. On behalf of the Ministry of Health it is urged that the meaning of that phrase is that there are included all interests which were, in fact, immediately before the appointed day, held by the trustees for the purposes of that hospital in which only those trustees were concerned and in which other persons were not concerned, and that, therefore, one need not go further than to ascertain, in cases where no other persons were concerned, as is the fact here, what actually was the position immediately before the appointed day. On the other hand, it is contended on behalf of the defendants that effect must be given to the employment of the verb "used" and the verb "held" between which there is a contrast. The verb "used" is employed to describe what was being done with the premises or the movable property. The verb "held" is employed to qualify the word "interests." Where, as is the case, that verb is used in conjunction with the words "by trustees" as qualifying "interests," the result must be that the interests are interests held by trustees on trust. Then, when those words are followed by the words "solely for the purposes of that hospital," one has to look at the trusts on which the trustees held the interests in question and see whether those trusts relate solely to the purposes of the hospital, for, it is said, if the trusts were wider than trusts connected with the hospital, the result must be that it cannot be predicated of the interests in question that immediately before the appointed day they were held by trustees solely for the purposes of the hospital.

It appears to me that both those constructions have points which recommend them. There is, therefore, in my view, an ambiguity in the sub-section. Before, therefore, I turn to the relevant documents, I must see whether there are provided in any other part of the Act provisions which indicate or provide a context for the true interpretation of this difficult phrase "held solely." In the next sub-section, sub-s. (2), the Act deals with the case of hospitals vested in a local authority, and it is to be observed that the same language as is employed in the earlier part of sub-s. (1) is not employed in the earlier part of sub-s. (2). The phrase which gives rise to the difficulty in this matter does appear in the later part of sub-s. (2) where it is provided, omitting words irrelevant to the present purpose:

"all property held by a local authority immediately before the appointed day being property held solely for the purposes of those hospitals."

It is pointed out on behalf of the Ministry, and, in my view, pointed out with considerable force, that local authorities are entitled, within very wide limits, to alter the purpose for which they hold property. It would have been possible

for local authorities to change the purposes for which they held property used as hospitals. Therefore, it is said that the phrase "held solely" as used in that sub-section cannot have the construction contended for by the plaintiffs under s. 6 (1). As I have said, on the face of it sub-s. (2) is not dealing with exactly the same matter, but there is the same phrase used, and *prima facie* one expects that a phrase such as that will not have different meanings in different parts of the same Act.

A I turn to sub-s. (5) which I have read. As will have appeared, that deals with apportionment, as between the Minister and other persons concerned, of interests in the premises. So that the condition for the operation of that sub-section is that there must be two sets of persons concerned, the Minister and the other persons concerned. Therefore, it relates to property in regard to which, before the appointed day, two sets of persons were concerned, the governing body of the voluntary hospital or the trustees, as the case may be, on the one hand, and other persons concerned, on the other hand. The interests of the predecessor of the Minister, namely, the governing body or the trustees, must, of course, be interests falling within sub-s. (1) or sub-s. (2) as the case may be. Therefore, it does not appear to me that sub-s. (5) provides any conclusive guide to the answer to this point.

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C I must not leave out of consideration the provisions of s. 7 (9) (a). It is true that s. 7 is dealing with a different subject-matter, namely, endowments of voluntary hospitals, but, here again, I find this phrase "held solely." Paragraph (a) of sub-s. (9) refers to regulations "for the apportionment of any property held by the governing body of a voluntary hospital," and in view of the definition section, I think that phrase is wide enough to include trustees,

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". . . to which this section applies partly for the purposes of that hospital and partly for other purposes, being property which would, if it were held solely for the purposes of the hospital, constitute an endowment . . ."

E The contrast there is between purposes of the hospital and "for other purposes" in the case of property which is held by a governing body. The purpose of the regulations is to effect an apportionment, the test applied being to see what would be the position if the property were held solely for the purposes of the hospital, that is, solely for the purposes of the hospital immediately before the appointed day. Finally, in s. 7 (10), one again meets the same phrase "held by . . . trustees solely for the purposes of that hospital."

F  
G Reading that series of provisions, I feel driven to the conclusion that, in s. 6 (1), the phrase "held by trustees solely for the purposes of that hospital" bears the construction for which the Ministry contends, and that one is not directed by the sub-section to pursue the inquiry what were the exact terms of the trust deed or deeds under which the trustees held the property with a view to discovering whether, under those deeds, they had a power to divert the property, or any of it, to other purposes than those which were in operation immediately before the appointed day. In my view, the sense of this series of provisions is that one takes one's stand once and for all on the appointed day and sees for what purpose the property was being held then, and, if the property was then being held for purposes of the hospital and for no other purposes in fact, that is an end of the matter, and property falling within that description passes under the sub-section to the Minister.

H With that construction in mind, I turn to the deed of Feb. 5, 1924. The trusts declared there are to hold the property

"(a) upon trust that the said premises shall form the site for and that there shall forthwith be erected thereon a maternity home [and secondly] the trustees shall have the entire and absolute control of the said land and buildings for the time being thereon, and the management regulation

repair and care thereof subject as hereinafter provided with power at their discretion to delegate the said management regulation, repair and care."

By cl. 2 the deed provides:

"It shall be lawful for the trustees and the survivors . . . from time to time to build upon let mortgage sell pull down re-build or alter and otherwise deal with the said premises and any erections or buildings for the time being thereon in such manner in all respects as the trustees or trustee shall think fit."

It will be observed that there are included power to let, power to mortgage, and power to pull down. Clause 3, which is monetary, provides that the trustees must apply and deal with all moneys which arise from any sale, mortgage, or other disposition under the power contained in cl. 2

". . . either for the general purposes of the maternity home aforesaid or for such other public, charitable purpose and in such manner as the trustees or trustee shall think fit,"

with power to settle and approve any scheme. Then there follow restrictive covenants which, on the view I take of the matter, are not really material. In fact, throughout the history of this trust, the trustees having erected the maternity home, managed and conducted it, and the land and premises were, in fact, being used at the appointed date for the purposes of a maternity home. On the construction which I place on the relevant section, s. 6 (1), therefore, the land and premises in question passed to and vested in the Minister.

I turn now to the other point in the case, that is, the question of the fate of the funds, the subject of the deed of Sept. 29, 1926, to which I have already referred. As emerges from s. 7 (4), the endowments which are there dealt with are endowments of a voluntary hospital to which s. 6 applies, and as emerges from s. 7 (10), the expression "endowment" means property held by the governing body of the hospital or trustees solely for the purposes of that hospital. I find nothing in s. 7 which provides a context which would enable me to interpret the words "held solely for the purposes of that hospital" differently from those words as used in s. 6 (1). Indeed, I have prayed in aid certain of the provisions of s. 7 (9) and (10) to interpret those words in s. 6. It is, in my judgment, proper, unless one is forced to the contrary, to give the same meaning to a word or a phrase throughout an Act of Parliament or other document under construction. Again, the fact emerges—there is no dispute on it—that at the appointed day the funds subject to the deed of Sept. 29, 1926, were being used for the purposes of the hospital and, in my view, solely for the purposes of the hospital. The deed is expressed to be supplemental to the previous deeds dealing with the land and premises, and the recital is that "the settlors are desirous of endowing the said maternity home in manner hereinafter appearing." They are given power to retain the shares in question; then there is a trust that the annual income be applied in perpetuity as provided in the deed. Clause 3 provides that the trustees:

". . . shall out of the income of the endowment in the first place defray the cost of maintaining the structure and interior of the said maternity home and of any annex or other buildings which may from time to time be erected in connection therewith in good condition and repair and of insuring the same,"

and other activities of management. Clause 4 deals with surplus income, directs the trustees to invest that surplus income, and hold the investments resulting therefrom on the trusts declared concerning the endowment. By cl. 6 they are given power to apply the income as capital of the endowment

". . . for the purpose of making such alterations improvements and additions to the structure and equipment of the maternity home and the



erection of an annex or other buildings in connection therewith as the trustees shall from time to time in their absolute discretion think fit."

By cl. 7, which was relied on on behalf of the defendants, the trustees are given what is described as an overriding trust regarding the capital. The clause provides:

A " . . . the trustees shall if and when they think fit sell the said shares or other the investments for the time being representing the endowment and apply the proceeds of such sale for such other charitable trust and in such manner as they shall think fit."

B Clearly, therefore, the trustees, but for the Act, could at any time have deflected the income of these investments away from the maternity home, but, on the construction which I have placed on s. 6 and s. 7, that power is irrelevant because at the appointed day the trustees were devoting the funds and its income towards the maintenance and conduct of the maternity home, and for no other purpose.

C I, therefore, hold that, as in the case of the land and premises under s. 6, so in the case of the funds subject to the deed of Sept. 29, 1926, they vest under the Act, in accordance with the provisions of s. 7. In the result, the plaintiff is entitled to the declaration asked for.

*Declaration accordingly. Costs of the trustees to be paid out of the endowment fund.*

Solicitors: *The Solicitor, Ministry of Health* (for the plaintiffs); *Freshfields* (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

### Re COLLINS (AN INFANT).

E [COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), April 25, 1950.]

*Infant—Custody—Orphan—Religious upbringing—Conflict between grandparents—Father's direction as to religion of child—Welfare of child paramount consideration—Guardianship of Infants Act, 1925 (c. 45), s. 1.*

F A boy of six-and-a-half years of age lost his father when he was one year old, and his mother died three years later. The father being a Roman Catholic and the mother a Protestant, the parents had agreed that the children of the marriage should be brought up in the Roman Catholic faith, and the boy was baptised in the Roman Catholic church. After the father's death and during most of the remaining years of the mother's life the boy lived with his paternal grandparents, but, shortly before her death, the mother wished that the boy should live with his maternal grandparents, and he had resided with them for two and a half years. G An application by the paternal grandparents for the custody of the boy, so that he could be brought up in the Roman Catholic faith, was refused on the ground that it would be contrary to the welfare of the child if he had to leave his present home. On appeal,

H HELD: s. 1 of the Guardianship of Infants Act, 1925, which provides that where the custody or upbringing of an infant is in question the court shall regard the welfare of the infant as the paramount consideration, was not limited to a case where both parents were living, and the former rule of law, whereby a father had the right to choose the religion of his child, did not survive in a case where the parents, or either of them, were dead.

*Re Thain* ([1926] Ch. 676), *distinguished.*

[AS TO RIGHT OF FATHER TO DETERMINE RELIGION OF CHILD, see HALSBURY, Hailsham Edn., Vol. 17, pp. 669, 670, paras. 1387, 1388; and FOR CASES, see DIGEST, Vol. 28, pp. 274-278, Nos. 1254-1289.]

Cases referred to:

- (1) *Chinchen v. Chinchen*, [1950] W.N. 22.
- (2) *Hawksworth v. Hawksworth* (1871) 6 Ch. App. 539; 40 L.J.Ch. 534; 25 L.T. 115; 35 J.P. 788; 28 Digest 279, 1302.
- (3) *Re Thaini*, [1926] Ch. 676; 95 L.J.Ch. 292; 135 L.T. 99; Digest Supp.
- (4) *Re J. M. Carroll*, [1931] 1 K.B. 317; 100 L.J.K.B. 113; 144 L.T. 383; 95 J.P. 25; Digest Supp.

APPLICATION for extension of time to appeal from an interlocutory order of WYNN-PARRY, J., in chambers, made on Dec. 21, 1949, refusing to grant to the applicants, the paternal grandparents of a boy of six-and-a-half years of age, the custody of the child. The facts and the relevant section of the Guardianship of Infants Act, 1925, appear in the judgment of SIR RAYMOND EVERSLED, M.R.

*O'Sullivan, K.C.*, and *J. C. B. W. Leonard* for the applicants, the paternal grandparents.

*C. A. J. Bonner* for the respondents, the maternal grandparents.

**SIR RAYMOND EVERSLED, M.R. :** This case comes before us by way of appeal from a decision of WYNN-PARRY, J., in chambers on Dec. 21, 1949. A preliminary point has been taken on behalf of the respondents, namely, that the appeal is out of time, the order made being an interlocutory order. That it was such an order seems plain having regard to the decision of this court in *Chinchen v. Chinchen* (1). Counsel for the applicants have, therefore, asked, first, that the time for appealing may be treated as extended so that we may entertain the appeal out of time.

The case relates to the custody of a boy aged six-and-a-half years, and it is to be expected that those who have brought this dispute before the Court of Appeal feel (without a motive which deserves any kind of criticism) the matter to be one of the utmost importance. Since, however, it is in relation to an infant, I think that on general principles and in the public interest the court should be a little slow to entertain an appeal, since the decision in such cases is so very much a matter for the judge's discretion, and one of great responsibility. No judge can claim to exercise ideal wisdom in these matters, but the jurisdiction he has is that which devolves on him from the sovereign as *parens patriae*. Parents would not assert that they were never wrong in any decision they made with regard to their own children, but few parents would desire their decisions to be reviewed by other persons. I mention these matters because, although I propose to deal with this case on the preliminary issue, I desire to make it plain that I do so after having heard at considerable length a discussion on the case, which has satisfied me, first, that the learned judge did not in any respect misdirect himself, and, secondly, and as a consequence, that, if we were to go more fully into the matter, there is nothing which would justify this court in interfering with the exercise by the learned judge of his discretion.

This boy lost both his father and his mother. When he was only about a year old, his father lost his life while serving in the Royal Air Force. Shortly afterwards the mother contracted tuberculosis, and she died three years later. The boy had, on both sides of the family, grandparents who have been most assiduous in their efforts for his welfare, and nothing could be said against their devotion to the interests of the child. The matter has arisen primarily because the parent's marriage was a mixed marriage, the father being a member of the Roman Catholic church and the mother a member of the Protestant church. The boy was baptised into the Roman Catholic church, as is the usual practice in such cases, and the mother assented to his being brought up in the Roman

A Catholic faith. After the father's death and during most of the remaining years of the mother's life, the boy lived with the paternal grandparents, the applicants in this case. Shortly before her death, the mother appears to have expressed the wish that the boy should go to her own parents, and he left the home of the paternal grandparents and went to his maternal grandparents, where he still lives, and where he is being brought up in the Protestant faith according to the principles of the Congregationalist denomination. If ever a problem of difficulty  
B was a learned judge was put before a judge it is a case like this, where, on the one hand, the paternal grandparents are pressing for the child to return to the Catholic church, and, on the other hand, the maternal grandparents claim to retain him where he now is. No wonder the learned judge said that it was a fine balance, but he came to the conclusion that the right order to make  
C was to allow this boy to remain where he was. Although the order makes no express reference to religious upbringing, I think everybody agrees that, so long as he remains where he is, he will not be brought up in the Roman Catholic faith.

D Counsel for the applicants argued that the learned judge misdirected himself, and, therefore, first, we ought to allow this appeal to proceed, and, next, if we did, we should, because of the misdirection, interfere with the exercise of the judge's discretion. Counsel for the applicants put the case in two ways, one more bold than the other. I take the less bold one first. The judge, counsel said, ought to have considered the arrangement between the spouses that the child should be brought up in the Roman Catholic faith, the fact that the child had been baptised into the Roman Catholic church, and, finally, the desire of the father that the child should be brought up in his (the father's) own faith. Counsel  
E said that those things ought to have been considered, and that the learned judge did not adequately weigh them. The learned judge states, according to a note of the judgment:

"The cases recognise that on the question of religion the court has firmly refused to choose between different religions and pronounce on their respective merits."

F Counsel for the applicants said that the judge went wrong there, because he would not consider the question which of two religions ought to be preferred. I am sure the learned judge did not intend any such thing, as appears from the last words "and pronounce on their respective merits." It has been said many times that a temporal court is not able to decide in any case which religion affords the greater benefit to its adherents. That the judge had to consider the question which religion should, so to speak, prevail in the child's life at the moment, I think is obvious from the whole purport of his decision, and, particularly, by the reference to the "fine balance." It also appears from the note of the judgment that the judge said:

G "I must take into consideration the express wish of the mother that the child shall not be brought up in the Roman Catholic faith. She took the active step of sending the child with her sister to her own Congregational church. There is also this circumstance, that the child for two-and-a-half years has been living with his maternal grandparents and has been brought up as one of their family."

H The learned judge said it would be a hard thing to take the child from that home. I am quite satisfied that in stating those matters the learned judge did not exclude from consideration any of the matters which counsel for the applicants has mentioned, and to which I have already referred, but, weighing them all as best he could, the learned judge came to the conclusion that in the interests of the child the right order was that the child should not be disturbed from where he now is. So far, if I am right, for the reasons I have indicated, I cannot think that we should be entitled to interfere with the exercise of that discretion.



I turn to counsel's other point. Historically there is, I think, little doubt that in 1871 a father was treated as having a right, which the law was bound to recognise and enforce (unless he had by misconduct of some kind forfeited the right), to dictate the religion of his child. That this right to dictate was not lost by death appears from *Hawksworth v. Hawksworth* (2). The hardship of the rule, in the view of the judges, is apparent from some observations of WICKENS V.-C., when he said (6 Ch. App. 540):

" . . . to direct that this ward shall be brought up in the Roman Catholic faith will be to create a barrier between a widowed mother and her only child ; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others ; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man ; and lastly, to inflict severe pain on both mother and child. But it is clear that no argument which would recognise any right in the widowed mother to bring up her child in a religion different from the father's can be allowed to weigh with me at all."

MELLISH, L.J., however, said (*ibid.*, 544):

" It certainly, to me, is very desirable that the rule of law which regulates the religion in which children of early years should be educated should be clearly laid down and enforced."

I think there is no doubt that that rule persisted until 1925, though it may be that in the interim there was possibly some change of feeling in regard to it. The social philosophy of the times had somewhat altered, and the result was the passing of the Guardianship of Infants Act, 1925, which provides by s. 1:

" Where in any proceeding before any court . . . the custody or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody [or] upbringing . . . is superior to that of the mother, or the claim of the mother is superior to that of the father."

Counsel for the applicants said that that pronouncement did not affect the pre-existing rule, and, particularly, did not mitigate the rule of law to which MELLISH, L.J., referred in *Hawksworth v. Hawksworth* (2). I cannot agree. It is true that in *Re Thain* (3), where a father who had been away on service sought to regain the custody of his own child (the mother being dead) from persons who had looked after the child during his absence, the question to be considered concerned the right of a father as against the foster parents. In that connection the first part of s. 1 of the Act of 1925 was relevant, namely, that, in deciding a question concerning the custody of a child, the court is to regard the welfare of the infant as the first and paramount consideration. Both LORD HANWORTH, M.R., and SARGANT, L.J., said that those words did not alter the law, but stated what had been the practice in the Chancery Court. That being so, the court considered that the only thing to do in the circumstances, now that the father could provide a home and that it was in the best interests of the child that it should be done, was to say that the child should go to his own parent, notwithstanding the inevitable wrench when the child left the home to which it had become used.

In my judgment, the point with which we are concerned did not arise in *Re Thain* (3), for s. 1 of the Act of 1925 states, first, that the principle of paramount consideration is the welfare of the infant and then goes on to say that the court shall not take into consideration the question whether any common law right of the father prevails over that of the mother or *vice versa*. Counsel for the

applicants said that that only applied when there is a direct issue between father and mother, and in the present case that is not the position, because both father and mother are dead. He asked the court, therefore, to say that, though the second part of the section might take away the application of the older rule when father and mother are living, at any rate when the father is dead that rule comes again into full force and effect. That would seem to me to be a most surprising result, and I think it is ill-founded. For practical purposes this is a case where the two rival religions of father and mother are found to be, on the evidence, in conflict, and the conflict must be solved in the same way as if both parents were alive. Consideration must obviously be given, as counsel for the applicants said, to the fact that both parents at one time agreed on religion, and, pursuant to that agreement, the child was baptised into the Catholic faith.

Changes in religious upbringing are matters not lightly to be regarded. The last of the cases to which counsel for the applicants referred, *Re Carroll* (4), lends no support for the proposition for which he contended. In that case the problem arose whether the mother of an illegitimate child could recover its custody (and bring it up as she wished, and, in particular, in her own religion) from the particular society with which the child had been lodged and where it had been brought up in a different religion. The issue, therefore, was between the mother of an illegitimate child—and for practical purposes she is the only parent that such a child has—on the one hand, and an institution on the other. In that connection SLESSER, L.J., drew attention to the limitation which may fairly be put on the words of the second part of s. 1 of the Act of 1925. The learned lord justice considered historically the position of the father or mother of a child in reference to religion and referred to a number of early cases. The rule had been that a parent—particularly a father where there were two parents,—had in the ordinary way the legal right to require that the child should be brought up in his faith, and that right was recognised in the terms of s. 4 of the Custody of Children Act, 1891. Then the lord justice said ([1931] 1 K.B. 355):

“ This rule is now modified in any proceedings before the court in consequence of the Guardianship of Infants Act, 1925 . . . so that, to-day, as between father and mother, the court may decide on the basis of the welfare of the infant which religious education it shall be given. This statute, however, in my view, has confined itself to questions as between the rights of father and mother which I have already outlined . . . ”.

That brings me back, therefore, to the point: Is s. 1 of the Act of 1925 to be confined strictly to a case when the issue is between father and mother both living, or does it apply where either the father, or both the father and mother, are dead? In my view, it is impossible to put that limitation on the intention of the words used by Parliament. It seems to me, therefore, that in such a case as this there is to-day no warrant for the paramountcy of the father's religion for which counsel for the applicants contended.

For these reasons, and after having given the very anxious thought which any case of this sort demands, I am satisfied that there is here no misdirection by the learned judge, so that, if we were to go further into the matter, it would be impossible for us to say that his discretion should be interfered with. That being so, I think it is in the best interests of all concerned that we deal with this matter on the technical question of the appeal being out of time, and we should not further consider it.

ASQUITH, L.J.: I entirely agree.

JENKINS, L.J.: I also agree.

*Application refused with costs.*

Solicitors: *S. F. Miller, Matthews & Co.*, agents for *Thursfield, Messier & Shirlaw*, Wednesbury (for the applicants); *Miller & Smiths* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

## LAND REALISATION CO., LTD. v. POST OFFICE.

[CHANCERY DIVISION (Romer, J.), April 18, 1950.]

*Compulsory Purchase—Speedy acquisition of land in urgent cases—Authorisation rendered abortive—Validity of second authorisation—No change of circumstances—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), s. 2 (2), (3)—Town and Country Planning Act, 1947 (c. 51), s. 37 (2).*

The Acquisition of Land (Authorisation Procedure) Act, 1946, s. 2, provides: “(2) Where . . . the Minister . . . is satisfied that it is expedient that he should purchase any land under any enactment mentioned in para. (b) of sub-s. (1) of the foregoing section . . . and the Minister . . . [is] satisfied that it is urgently necessary in the public interest that the Minister . . . should be enabled to obtain possession of the land without delay, the Minister . . . may, in lieu of being authorised to purchase the land in accordance with the provisions of the foregoing section . . . be so authorised . . . by an authorisation in writing given by the Minister . . . under this sub-section . . . (3) At any time not earlier than seven days nor later than three months after the giving of an authorisation under this section the acquiring authority may enter on, and take possession of, the land to which the authorisation relates notwithstanding that the purchase of the land has not been completed.”

By the Town and Country Planning Act, 1947, s. 37 (2): “If . . . (b) the Minister [of Town and Country Planning] and the Postmaster-General are satisfied that the acquisition of any . . . land is necessary for the purpose of the Post Office, the Minister of Works or the Postmaster-General . . . may be authorised to purchase that land compulsorily . . .” By s. 37 (4): “The Acquisition of Land (Authorisation Procedure) Act, 1946, shall apply to the compulsory acquisition of land under this section . . .”

In May 1947, the Post Office decided to acquire certain land belonging to the plaintiffs for the purposes of a telephone exchange. On June 22, 1948, having been unable to arrange to purchase the land on a voluntary basis, it gave the plaintiffs notice of its intention to give an authorisation under s. 2 (2). On Sept. 28, 1948, after considering representations made by the plaintiffs, the Minister of Works, on behalf of the Post Office in accordance with the Town and Country Planning Act, 1947, s. 37, signed the authorisation. The Post Office did not, however, enter into possession within three months of the authorisation as required by s. 2 (3) of the Act of 1946, but it entered into possession on Jan. 3, 1949, and remained until May 31, 1949. It then relinquished possession, having accepted the plaintiffs' representation that it was a trespasser. On July 13, 1949, the Post Office served a further notice on the plaintiffs in respect of the land in question in terms similar to those of the notice of June 22, 1948, and thereafter the procedure under s. 2 (2) was repeated until, on Aug. 27, 1949, an authorisation identical *mutatis mutandis* with that of Sept. 28, 1948, was made, and two days later it was served on the plaintiffs. On Oct. 12, 1949, the Post Office re-entered into possession. The plaintiffs claimed, *inter alia*, a declaration that the authorisation dated Aug. 27, 1949, was invalid.

HELD: providing that the “Minister” within s. 2 was satisfied that the purchase was expedient and that the proposed authorisation was urgently necessary within the meaning of the sub-section, there was nothing in s. 2 (3) to prevent his going through the procedure twice in relation to the same land, although there had been no change of circumstances, and, therefore, the authorisation was valid.

[FOR THE ACQUISITION OF LAND (AUTHORISATION PROCEDURE) ACT, 1946, s. 2, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 1067; 1068.]



ACTION by the plaintiffs, the Land Realisation Co., Ltd., against the defendant, the Post Office, for a declaration that an authorisation made by it on Aug. 27, 1949, under the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 2 (2), was invalid; for possession of the land affected; and for mesne profits or damages in respect of its wrongful occupation. The plaintiffs further claimed damages in respect of the wrongful entry of the defendant on their land, and its depositing chattels and executing works thereon.

*Russell, K.C.*, and *Victor Coen* for the plaintiffs.

*Ungoed-Thomas, K.C.*, and *Newsom* for the defendant.

**ROMER, J. :** This is an action by a company called Land Realisation Co., Ltd., and they are suing the Post Office for certain relief arising out of the fact that the Post Office, in pursuance of certain orders the validity of which the plaintiffs impeach, entered into possession of land which the plaintiffs own at Alfriston, in Sussex. The whole trouble has arisen from the fact that the defendant sought to bring into operation certain powers which, if exercised by it, would result in its becoming entitled to enter into possession of the land, but those powers involve a time limit of three months within which possession must be taken. Although the necessary machinery was brought into operation by the defendant for paving the way to its compulsory acquisition of this land, it overlooked the necessity for entering into possession within three months, and, consequently, as is freely admitted, became a trespasser for a short time. That is the subject-matter of a claim for damages for trespass, and will be referred to chambers for inquiry. The substantial complaint is that the defendant, having deliberately brought this machinery into operation once, proceeded to bring it into operation all over again, and the question is whether the defendant, whose *bona fides* are not and cannot be assailed, was entitled to act as it did.

To make the position plain it is necessary to refer to one or two provisions of the Acquisition of Land (Authorisation Procedure) Act, 1946, as extended by the Town and Country Planning Act, 1947. Section 1 of the Act of 1946 relates to what one might describe as ordinary compulsory purchase, but s. 2 of the Act deals with temporary powers for speedy acquisition of land in urgent cases, as the marginal note indicates, and it is under that section that the defendant acted. Section 2 (1) refers to a period of five years, beginning with the commencement of the Act, and sub-s. (2) provides:

“Where during the period aforesaid the Minister of Transport is satisfied that it is expedient that he should purchase any land under any enactment mentioned in para. (b) of sub-s. (1) of the foregoing section, or the Board of Trade are satisfied that it is expedient that they should purchase any land under the Distribution of Industry Act, 1945, and the Minister or Board are satisfied that it is urgently necessary in the public interest that the Minister or Board should be enabled to obtain possession of the land without delay, the Minister or Board may, in lieu of being authorised to purchase the land in accordance with the provisions of the foregoing section or of the said Act of 1945, be so authorised, subject to the provisions of sched. III to this Act, by an authorisation in writing given by the Minister or Board under this sub-section.”

Section 2 further provides:

“(3) At any time not earlier than seven days nor later than three months after the giving of an authorisation under this section the acquiring authority may enter on, and take possession of, the land to which the authorisation relates notwithstanding that the purchase of the land has not been completed . . . (5) A power to enter on and take possession of land conferred by an authorisation given under this section may, save as provided in sched.

III to this Act, be exercised without notice to or the consent of any person and without compliance with ss. 84 to 90 of the Lands Clauses Consolidation Act, 1845, but subject to payment of the like compensation . . ."

Schedule III to the Act provides:

"2. (1) Before an authorisation is given under s. 2 of this Act the acquiring authority must—(a) have published in one or more local newspapers circulating in the locality in which any of the land to which the authorisation relates is situated a notice stating that the confirming authority is about to take into consideration the giving of an authorisation under s. 2 of this Act with respect to land described in the notice, being land consisting of or comprised in the land to which the authorisation relates, and that representations which any person desires to make must be made to the confirming authority in writing within fourteen days from the date of the publication of the notice; and (b) have served on every owner and occupier of any of the land to which the authorisation relates a notice in writing stating that the confirming authority is about to take into consideration the giving of an authorisation as aforesaid, and that representations which any of the persons required to be served desires to make must be made to the confirming authority in writing within fourteen days from the date of the service of the notice on him . . . 3. Before giving an authorisation under s. 2 of this Act the confirming authority shall consider any representations duly made to the authority; and as soon as may be after the authorisation has been given or the decision has been taken to refuse it the confirming authority shall send to any person who has made representations with respect thereto specifying an address for the purposes of this paragraph, notification thereof in a registered letter by post to the address specified."

In accordance with the Town and Country Planning Act, 1947, s. 37, the Post Office was made a confirming authority for the purposes of s. 2 of this Act.

In May, 1947, the Post Office was minded to acquire this land at Alfriston for the purposes of a telephone exchange, and negotiations were started with the plaintiffs with a view to acquiring the property. Certain offers were made, but nothing came of those approaches by way of a voluntary agreement, and eventually, on June 22, 1948, a representative of the Ministry of Works wrote to the secretary of the plaintiff company saying that he was directed by the Minister to enclose a notice on behalf of the Post Office in relation to the proposed acquisition of land at Alfriston in accordance with the provisions of the Town and Country Planning Act, 1947. The enclosed notice was to this effect:

"Take notice that the Postmaster-General is about to take into consideration the giving of an authorisation under s. 2 (2) of the Acquisition of Land (Authorisation Procedure) Act, 1946, as amended by s. 37 (4) of the Town and Country Planning Act, 1947, to purchase compulsorily the land which is described in the schedule hereto being land the acquisition of which, pursuant to s. 37 (2) of the Town and Country Planning Act, 1947, the Minister of Town and Country Planning and the Postmaster-General are satisfied is necessary for the purposes of the Post Office. The said land is delineated and shown coloured pink on a plan marked TCP/PO/3 and signed on behalf of the Postmaster-General and deposited at the offices of the Hailsham Rural District Council, Cortlandt, Hailsham, Sussex, where it may be seen at all reasonable hours. Any representations regarding the proposed authorisation must be made in writing and addressed to the Ministry of Works, Director of Lands and Accommodation, Romney House, Marsham Street, London, within fourteen days from the date of service of this notice on you."

Certain representations were sent in on behalf of the plaintiffs, but, notwithstanding the views which they advanced, on Sept. 28, 1948, the Minister of Works signed an authorisation, and that authorisation, after referring to the relevant statutory provisions, recites that:

A "The Postmaster-General is satisfied that it is expedient that he should purchase the lands described in the schedule to this authorisation (to which lands the provisions of para. 1 of sched. III to the Act of 1946 do not apply) under s. 37 of the Act of 1947 (being lands which the Minister of Town and Country Planning and the Postmaster-General are satisfied that the acquisition thereof is necessary for the purposes of the Post Office) and that it is urgently necessary in the public interest that he should be enabled to obtain possession of the said lands without delay. And whereas the provisions of para. 2 of sched. III to the Act of 1946 have been complied with. Now, therefore, in pursuance of the powers conferred on him by s. 37 of the Act of 1947 and s. 2 of the Act of 1946, the Postmaster-General is hereby authorised to purchase compulsorily for the purposes of the Post Office the lands described in the schedule to this authorisation."

B Those lands are in fact the lands in Alfriston to which I have referred.  
C That authorisation was sent by the Ministry of Works enclosed with a letter dated Oct. 18, and addressed to the solicitors for the plaintiffs, and in that covering letter the writer, on behalf of the Ministry, said:

"I am directed to inform you that it has been decided to proceed with the acquisition of this land and the necessary authorisation for compulsory purchase has now been made."

D Having regard to the requirements of s. 2 (3) of the Act of 1946, it was incumbent on the defendant to enter into possession of the land not later than three months after the date of the authorisation, namely, by Dec. 28, 1948, but he did not do so. After certain further representations had been made by the plaintiffs and certain correspondence had passed, to which I need not refer, the Postmaster-General intimated that he was proposing to take possession of this land on Jan. 3, 1949, and that he proceeded to do. It was then drawn to his attention that he was out of time, that he had no right to go on this land by virtue of the authorisation of Sept. 28, 1948, and that he must be regarded as a trespasser. At first he was disposed to dispute that, but eventually he accepted it, and he left the property on May 31, 1949. He then proceeded to put this machinery in motion all over again. On July 13, 1949, a notice was served on the plaintiffs similar to that which was dated June 22, 1948, intimating that the Postmaster-General was taking into consideration whether he should grant the necessary authorisation, and so on, and that was followed by renewed objections by the plaintiffs, and certain correspondence followed on those representations. On Aug. 27, 1949, an authorisation, in precisely the same terms as that of Sept. 28, 1948, and containing the same recitals, was served on the plaintiffs, and on Oct. 12, 1949, the defendant re-entered into possession. On Oct. 27, 1949, the plaintiffs issued their writ, and they claim by their statement of claim a declaration that the authorisation made by the Postmaster-General on Aug. 27, 1949, was invalid, and that the plaintiffs were entitled to possession, mesne profits, or, in the alternative, damages, in respect of wrongful occupation by the defendant from Jan. 3 to May 31, 1949, and from Oct. 12, 1949, until delivery of possession to the plaintiffs, and damages for wrongfully entering the plaintiffs' land and depositing chattels and executing works thereon.

H The Postmaster-General is not concerned to dispute that his original admission was unprotected so far as it rested for its validity on the authorisation of Sept. 28, 1948, and he says that he is prepared to pay damages in respect of any damage that may have resulted to the plaintiffs by reason of his having entered into



possession without proper authority. With regard to the authorisation of August, 1949, he says that that was perfectly in order, and he relies on it as establishing a title to possession. The matter came before me last term on the application of the defendant to have the whole case disposed of on a point of law, and attempts were made on both sides to formulate precisely what question of law would determine the whole of the litigation between the parties, apart from the question of damages for trespass. No satisfactory point of law emerged, but the plaintiffs did amend their statement of claim by pleading:

"The defendant did not enter on or take possession of the plaintiffs' said land in accordance with s. 2 (3) of the Acquisition of Land (Authorisation Procedure) Act, 1946, or otherwise until more than three months after the said authorisation dated Sept. 28, 1948. Neither on July 13, 1949 (the date of the said purported second notice) nor on Aug. 27, 1949 (the date of the said purported second authorisation), had there been since June 22, 1948 (the date of the said first notice) or since Sept. 28, 1948 (the date of the said first authorisation), any change in the circumstances relevant to the decision of the Postmaster-General to give either of such notices or either of such authorisations."

To that the defendant put in an amended defence as follows:

"The defendant makes no admission with regard to the second sentence of the said paragraph and will object that the allegations in the said sentence are irrelevant and that under s. 2 (2) of the Acquisition of Land (Authorisation Procedure) Act, 1946, as amended by the Town and Country Planning Act, 1947, it is within the exclusive discretion of the Postmaster-General, into whose exercise of such discretion this Honourable Court will not inquire, to determine whether there is any such circumstance or absence of circumstance as alleged in the said second sentence and whether it is relevant to the Postmaster-General's decision referred to in the said second sentence."

Before me, no evidence has been called. The question of damages is to be referred to chambers because, as I understand it, the gentleman who might have given evidence on that matter—the plaintiffs' solicitor—is unfortunately unwell and unable to attend.

Accordingly, the only matter which has been discussed before me is a pure question of law arising on the construction of the legislation to which I have referred, and, more particularly, to s. 2 (2) and (3) of the Act of 1946. Counsel for the plaintiffs pointed out that in the ordinary type—if one may so describe it—of compulsory purchase, there are considerable safeguards, which have become stereotyped, of the interests of the owner of the land affected. In particular, there is, in general, either a public inquiry or a special hearing of objectors, and that is followed by a report which is considered by the Minister who, with all the assistance thus offered to him, arrives at a decision. Counsel says that that is the ordinary form of procedure where a government department desires to acquire compulsorily the property of one of His Majesty's subjects. The other form of compulsory purchase is that provided by s. 2 of this Act of 1946. It is a method of procedure which does not give to the persons affected the safeguards which the ordinary procedure affords, because there is no public inquiry and the only opportunity which a person affected has to make known his views is to submit written representations which can be taken into account, but which may not have the same force as oral representations. Counsel says that this form of acquisition is of such shape and character, as appears from the fact that it was only to last for a period of five years and was confined in its intendment to the acquisition of land in urgent cases, that an exercise of powers under so special an authority should be jealously scrutinised by the court. Counsel pointed out that one of the principal safeguards in the section, which

introduces this special power and confers it, is that which requires entry into possession not later than three months after the giving of an authorisation, and he argues that the object of that was, presumably, to protect the owner of property who would know where he stood in the matter and would not be left wondering indefinitely whether his land was to be taken or not. Applying those considerations to the facts of the present case, he said that the Post Office was seeking, in effect, to extend the three months limit which it had by inadvertence overstepped by setting into motion this machinery for the second time. Counsel's arguments went rather further than that in the first instance, because his first proposition, although he said it was not necessary in this case to show it, was that the Post Office cannot use this procedure twice. That view imposes a limitation on the apparent powers of the Minister which I am unable to accept, as it would result, if ever a mistake were made, as one was obviously made in the present case, in immunising thereafter for ever the land which the Minister had desired to obtain. I see no warrant for accepting such a qualification as that. Secondly, it was said that the Minister cannot use this procedure twice unless the circumstances have changed; and, finally, and this is the point which is nearest home, that there is no power in the Minister in substance to extend the period of three months, prescribed by s. 2 (3). It was said that here the Minister was obviously seeking how he could extricate himself from the difficulty which had arisen from the fact that possession was not taken, as it should have been taken, within three months of the first authorisation, and that to rectify the matter he had brought into play this machinery all over again in such a way as to reduce the whole position to something approximating to a farce. From that way of looking at it, counsel for the plaintiffs developed his argument by saying that, if the defendant was right, it could sterilise land for an indefinite period by a series of repeated authorisations so that land-owners might find their land sterilised indefinitely without compensation and not knowing whether they could or could not rightly regard themselves as able to develop the property or to seek to find a purchaser if they wanted to sell. The argument for the plaintiffs is that that is a thing which, on a fair construction of s. 2 of this Act, is not open to the defendant, or to any government department who is a confirming authority, to do. Certain illustrations were then presented to me as to what a government department might do by way of trying to get the best of both worlds, if one may so describe it, by serving authorisations in regard to two plots of land and renewing them as and when their time ran out, and in the meantime deciding which one they really wanted to have, and so on. It is legitimate and, I think, helpful, to make criticisms of that sort, but one has to bear in mind that when the legislature confers powers on a Minister it is conferring powers on a person who, presumably, will use those powers, not only *bona fide*, but in a responsible spirit and in the true interests of the public and furtherance of the objects for the attainment of which the powers were conferred. I approach this legislation mindful of what might happen if I accept the defendant's argument, though confessing, as I am bound to confess, that I thought that many of the possibilities which were mentioned are extremely unlikely to arise in practice.

The plaintiffs do not contend that they can question the fact that the Postmaster-General was in fact "satisfied," within the meaning of s. 2 (2), and it is well settled that where a statutory provision empowers a minister to do something which he is satisfied is necessary having regard to a certain state of affairs, a statement by him that he is so satisfied will be accepted in these courts. Consequently, I approach the matter on the basis that it cannot be disputed that on Aug. 27, 1949, the Postmaster-General was satisfied in the sense indicated. Unless I can find something which cuts down the *prima facie* and ordinary meaning expressed in the perfectly simple language of s. 2 (2), I am bound to hold that the conditions precedent for the issue of this authorisation

existed. I am invited by the plaintiffs to say that, although it is not necessary, nor, indeed, may it be practicable, to read into sub-s. (1) any express or necessarily implicit language of qualification, nevertheless I cannot accept the argument of the defendant in this case without, in effect, ignoring, the spirit, if not the letter, of sub-s. (3), because, as I have already mentioned, it was put to me that, if that were right, then the government department could extend indefinitely the time limit imposed.

I do not think that there is anything like enough in sub-s. (3) or the requirements of sub-s. (3) to impose any such limitation as is suggested on the powers conferred by sub-s. (2). As I see it, I have only to be satisfied that at the date when the authorisation emanated from the Postmaster-General he was satisfied as to the things regarding which he had to be satisfied before that authorisation could issue. Once it has been established to my satisfaction that those conditions precedent have been fulfilled, it appears to me that the matter is at an end, and none the less so because the effect of the language may be to extend the time in the sense that the Minister, although he has not entirely fallen in line with the time limit imposed by sub-s. (3), is getting his way by having another opportunity of putting himself in order. It is really not extending the time limit. It is starting the machinery in motion again. Representations in writing can be sent in again, and must be considered again. When the second authorisation issues the Minister must be just as satisfied about the issues as he was on the first occasion. Seeing that on the first occasion the Post Office failed to carry into effective operation the implementation of these powers in relation to this land, and that it was prompted to make a second attempt, conforming again with the requirements of the Minister's being satisfied, it seems to me that I should be introducing a limitation on the exercise of his powers which is not only foreign to the language which is used, but which also would appear to be foreign to the conception related to this kind of matter which arises under the Interpretation Act, 1889, s. 32 (1).

I have very carefully considered all the arguments which have been addressed to me, and I have done my best to deal with them, but I might sum the whole thing up by saying that I do not think any real point of construction arises here. The language seems to be reasonably plain, and, provided always that the Minister does what he is required to do before the authorisation can issue, the fact that he has tried to acquire the land already is no obstacle to his trying again, even though he tries immediately after the failure of his first endeavour. Accordingly, in my judgment, the second authorisation was valid, and the plaintiffs are not entitled to any relief on the footing that it is void. There will be no declaration that the second authorisation was valid as there is no counterclaim asking for such a declaration. The plaintiffs succeed only to the extent of having an inquiry as to the damages which they sustained by reason of the wrongful occupation of their land by the defendant from Jan. 3, 1949 to May 31, 1949, and for wrongfully entering the land.

*Order accordingly. Costs down to the delivery of the defence to be the plaintiffs; costs thereafter to be the defendant's. No order as to costs of the application to set down a point of law. Costs of inquiry as to damages reserved.*

Solicitors: *Hyman Isaacs, Lewis & Mills*, agents for *Burt Brill & Edwards*, Brighton (for the plaintiffs); *Sir Clement Hallam* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]



# R. v. BERMONDSEY BOROUGH COUNCIL. *Ex parte* LEONARD AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, JJ.), April 24, 1950.]

*Metropolis—Street trading—Application to designate street—Earlier designating resolution rescinded—No right to apply anew—London County Council (General Powers) Act, 1947 (c. xlv), s. 16.*

By the London County Council (General Powers) Act, 1947, s. 16 (4): "If it is desired by any persons (not being less than ten in number) residing or trading in a borough that any street in the borough in respect of which a designating resolution has not been passed should become a designated street those persons may at any time after . . . Nov. 30 [1947] make application to the borough council for the passing by the borough council of a designating resolution in respect of that street."

On Nov. 27, 1947, the respondent borough council designated S. road as one of the streets in which street trading might take place. In April, 1949, that resolution was rescinded. On Oct. 17, 1949, the applicants, who were street traders, asked the council to consider their application that the street might again be designated for street trading. The council refused to consider the application on the ground that, as a designating resolution had once been passed relating to the street, no further application could be made. On a motion for an order of *mandamus* to direct the council to consider the application,

**HELD:** where a designating resolution had been passed by a borough council and subsequently rescinded there was no right under s. 16 (4) of the London County Council (General Powers) Act, 1947, to make an application to re-designate the street in question as a trading street.

[AS TO STREET TRADING IN THE METROPOLIS, see HALSBURY, Hailsham Edn., 1950 Supp., Tit. Street and Aerial Traffic; and FOR CASES, see DIGEST, 2nd Supp.]

MOTION for an order of *mandamus* directing Bermondsey Borough Council to determine an application by street traders to designate a street for street trading purposes. The applicants contended that they had the right to make such an application under s. 16 (4) of the London County Council (General Powers) Act, 1947. The facts appear in the judgment of LORD GODDARD, C.J.

G. G. Baker for the applicants.

Vernon Gattie for the council.

J. P. Ashworth for the Secretary of State for Home Affairs.

**LORD GODDARD, C.J. :** In this case counsel for the applicants moves for an order of *mandamus* addressed to Bermondsey Borough Council and also to the Home Secretary, commanding the council to take into account and consider representations made by certain street traders and to consider whether or not they will designate Southwark Park Road as a designated street within the meaning of s. 16 (1) of the London County Council (General Powers) Act, 1947.

For many years street trading has been carried on from stalls in the Southwark Park Road. By s. 16 (1) of the Act of 1947 it is provided:

"A borough council may from time to time by resolution—(a) designate any street within the borough as a street in respect of which they will entertain applications for the grant of street trading licences; and (b) specify in relation to any designated street within the borough any class or classes of articles or things which or other than which they will not prescribe in any street trading licences granted by them in respect of that street; and may

from time to time by subsequent resolution rescind or vary any such resolution . . .”

with a proviso that they are to consult the commissioner of police. By sub-s. (2) (a):

“A borough council shall give public notice of the passing by them of a resolution under the foregoing sub-section by posting a notice in the street to which the resolution relates and in such other manner as they think desirable.”

So that will apply to resolutions designating or resolutions rescinding former resolutions. Sub-section (3) provides:

“A borough council shall as soon as practicable after the passing of this Act take into consideration—(a) the streets prescribed by the street trading licences granted by them and then in force; (b) the number of such licences for the renewal of which applications are likely to be made to them; (c) all other circumstances of the street trading within the borough; and (d) any representations which may be made to them with respect to the matters aforesaid by any recognised organisation representative of street traders within the borough; and shall not later than Nov. 30, 1947, pass such designating resolutions as appear to them to be necessary for the time being for the purposes of this Part of this Act.”

It is clear that Parliament intended by that sub-section that the designation of the streets in which traders would be allowed to trade should be settled at the earliest possible moment. There is no question that before Nov. 30, 1947, the council had designated Southwark Park Road as one of the streets in which street trading might take place. Sub-section (4) provides:

“If it is desired by any persons (not being less than ten in number) residing or trading in a borough that any street in the borough in respect of which a designating resolution has not been passed should become a designated street those persons may at any time after the said Nov. 30, make application to the borough council for the passing by the borough council of a designating resolution in respect of that street.”

It is in respect of the right given by that sub-section that this order of *mandamus* is being sought, because there is no question that the council have said: “We are not going to consider this because Southwark Park Road is a street in respect of which a designating resolution at one time has been passed.”

If the matter stood there, it might be said that, if a designating resolution has been passed and then rescinded, the street must be regarded *de novo* after the rescission. We look, however, at s. 16 (8) which says:

“Any person aggrieved by a resolution of a borough council passed under para. (b) of sub-s. (1) of this section or by a resolution rescinding or varying any such resolution or any designating resolution may within twenty-eight days of the passing of the resolution by which he is aggrieved appeal to the Secretary of State.”

That shows that, if a street which has been designated has that character taken away by a resolution rescinding the resolution by which it was designated, the persons aggrieved may appeal to the Secretary of State. Parliament has limited the time in which the decision of the council can be appealed to the Secretary of State, and it would seem odd if persons who do not appeal within the prescribed period could begin *de novo* after that time has elapsed. I think that the real answer to the argument of counsel for the applicants is that the words in sub-s. (4) are “in respect of which a designating resolution has not been passed,” and are not “in respect of which a designating resolution is not in force.” If it was intended that at any time persons could apply for the designation, or, if I may use the expression, the re-designation, of a street,

it seems to me that the appropriate words would be: "If it is desired by any persons that any street in the borough in respect of which a designating resolution is not in force should become a designated street . . ." or simply "If it is desired by any persons that any street in the borough should become a designated street . . .". The words of the sub-section are "in respect of which a designating resolution has not been passed." In respect of the street in question here a resolution has been passed, and it has been rescinded. When it was rescinded a right of appeal was given, and of that right the parties did not avail themselves, it may be by misunderstanding or oversight. There must be some finality in this matter, and, taking the section as a whole, I think it was intended that if the council rescind a resolution designating a street, the remedy is by appeal to the Secretary of State brought within the time permitted by s. 16 (8). For these reasons I am of opinion that this application fails.

**MORRIS, J. :** I have come to the same conclusion. In my judgment, the court has only to consider the meaning of the words to be found in s. 16 (4), "any street in the borough in respect of which a designating resolution has not been passed." It seems to me that there is great force in what counsel for the applicants has said—that, on the facts that have given rise to the present application, there were good reasons which actuated the traders when they refrained from appealing within twenty-eight days of the rescinding resolution. I think there is also great force in the submission that it might well be that future residents and future traders in the area would desire to apply in respect of Southwark Park Road, and they would never be people who had had the opportunity to appeal under sub-s. (8). But when those contentions are analysed, they amount to no more than an argument that different words might have been employed in the section from those which were employed. It seems to me, therefore, that the sole function of the court is to decide the construction of the actual words used. Those are different words from such words as "is not in force," or "is not for the time being in force." Is Southwark Park Road, or is it not, a street in respect of which a designating resolution has not been passed? A designating resolution was originally passed in respect of Southwark Park Road, and, therefore, the conclusion at which I arrive is that the application fails.

**FINNEMORE, J. :** I have come to the same conclusion, perhaps a little regretfully, because, in one sense, the construction we feel bound to put on the provisions in this Act does limit somewhat the rights of subjects, but the matter seems to me to be clear.

A borough council is given power under s. 16 to designate certain streets for the purposes of street trading. It is also given power to rescind or vary a resolution to that effect. If a street is not designated, it is open under sub-s. (4) to persons affected to apply to the council that that street should be designated, and, if the council refuses, they then have the right to appeal to the Secretary of State. That applies to the streets described in sub-s. (4) as streets in respect of which a designating resolution has not been passed. I think that must mean, has never been passed. There is a further procedure, because the council, if it does designate a street, has power to rescind or vary that resolution, and then persons who are aggrieved by that rescission or variation have rights of appeal similar to those of persons who apply in respect of a street which is not designated. The position, therefore, seems to be that if a street has never been designated, persons affected may apply to the council to have it designated. On refusal, they must appeal within twenty-eight days to the Secretary of State. People who are concerned about the rescinding of a resolution which has designated a street have also a right of appeal within twenty-eight days to the Secretary of State. If people in the second class omit to make their appeal within twenty-eight days, I do not think they are entitled to come under



sub-s. (4) and say that because the resolution designating the street has been rescinded it is a street in respect of which a designating resolution has not been passed. I think they are confined to their rights of appeal, and once the twenty-eight days have passed, they cannot take any other step to deal with the position arising out of the rescinding of the resolution. Accordingly, I agree that this application fails.

*Application dismissed with costs.*

Solicitors: *Rye and Eyre* (for the applicants); *S. E. Freeman*, town clerk, Bermondsey (for the borough council); *Treasury Solicitor* for the Secretary of State for Home Affairs.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

EDWARDS v. NEWLAND (E. BURCHETT, LTD., Third Parties).

[COURT OF APPEAL (Tucker, Somervell and Denning, L.JJ.), April 21, 24, 1950.]

*Bailment—Personal contract—Personal skill and care—Storage of furniture for reward—Damage to premises by bombing—Loss of goods—Reasonable care—Burden of proof.*

In 1939 the defendant agreed to store the plaintiff's furniture for reward, but, instead of storing it himself, he arranged, without the plaintiff's knowledge, for its storage by the third parties. In October, 1940, the third parties' premises were severely damaged by a bomb. They immediately notified the defendant and advised him, by a letter dated Oct. 21, 1940, to remove his goods as soon as possible as there was danger of their being damaged. The defendant wrote to the plaintiff with similar advice, but his letter suggested that it was his own premises and not those of third parties that had been bombed. The plaintiff attempted to remove his furniture, but was prevented from doing so by the defendant as his account with the defendant for the storage of the goods had not been paid in full. The third parties took steps to render the premises secure, but there was a period during which, through no fault of the third parties, thefts were possible. In 1945, when the plaintiff required the re-delivery of his furniture from the defendant, some goods were missing. In an action by the plaintiff claiming damages from the defendant for the loss of the goods, the defendant denied liability, but joined the third parties, against whom he claimed the amount of any damages for which he might be held liable to the plaintiff.

**HELD:** (i) a contract to store is a contract of bailment under which the bailor transfers possession to the bailee, and the bailee undertakes to take possession of the goods and exercise reasonable care in looking after them; he can only deal with them in accordance with the authority, express or implied, conferred on him by the bailor; and, therefore, a person who has undertaken to be a bailee for storage, and who never, in fact, acts as such a bailee, but gets someone else to take possession of the goods, is in breach of his contract *ab initio*.

*Per* TUCKER, L.J.: if in any case there is authority, express or implied, on the bailee to part with the possession of the goods, the contract ceases to be one purely of bailment. It becomes a complex contract under which the defendant may be under an obligation to the bailor so long as he has custody of the goods and has other obligations placed on him if and when,

in accordance with the authority conferred by the bailor, he parts with the possession of the goods.

(ii) in a contract for the storage of furniture, the personal care of the bailee for storage was of the essence of the contract, and, therefore, as the defendant did not look after the goods himself, but gave possession of them to third parties, he was in breach of his contract *ab initio*, and was liable to the plaintiff in damages for the loss of the goods.

(iii) the third parties were not relieved from their obligations to the defendant by their letter of Oct. 21, 1940, and the onus was on them to show that they had taken all proper measures for the protection of the goods after the premises were bombed and that the goods disappeared without any failure on their part to take reasonable care; as they had given a sufficient explanation of the circumstances in which the goods might have disappeared without any breach of their obligations as bailees, the defendant was not entitled to damages against them.

[AS TO PERSONAL CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, p. 187, para. 266; and FOR CASES, see DIGEST, Vol. 12, pp. 588-592, Nos. 4906-4929.]

AS TO OBLIGATIONS OF A BAILEE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 748-752, paras. 1232-1236; and FOR CASES, see DIGEST, Vol. 3, pp. 72-75, Nos. 133-148.]

Cases referred to:

- (1) *British Waggon Co. v. Lea & Co.*, (1880), 5 Q.B.D. 149; 49 L.J.Q.B. 321; 42 L.T. 437; 44 J.P. 440; 12 Digest 589, 4911.
- (2) *Robson v. Drummond*, (1831), 2 B. & Ad. 303; 9 L.J.O.S.K.B. 187; 109 E.R. 1156; 12 Digest 589, 4909.
- (3) *Tolhurst v. Associated Portland Cement Manufacturers* (1900), Ltd., *Tolhurst v. Associated Portland Cement Manufacturers* (1900) & *Imperial Portland Cement Co.*, [1903] A.C. 414; 72 L.J.K.B. 834; 89 L.T. 196; 12 Digest 588, 4907.
- (4) *Davies v. Collins*, [1945] 1 All E.R. 247; 114 L.J.K.B. 199; 172 L.T. 155; 2nd Digest Supp.
- (5) *Brabant & Co. v. King*, [1895] A.C. 632; 64 L.J.P.C. 161; 72 L.T. 785; 3 Digest 73, 137.
- (6) *Coldman v. Hill*, [1919] 1 K.B. 443; 88 L.J.K.B. 491; 120 L.T. 412; Digest Supp.
- (7) *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696; [1937] 1 K.B. 534; 106 L.J.K.B. 437; 156 L.T. 4; Digest Supp.
- (8) *Ballard v. North British Ry. Co.*, 1923 S.C. 43; 36 Digest 88, 581 *vix*.
- (9) *Morison, Pollexfen & Blair v. Walton*, (1909), cited [1915] 1 K.B. at p. 90; 3 Digest 74, 143.
- (10) *Lilley v. Doubleday*, (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest 77, 163.

APPEAL by the defendant from an order of HUMPHREYS, J., dated Jan. 17, 1950, in an action claiming damages for the loss of certain furniture which the plaintiff had delivered to the defendant for storage. The defendant denied liability on the ground (*inter alia*) that he had not agreed to store the furniture himself, but had merely agreed to arrange for its storage, and he cited third parties, to whom he had given possession of the furniture for storage and against whom he claimed any damages for which he might be held liable to the plaintiff. HUMPHREYS, J., found that the defendant had undertaken to store the goods and held him liable in damages to the plaintiff. The learned judge dismissed the defendant's claim against the third parties on the ground that the loss occurred without any failure on their part to take reasonable care. The facts appear in the judgment of SOMERVELL, L.J.

*Eric Sachs, K.C.*, and *Glazebrook* for the defendant.

*A. H. Ormerod* for the plaintiff.

*Rees-Davies* for the third parties.

**TUCKER, L.J.:** I will ask **SOMERVELL, L.J.**, to deliver the first judgment.

**SOMERVELL, L.J.:** This is an appeal by the defendant from a decision of **HUMPHREYS, J.** Third parties are cited, and **HUMPHREYS, J.**, found the defendant liable to the plaintiff for a certain sum, and found for the third parties in the proceedings as between the defendant and the third parties. The claim set out in the statement of claim alleges:

"In or about May, 1939, the defendant agreed with the plaintiff to store for him for reward the furniture and effects described in an inventory dated Nov. 10, 1944, and to deliver the same to the plaintiff when required."

It then goes on to allege that in December, 1945, when the plaintiff required re-delivery of the goods, certain of the goods which it was alleged had been delivered in 1939 were not re-delivered. Particulars were given, and the value as set out in the particulars amounted to some £320 odd pounds.

The first defence was that the defendant did not agree to store the plaintiff's goods, but agreed with the plaintiff's wife, as the plaintiff's agent, to arrange to store certain goods, and that the defendant made a contract on the plaintiff's behalf with *E. Burchett, Ltd.*, the third parties, that they should store the goods. It is stated in para. 2 of the defence:

"In the said contract the defendant acted as agent for the plaintiff and not otherwise."

On the point whether the defendant contracted as agent for the plaintiff there was a conflict of evidence, and on that point the defendant failed. [His LORDSHIP dealt with the evidence on the point and cited a passage from the judgment of **HUMPHREYS, J.**, in which the learned judge set out the evidence of the plaintiff in the matter. His LORDSHIP continued:] In a later passage in his judgment the learned judge dealt with a letter (to which I shall refer later) and said:

"I am quite satisfied that the plaintiff is right in saying that he had not the faintest idea that the goods had been stored with [the third parties]. He thought they had been stored with [the defendant], with whom he had a contract to that effect."

Those findings were, I think, accepted by counsel for the defendant, and, in any case, it is clear to me that they cannot be disturbed in this court.

The main issue of fact below was: Had the plaintiff proved that all or any of the goods set out in the particulars were deposited in 1939? There was a great deal of evidence about that, and the learned judge found that the plaintiff failed as to some of the goods for which he was claiming and succeeded as to others. The sum claimed was £321. Judgment was given for £84, and that is not challenged here.

With regard to the claim as between the plaintiff and the defendant the learned judge found that the defendant had undertaken to store the goods, and, not having himself stored the goods, he had no defence to the claim. With regard to that the learned judge said:

"The defendant's answer to this claim is: 'I did nothing. I undertook to look after your goods and what I did was to hand them over to somebody else whom you do not know, and said: "Will you look after these goods?"' The defendant may have a very good action against the third parties if they have not looked after the goods, but . . . he has no answer to the plaintiff's claim, which is to the effect: 'You undertook to look after the goods. I cannot bring an action against the third parties. I do



not know who they are, except from what you told me. I had no contract with them, therefore I cannot sue them. It is you that I sue, and if you have not looked after my goods and have, in fact, not returned them, then I claim damages'."

A The learned judge says that that is good law and good sense, and there is no real dispute in regard to the facts. Counsel for the defendant challenges the judge's decision that that is good law. He submits that, if A undertakes to store goods, he is not himself undertaking to take charge of them and to take reasonable care of them, but is undertaking that reasonable care will be taken of them by any person to whom he entrusts them. He referred to some cases (none of which, he agreed, dealt with contracts of bailment) where the question was discussed whether the obligation taken, on the face of the contract, by the original party was an obligation which could be performed by a sub-contractor or, in some of the cases, by an assignee. In *British Waggon Co. v. Lea & Co.* (1), repairs were to be done to certain waggons, and the court decided that the repairs were such that the other party could not say that the contract was at an end because the repairs, in the events which happened, were being done by someone other than the original contracting party. COCKBURN, C.J., delivering the judgment of the Divisional Court, said (5 Q.B.D. 153):

D "We entirely concur in the principle on which the decision in *Robson v. Drummond* (2) rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party."

F That is the principle and it was considered in *Tolhurst v. Associated Portland Cement Manufacturers* (1900), Ltd. (3), the next case to which we were referred. There it was held that the principle did not apply. At the end of his judgment LORD LINDLEY referred to the *British Waggon Co.* case (1) and said ([1903] A.C. 425):

"In conclusion, I will only add that *British Waggon Co. v. Lea* (1) was, in my opinion, rightly decided, and is an authority very much in point for the Associated Company."

G We were referred to *Davies v. Collins* (4), a more recent decision of this court. That case concerned a contract for cleaning a uniform and doing certain small repairs, and the decision turned in the main on the actual wording of a condition of the contract, which, of course, does not assist us here, but, in his judgment, LORD GREENE, M.R., said ([1945] 1 All E.R. 250):

H "Whether or not in any given contract performance can properly be carried out by the employment of a sub-contractor must depend on the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstances."

Counsel for the defendant has pointed out that there is no reported case in which a bailee *simpliciter*, such as the bailee in this case, who simply contracted to store goods, has been held entitled to take advantage of the limited liability which attaches to such a bailee when he has in fact entrusted the goods to someone else. In my opinion, the submission of counsel for the defendant

that the bailee undertakes only that reasonable care will be taken of the goods by any person to whom he entrusts them fails on two grounds which, though related, may to some extent be said to be distinct. I think it fails from the nature of the contract of bailment which we have to consider. A contract to store is a contract of bailment under which the bailor transfers possession to the bailee, and the bailee is undertaking, as it seems to me, to take possession of the goods and exercise reasonable care in looking after them on the principles which have been laid down in the cases. Therefore, a man who has undertaken to be a bailee for storage, and who never, in fact, acts as such a bailee, but gets someone else to take possession of the goods, seems to me to be in breach of his contract *ab initio*. I think it may also be said that the class of case with which we are dealing, *viz.*, the storage of furniture, comes within the principle stated in the *British Waggon Co.* case (1), namely, that this is the type of contract in which the personal care of the other contracting party is of the essence of the contract. Storage of furniture is a matter which can be done carefully or not so carefully. It clearly is a type of case in which a person may have a reputation for taking great care. Nor do I think it necessary in a case of this kind for the plaintiff to show that he relied on any special or general reputation of the defendant. The defendant was recommended to the plaintiff's wife, and he was chosen and asked if he would store the furniture, and, as he undertook to do so, I think that was a type of matter which he could not hand over to be performed by a sub-contractor. Therefore, for those reasons, I think the submission fails. I think the learned judge was right in what he said, that, in the circumstances which I have detailed, the defendant had no answer to this claim. I should, perhaps, also refer to this. There is, I think, no dispute that this was a plain contract to store, because, if one turns to para. 3 of the defence, which follows on the paragraph in which the defendant alleges that he acted merely as agent, he says:

"If, contrary to the defendant's contention, he agreed as principal to store the plaintiff's goods . . ."

That is how he puts the alternative defence, and, it seems to me, he did not store the plaintiff's goods. That disposes of that point.

I will now turn to the second point. The learned judge, having held the defendant liable to the plaintiff, held that the third parties were not liable to the defendant, and that decision is also challenged by counsel for the defendant. It is clear that the third parties, *vis-a-vis* the defendant, were bailees and under a duty to use reasonable care. In considering this part of the case, I must go into the history of what happened. These goods were stored in April, 1939. Then the war broke out and on Oct. 15, 1940, the third parties' premises were bombed. On Oct. 21, 1940, the third parties wrote this letter to the defendant:

"We regret to inform you that our premises have been severely damaged by a bomb. Your effects are so far intact, but owing to the roof being shattered, all goods stored are open to the elements, although we are endeavouring to make it as waterproof as possible. Also, one wall is badly fractured and liable to collapse. We would strongly advise you to remove your goods as soon as possible."

The defendant, having received that letter, wrote to the plaintiff, saying:

"I regret to inform you that the premises where your furniture is stored have been severely damaged by a bomb. Your effects are so far intact, but owing to the roof being shattered, all goods stored are open to the elements, although I am endeavouring to make it as waterproof as possible. Also, one wall is badly fractured and liable to collapse, I would strongly advise you to remove your goods as soon as possible. Enclosed please find account to date and a cheque in settlement will oblige."

As the learned judge pointed out, that was a somewhat curiously worded letter, and it was that letter on which he in part relied in finding against the defendant on the defence put forward of agency, because the defendant was not himself "endeavouring to make it as waterproof as possible." As appears from the next letter of Oct. 30, 1940, the plaintiff's wife, whose husband was on military service, sought to remove the goods, but the defendant had presumably instructed the third parties that the goods were not to be delivered unless and until his (the defendant's) account with the plaintiff was paid in full. I cannot but think that that might have been made more clear to the plaintiff by the letter from the defendant to the plaintiff, but the plaintiff wrote a letter to the defendant in which she said:

"I have learned to-day that the firm with whom I arranged to remove the furniture were refused access to it in view of the account outstanding. I am not able to get in touch with my husband quickly owing to his military duties—so I have filled in one of the cheques he left me for half the amount—I do not like to send the whole until I have seen him. I should be most grateful if you would telephone the removal firm of F. de 'Ath & Sons . . . and arrange for them to re-store. I will come to London as soon as the line is in order again—when I shall be glad if you will tell me when I can call if there was any damage done and will settle the balance of the account. I am most anxious that the furniture should be moved immediately if your are not able to make provision for its safety yourselves."

There does not appear to have been an answer to that letter. In the course of argument the court put to counsel for the defendant a possible point against him which was rather on these lines. Might it not be said, even on his view of the contract, that the defendant could and should have arranged to have the goods re-stored and could have taken proper steps of that kind without sacrificing his lien? On the view I take on the first point, it is unnecessary to consider that. However, there was also an argument, on which it is necessary to express an opinion, with regard to the effect of the letter of Oct. 21, 1940. In the court below there was clearly some argument whether, as a result of the writing of that letter, the third parties ceased to be responsible. That, I think, if those words are given their legal import, is wrong. In my view, they clearly remained liable to take reasonable care in the circumstances. Having regard, however, to the difficulties of staff and all the rest of it, if premises are bombed, the goods may be imperilled either from theft or from weather, although the standard of reasonable care which the law imposes is complied with. That is the view which I take as to the effect of that letter.

Before turning to the evidence, I will refer to the authorities on which counsel for the defendant relied. The first was *Brabant & Co. v. King* (5), a decision of the Privy Council on an appeal from the Supreme Court of Queensland. The headnote is:

"Where the government, being bailees for hire, stored the appellants' explosive goods in sheds near to the water-edge :—*Held*, that the selection of such a site rendered it incumbent upon them to place the goods at such a level as would in all probability ensure their absolute immunity from the incursion of flood water; that the appellants were entitled to rely on the care and skill of their bailees, and could not be said to have accepted any risks of defective storage with which they had made themselves acquainted."

The Supreme Court held by a majority:

"... that the government were liable for negligence in the manner in which the explosives were dealt with, but that they were not liable for damage caused by any unsuitability in the magazines, as this was known



to the plaintiffs and their servants, and that the maxim '*Volenti non fit injuria*' applied."

The passage in the judgment of the Privy Council which was relied on by counsel for the defendant is this ([1895] A.C. 640):

"Their lordships can see no reason to doubt that the relation in which the government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled store-keeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

I accept, I think, the points which counsel for the defendant made on that case. One, perhaps, relates back to the point I have just considered. The mere fact that the defendant was told that the premises had been bombed did not, as from that moment, relieve the third parties of their obligations. I also accept that, when an emergency arises, it is the duty, as is stated here, to take all proper measures for the protection of the goods.

The next case cited was *Coldman v. Hill* (6), which dealt with an agister of cattle. The cattle were stolen and it was held by the Court of Appeal that reasonable steps were not taken after the theft occurred. SCRUTTON, L.J., said ([1919] 1 K.B. 454):

"First, what was the defendant's duty? He was a bailee for hire, and it is clear that his duty was not that of an absolute insurer, but was to use towards the preservation of the goods entrusted to him from injury that degree of care which might reasonably be expected from a skilled agister or a reasonable man in respect of his own goods, and that obligation included not only the duty of taking all reasonable precautions to obviate risks of injury, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

That was really the same kind of point as in *Brabant & Co. v. King* (5).

The last case cited on this point was *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Brothers* (7). In his judgment LORD WRIGHT, M.R. ([1936] 3 All E.R. 702) referred to a statement of the rule given in a dissenting judgment by LORD DUNEDIN in *Ballard v. North British Railway Co.* (8), in which LORD DUNEDIN said (1923 S.C. 54):

"I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion."

After citing this passage, LORD WRIGHT, M.R., said ([1936] 3 All E.R. 702):

"I think this is merely stating the same rule as that stated by LORD LOREBURN, L.C., and LORD HALSBURY from another aspect. If the plaintiffs show that they took all reasonable and proper care of the goods, the mere fact that they were, notwithstanding, stolen is not sufficient any longer to make them liable for negligence. Their explanation is, then, that the thieves must have shown ingenuity and daring against which reasonable precautions could not avail. Hence, I think the plaintiffs discharge the burden of proof upon them if they can show that the theft took place notwith-

standing that they had taken all reasonable precautions to guard against the danger."

Of course, the circumstances were different here from those in any of those cases, and I think it would be impossible to seek to lay down some formula as to what a defendant bailee, who fails to return some of the goods deposited, has to prove to discharge the onus which the law places on him. It will depend

A on the circumstances. The circumstances here were, as indicated in the letter, that the premises were bombed (I will come back to the relevance of that again later). Also, I think it is a relevant circumstance that there was no checking of these goods by the defendant at any time from when they were deposited in 1939 to the time when they were asked for in 1945, but I do not know whether this was negligence on anyone's part, because it is difficult to get about during  
B a war. On this part of the case the main passage in the learned judge's judgment is as follows:

"As between the defendant and the third parties, the position is that the third parties had agreed to use reasonable care and look after the goods which, from their point of view, were the property of the defendant, because it was with him that they agreed to look after the goods, for a reward. The  
C evidence is that they did use reasonable care and attention up to Oct. 20, 1940, and on that day something happened for which they were not responsible—the bombing. The third parties took all reasonable precautions, so far as they could, of course. They told the authorities and they did all that could be done physically. They also wrote to every person who had goods deposited with them—the person in this case being, of course, the  
D defendant—asking them to remove the goods. I have already stated how the defendant dealt with the matter, but, so far as the third parties were concerned, they had written to the defendant to remove the goods. He did not do it, and, indeed, he prevented it from being done. Therefore, I have to consider the effect of the letter of Oct. 21, 1940, as between the third parties and the defendant. Can I say that, as between them, on and  
E after Oct. 15—if that be the date when the premises were bombed—first, that the agreement continued, and that the third parties were careless in looking after the goods of the defendant? They strongly advised the defendant to remove the goods as a result, be it observed, of something which was no fault of their own. Here is enemy action intervening, and the third parties, having suddenly—through no fault of their own—been  
F put in a position where they were unable safely to look after the goods, told the defendant so and strongly advised him to remove the goods. The defendant did not remove the goods and I think the true view in law—as, I think, it is the true view in common sense—is that the third parties were no longer liable to do anything more than they could do, *i.e.*, repair, as soon as they could and as well as they could, their damaged premises.  
G The evidence is that they did. Therefore, I cannot find that they were liable to the defendant for any damage that may have been done—and, I have no doubt, was done—to the goods, which, as we now know, were the goods of the plaintiff and his wife, while they were in the third parties' custody."

H I should, perhaps, have referred to an earlier passage where the learned judge deals with the possibility of theft during this bombing period:

"I have very little doubt that in all probability some of the goods were taken in those circumstances from the third parties' damaged premises, but I cannot find it, because there is no evidence and never would be any evidence of it."

The point, as it seems to me, which emerged is this. The third parties having failed to re-deliver certain goods, the plaintiff claimed for them.

The third parties must give an explanation which satisfies the court that the goods disappeared without any failure on their part to take reasonable care. The case put is that, there having been this bombing and opportunities for theft (the evidence of which I will consider in a moment), the reasonable and proper inference is that these goods did disappear at that time. The third parties also have to satisfy the court that, that being so, they did not fail to take reasonable care during that time. I think the difficulty which arose in the matter was that in the court below the defendant was not really challenging the evidence given by Mr. Burchett senior, who was in charge of the business to be done, and were not putting to him that he did not take steps which a careful and prudent storer of goods would have taken, and the evidence from that point of view is, perhaps, not altogether satisfactory. [HIS LORDSHIP dealt with the evidence on the point, and continued:] In my view, if one summarises the evidence with which we have had to deal, it comes to this. Until the bombing and after the repairs it was impossible, or, as the learned judge put it, "practically impossible" for anyone to steal goods without the knowledge of the third parties, and that seems to be the natural inference one would draw. There was a period when, through no fault of the third parties, thefts were possible, but the third parties deposed (and there was no cross-examination to the contrary) that they did all they could to look after their customers' goods, including these goods, in that period. The proper inference, I think, is that the goods disappeared as a result of theft during that period without any breach of the third parties' obligation in the circumstances as bailees. Those, I think, are the reasons given by the learned judge. For those reasons, I think that this appeal fails.

**TUCKER, L.J. :** I agree. With regard to the first question, namely, the issue between the plaintiff and the defendant whether the defendant, consistently with his contract with the plaintiff, could make a contract with the third parties for the custody of these goods, I think that it is contrary to the very nature of a contract of bailment of the type known as "hire of custody" that the defendant, the so-called bailee, should be entitled to part with the possession of the goods. He received the goods *prima facie* as a bailee and he can only deal with them in accordance with the authority, express or implied, conferred on him by the bailor. I think that, if in any particular case there is authority, express or implied, on the bailee to part with the possession of the goods, the contract ceases to be one purely of bailment. It becomes a complex contract under which the defendant may be under an obligation to the bailor so long as he has custody of the goods and has other obligations placed on him if and when, in accordance with the authority conferred by the bailor, he parts with the possession of the goods. Therefore, I think that in this case, there being evidence that there was a contract of bailment pure and simple, and it appearing that the defendant never had possession of the goods, but merely arranged with someone else to fetch and store them, he has no answer to a claim for the return of some of the goods which are not forthcoming. I think that that is the view which the defendant himself took of his duty and obligation, and it is clear from the correspondence that he was always at pains to give the impression to the plaintiff that he had charge of the goods himself. Furthermore, I think that there is very much to be said for the proposition that, even if counsel for the defendant is right with regard to the duty on the bailee, the defendant was in great difficulty as from Oct. 21, 1940, when he was advised that the goods were in premises where the roof had been shattered and were in great peril. It was, no doubt, wise of him to pass on this information to the plaintiff, but, I think, even if he was entitled to part with the possession of the goods, he was then under a duty to take active steps to preserve them, and he might perhaps have taken them to his own premises as a temporary measure. He gave no evidence to suggest that that was impossible. He might have made



arrangements for the goods to be stored elsewhere. When that point was put to counsel for the defendant, he did not really endeavour to controvert the position with regard to the defendant and the plaintiff, but, he said, if that was the position, then he could and would avail himself of the same argument against the third parties. I think that there may be a difficulty in the circumstances of this case as between the position of the defendant and the third parties when the bombing occurred in October, 1940. The third parties at once notified all their three hundred clients what had happened, but I think it would be difficult to suggest that it was the duty of the third parties, there and then, immediately to find accommodation for a very large quantity of goods for three hundred customers without even waiting for the consent of the customers. That position has to be distinguished from that of the defendant, as in his case the goods of only one customer had become imperilled. The defendant gave no evidence that he had taken any steps to provide for the safety of those goods. However, in view of the facts, I agree that the position with regard to the duty of the bailee was that stated by SOMERVELL, L.J., so I do not think it is necessary to express a final view.

With regard to the second point (the liability of the third parties to the defendant), although I agree that the evidence was rather scanty and was given as a result of leading questions, it would be wrong to say that the learned judge, in all the circumstances (having regard to the fact that there was no serious challenge made to those questions, the questions were not objected to, and there was no cross-examination) was in error in drawing the inference that in the chaotic conditions which prevailed after the bombing the third parties had not failed to discharge the onus which lay on them of showing that they had taken all reasonable care of these goods. I agree that the appeal should be dismissed as against the plaintiff and the third parties.

**DENNING, L.J.:** The first question is whether a storage contractor is entitled to hand over the goods to another person under a sub-contract. There are many bailments in which the bailee is entitled to make a sub-bailment.

The repairer of a motor car, for instance, can often reasonably send away a part of it to another firm for repairs. A carrier of goods may need to entrust them to another carrier for part of the journey. A hirer may himself often, quite lawfully, sub-hire the goods. It all depends on the circumstances of the particular case. The contract here is a contract for the storage of furniture. In such a case, in my opinion, the personal skill and care of the contractor is of the essence of the contract. Much care and skill is necessary in appointing the men who are to handle the goods, in selecting the place where they are to be stored, in seeing that it is reasonably fire-proof and burglar-proof, and in choosing the caretakers. The owner of the goods is entitled in these respects to the personal care and skill of the contractor. If the contractor employs a sub-contractor, he does it at his own risk because, if the goods are lost whilst in the hands of the sub-contractor, the contractor cannot say that they would have been lost in any event. By breaking his contract, he has prevented any evidence as to what would have happened if he had fulfilled it personally: see the observations of SCRUTTON, L.J. ([1919] 1 K.B. 457), in *Coldman v. Hill* (6) when he referred to *Morison, Polexfen & Blair v. Walton* (9), a decision of the House of Lords. I agree, therefore, that, by handing over these goods to a sub-contractor, the head-contractor broke his contract, and is liable for the subsequent loss: see *Lilley v. Doubleday* (10).

The second question is whether the contractor can recover against the sub-contractor. I have had some doubt in the course of the argument whether the sub-contractor really discharged the burden that lay on him. He gave no details of the measures which he took for protection of the goods after the bombing, and I think he ought to have done so. I should be sorry if we said anything today to lessen the burden of proof which lies on a bailee for reward.

The reason why I think that the contractor fails against the sub-contractor is because at the trial the contractor himself did not suggest that the sub-contractor was negligent. In order, as he thought, to escape liability to the owner of the goods, he wished to say that the sub-contractor was careful. He thought that that would mean that he himself would escape liability, but our decision on the first point shows that he was wrong. The contractor is liable to the owner, whether the sub-contractor was negligent or not. The contractor has now discovered his error. He now wishes on the appeal to turn round and say that the sub-contractor was negligent. I think it is too late for him to do that. At the trial, for his own purposes, he did not insist on full details of the protective measures being given by the sub-contractor, and I do not think that he can now complain that the full details were not given. I agree, therefore, that on the second point, also, the appeal fails.

*Appeal dismissed with costs.*

Solicitors: *B. P. Webster* (for the defendant); *Thomas Eggar & Son* (for the plaintiff); *Williams & Poole* (for the third parties).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

### NORMAN v. NORMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson and Pearce, JJ.), April 25, 1950.]

*Infant—Maintenance—Education or training—Infant aged more than sixteen—Continuation of payments under previous order—Application after cessation of order—Married Women (Maintenance) Act, 1949 (c. 99), s. 2 (2).*

By the Married Women (Maintenance) Act, 1949, s. 2 (1) : "The power of the court to vary an order made by virtue of s. 1 of the Married Women (Maintenance) Act, 1920, shall, notwithstanding anything in that section, include power to vary the order in accordance with the following provisions of this section. (2) If, upon the application of the married woman, it appears to the court that a child for whose maintenance provision is made by the order is or will be engaged in a course of education or training after attaining the age of sixteen years and that it is expedient for that purpose that the payments required by the order should continue, the court may by order direct that those payments shall continue for such period after the child attains that age, not exceeding two years from the date of the order, as may be specified in the order."

On Nov. 11, 1941, the wife was granted an order for the maintenance of herself and her child until he attained the age of sixteen. The child attained that age on Dec. 15, 1949, and the Married Women (Maintenance) Act, 1949, came into operation on Dec. 16, 1949. On Jan. 2, 1950, a summons was taken out by the wife under s. 2 (2) of the Act of 1949 for the continuation of payments for the child for the purposes of his education, but the magistrate held that he had no jurisdiction to make an order as the original order had already ceased to exist, and could not, therefore, be "continued." On appeal,

**HELD:** on the true construction of s. 2 (2) an application for the continuation of payments was not confined to cases where the original order had not expired, and the case must be sent back to the magistrate for consideration on the merits.

Cases referred to:

- (1) *Seaford Court Estates, Ltd. v. Asher*, [1949] 2 All E.R. 155; [1949] 2 K.B. 481.
- (2) *Heydon's Case* (1584) 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, 143.

APPEAL from an order of the East Ham stipendiary magistrate.

A The wife applied under the provisions of the Married Women (Maintenance) Act, 1949, s. 2 (2), to the magistrate for the continuation of payments under a maintenance order made in 1941 in respect of the maintenance of her child, who was now over sixteen years of age. The magistrate held that, as the application was made to him after the original order had ceased to operate because the child had already attained sixteen years, the statute conferred no jurisdiction on him to make the order and he dismissed the application. The wife appealed.

*Wakley* for the wife.

The husband was not represented.

B **HODSON, J.:** This is an appeal from a decision of the East Ham stipendiary magistrate by a wife who applied for an order under s. 2 (2) of the Married Women (Maintenance) Act, 1949, continuing the weekly payment made in respect of her child, of whom she had the custody, "from the date of the variation and for such period (within two years) as he may continue to be engaged in a course of education" at a certain school. We have no information on which this court can make an order, but we are asked to send the case back to the stipendiary to deal with the matter on the ground that he wrongly refused jurisdiction.

C The child of whom the wife has the custody attained the age of sixteen years on Dec. 15, 1949, and the Married Women (Maintenance) Act, 1949, came into operation on Dec. 16, 1949. On Jan. 2, 1950, the summons was taken out asking for money for the education of the child. Having regard to the wording of the section, the magistrate took the view that the order which had previously been made had ceased and there was nothing which he could continue. The original order was dated Nov. 11, 1941. It was subsequently varied, but the variations are immaterial. It was made in favour of the wife on the ground of the husband's desertion and gave her custody of the child. By a further provision she was to have maintenance for herself and maintenance for the child until the latter attained the age of sixteen, the custody also being limited under the powers conferred by the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (b), to the age of sixteen. This child having attained that age, the provision for custody and the provision for maintenance had, on the face of it, come to an end, and the order could only be said to be a subsisting order in so far as it could be enforced, for example, for the purpose of obtaining payment of any arrears due under it before the date when it ran out.

F The wording of s. 2 (1) of the Act of 1949 is as follows:

"The power of the court to vary an order made by virtue of s. 1 of the Married Women (Maintenance) Act, 1920, shall, notwithstanding anything in that section, include power to vary the order in accordance with the following provisions of this section."

G Before reading the following sub-section I must refer to the Act of 1920. It provides that on the application of a married woman an order which contains a provision committing the custody of a child to the applicant may, in addition to any other provision, include a provision that the husband shall pay to the applicant a weekly sum not exceeding ten shillings for the maintenance of each such child until such child attains the age of sixteen years. Section 2 (2) of the H Act of 1949 provides:

"If, upon the application of the married woman, it appears to the court that a child for whose maintenance provision is made by the order is or will be engaged in a course of education or training after attaining the age of sixteen years and that it is expedient for that purpose that the payments required by the order should continue, the court may by order direct that those payments shall continue for such period after the child attains that



age, not exceeding two years from the date of the order, as may be specified in the order."

Sub-section (3) lays down that the period specified may from time to time be extended, but not beyond the date when the child attains the age of twenty-one years. The difficulty felt by the stipendiary was that sub-s. 2 refers to provision being made by the existing order in the present tense and also refers to continuance of that order, and he pointed out that, according to the ordinary use of language, that presupposes that an order which is to be continued under s. 2 (2) is an order which is actually in force. The order in this case was not in force, and it could not be continued because it had already ceased to exist.

It is clear that this statute must be read so as to make sense and to remedy the mischief or fill in the gap in the scheme of things in connection with the maintenance and education of children which already existed. It is impossible to make sense of it if, as counsel for the wife pointed out, one takes such a strict grammatical view as the magistrate took, because it appears from the words, "If... it appears to the court that a child for whose maintenance provision is made by the order is or will be engaged in a course of education or training after attaining the age of sixteen years," that what is contemplated may be a child who has attained the age of sixteen years, so that necessarily the order in his case must have ceased, and, unless the order is treated as being an existing order, it is impossible to make any sense of the section. I think that it is necessary to take the same view of the word "continuing." It may be that in one sense the order has ceased, and it is clumsy to talk about the continuation of something which has ceased, but the order is treated in the first part of the section as being an existing order, which means an order which has not ceased, and once one comes to that conclusion the word "continue" is aptly used to describe the situation which exists with relation to it. I think, therefore, although the wording of this section is a little puzzling, that it is reasonably clear that the construction which the wife asks the court to adopt is the right one, and, therefore, this appeal must be allowed and the case sent back to the stipendiary magistrate for consideration on the merits.

**PEARCE, J.:** I agree. In *Seaford Court Estates, Ltd. v. Asher* (1), DENNING, L.J., said ([1949] 2 All E.R. 164):

"It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7 b) by the resolution of the judges [SIR ROGER MANWOOD, C.B., and the other barons of the Exchequer] in *Heydon's Case* (2) and it is the safest guide to-day."

I approach this question with that passage in mind. It seems unlikely that Parliament intended that the court should be unable to make a continuation of payments merely because the provision under the order has expired. There seems no real reason for this, and it would obviously lead to hardship. There is no power in the Act by which any relief could be given against such a situation, and it would be a great misfortune if, merely by allowing the existing provision to expire by one day, a mother was thereafter unable to provide education for her child and the child was deprived of the opportunities of education which Parliament clearly intended to bring within its reach. The words of s. 2 (2): "If... it appears to the court that a child for whose maintenance provision

is made by the order is or will be engaged in a course of education or training after attaining the age of sixteen years," in my opinion, show that the application need not be made before the time runs out, since where a child *is* engaged in a course of education after attaining the age of sixteen he or she must be over sixteen, and the provision in the order must have come to an end. It is said against this that the word "continuing" envisages that the provision of the order must still be in existence. In my view, there can be continuance of the order, even after an interruption, without unduly straining the words. It is also said that the words "provision is made" mean that the provision is still in force, but, since the original order, which is in favour of the wife, is still in force, I think it is possible to say that provision is made in the order even though that provision has come to an end. For these reasons I think that the application for continuance is not confined to cases where the provision has not expired, and I agree that the appeal must be allowed.

*Appeal allowed.*

Solicitors: *Duthie, Hart & Duthie* (for the wife).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

*Re* A DEBTOR (No. 416 of 1940). *Ex parte* OFFICIAL RECEIVER (TRUSTEE) v. HUBBARD AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), April 25, 1950.]

*Bankruptcy—Official receiver succeeding to trusteeship—Onerous property—Right of disclaimer—Statutory period for exercise of right—Extension of time—Bankruptcy Act, 1914 (c. 59), s. 54 (1) (7), s. 109 (4).*

The Bankruptcy Act, 1914, s. 54 (7), provides: "Where, on the release, removal, resignation or death of a trustee in bankruptcy, an official receiver is acting as trustee, he may disclaim any property which might be disclaimed by a trustee under the foregoing provisions, notwithstanding that the time prescribed by this section for such disclaimer has expired, but such power of disclaimer shall be exercisable only within twelve months after the official receiver has become trustee in the circumstances aforesaid, or has become aware of the existence of such property, whichever period may last expire." By s. 109 (4): "Where by this Act, or by general rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose."

In February, 1941, a debtor was adjudicated bankrupt and a private individual was appointed trustee in bankruptcy. In November, 1943, the trustee was released and the official receiver succeeded to the trusteeship by virtue of s. 93 (5) of the Bankruptcy Act, 1914. The property of the bankrupt included certain leasehold interests of an onerous nature which the original trustee had not disclaimed. In 1946 the official receiver became aware of the existence of the leaseholds, but he failed to disclaim them within the succeeding twelve months. On Jan. 25, 1950, the official receiver wished to relieve the debtor's estate of the burden of the leasehold interests in question, and he applied for an extension of time in which to disclaim them. The registrar refused the application on the ground that, as the official receiver had not exercised his power of disclaimer within the period of twelve months provided in s. 54 (7) of the Act of 1914, there was no power to grant the extension of time asked for. On appeal,

**HELD:** s. 54 (7) of the Act of 1914 gave the official receiver, succeeding to the trusteeship by virtue of his office, a statutory right to disclaim, which must be exercised within the period of twelve months from one of the two *termini* indicated in the sub-section, and unless so exercised, there was no power in the court to extend it, either under s. 54 (1), or by reference to general language of s. 109 (4) of the Act.

[FOR THE BANKRUPTCY ACT, 1914, s. 54 (1), (7), s. 109 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 2, pp. 389, 392, 420.] **A**

Cases referred to:

- (1) *Re Price, Ex parte Foreman*, (1884), 13 Q.B.D. 466; 5 Digest 939, 7672.
- (2) *Re Baker* (1891), 8 Morr. 116; 5 Digest 939, 7674.

**APPEAL** by the official receiver from an order of Mr. Registrar CUNLIFFE, dated Feb. 14, 1950, refusing an application for an extension of time for the purpose of disclaiming certain leasehold properties vested in the debtor at the date of her bankruptcy. **B**

The registrar was of opinion that, as the official receiver had failed to exercise his power of disclaimer within the period of twelve months allowed by s. 54 (7) of the Bankruptcy Act, 1914, there was no power to grant the extension of time asked for. It was contended for the official receiver that, in the same way as a trustee in bankruptcy could apply for an extension of time after twelve months from the date of his appointment by virtue of s. 54 (1) of the Bankruptcy Act, 1914, so the official receiver, on the bankrupt's property being vested in him, could apply for a similar extension under s. 54 (7) of the Act, or, alternatively, if s. 54 (7) was strictly limited to the twelve months' period therein specified, that the court had an overriding power, by the general provisions of s. 109 (4) of the Act, in the exercise of its discretion to extend the time within which such power of disclaimer might be exercised. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R. **C**

*Muir Hunter* for the official receiver.

*R. S. Lazarus*, for the lessor of one of the properties. **D**

**SIR RAYMOND EVERSLED, M.R. :** This is an appeal from a decision of Mr. Registrar CUNLIFFE in the bankruptcy of the debtor, a Mrs. Gladys Knight. The decision was given on an application on the part of the official receiver for an extension of time within which to disclaim certain leasehold properties vested in the debtor at the date of her bankruptcy. The adjudication was in February, 1941, when a private individual, Mr. Phillips, was appointed trustee in bankruptcy. In November, 1943, that trustee was relieved, and, thereupon, pursuant to the Bankruptcy Act, 1914, s. 93 (5), the official receiver succeeded *virtute officii* to the trusteeship. During the period when Mr. Phillips had been trustee no notice had been taken of the existence of these leasehold interests. They were of an onerous character, and, had note been taken of their existence and of their nature, it may well have been that the trustee would, in the exercise of his statutory powers under s. 54 (1) of the Act of 1914, have taken steps to disclaim them on behalf of the estate, and, if the statutory period of twelve months within which he could exercise that right had expired, he might then, pursuant to the same sub-section, have applied to the court for an extension of time within which to disclaim. **E**

The position of the official receiver on such a succession is dealt with by the express provisions of s. 54 (7). The questions which were dealt with by the learned registrar were briefly whether (i) the right to disclaim conferred on an official receiver by sub-s. (7) is, according to the proper construction of that sub-section, limited in point of time strictly to the twelve months' period which is stated in the sub-section; and (ii) assuming that it is by sub-section (7) so limited, whether, by the general provisions of s. 109 (4), an overriding power is given to the court in the exercise of its discretion to extend the time **F**



within which such a right of disclaimer may be exercised. The succession of the official receiver having occurred in November, 1943, the application for a day to be fixed to hear his application to disclaim was made on Jan. 25, 1950. It appears from the judgment of the registrar that in 1946 the official receiver became aware of the existence of these leaseholds and of their onerous nature, but no step was taken until Jan. 25, 1950, to relieve, if he could, the debtor's estate of the burden. The registrar stated at the end of his judgment that, assuming he had a discretion in the matter, he did not think there would be any serious obstacle to its exercise. He observed that no objection had been raised by other persons interested. The position in this court is not quite the same as it was before the learned registrar because the person interested as landlord or reversioner in respect of one, at any rate, of the leases, is now represented, I assume in order to oppose the official receiver's application. In the judgment to which I have already alluded occurs this sentence: "For some reason which does not appear the official receiver did not himself disclaim." It was indicated by counsel for the official receiver that owing to the ramifications of departmental life in the Board of Trade it never would be possible to state how it happened that a statutory right to disclaim was not more expeditiously sought to be exercised. That seems no reason for extending to such an application any powers the court has in its discretion. If the court is asked either by a private citizen or by a department of State to exercise a discretion in his or its favour, *prima facie* similar considerations ought to be taken into account. If anything, I should have thought the standard of efficiency and prudent conduct lay more heavily on a department of State than on an individual.

I return now to the matter in hand, *viz.*, whether there exists either by the terms of s. 54 (7) itself or by the joint operation of that sub-section and s. 109 (4) of the Act of 1914 any discretion in the court in the circumstances of this case? The registrar came to the conclusion that there did not, and I agree with his conclusions and with the reasons which he had so cogently expressed. Since the matter is one which, apparently, has not previously come before the court I will state my reasons. In a case where a trustee is appointed in the ordinary way, that is, on adjudication, whether that trustee is the official receiver or a private person, s. 54 (1) operates, and provides that in the case of onerous property he may, notwithstanding that he may have tried to sell it or exercised acts of ownership in respect of it,

"...subject to the provisions of this section ... by writing signed by him, at any time within twelve months after the first appointment of a trustee or such extended period as may be allowed by the court, disclaim the property."

Then there is a proviso which gives, in effect, an extended period where the property does not come to the knowledge of such trustee, and again the specific time mentioned has the addition "or such extended period as may be allowed by the court."

I propose first to deal with the section as we now find it and without regard to its history. I can pass over the intervening sub-sections, save to observe that in sub-s. (4) (which deals with the case where a trustee is called on to make up his mind with regard to onerous property) there is also an express reference after the period mentioned of twenty-eight days "or such extended period as may be allowed by the court." We come, therefore, to sub-s. (7), which is as follows:

"Where, on the release, removal, resignation or death of a trustee in bankruptcy, an official receiver is acting as trustee, he may disclaim any property which might be disclaimed by a trustee under the foregoing provisions, notwithstanding that the time prescribed by this section for such

disclaimer has expired, but such power of disclaimer shall be exercisable only within twelve months after the official receiver has become trustee in the circumstances aforesaid, or has become aware of the existence of such property, whichever period may last expire."

It is to be noted that this sub-section applies to the case only of the official receiver succeeding to the trusteeship by reason of release, removal, resignation or death. It is a succession regarding which he has no option and which automatically descends on him, and it is his duty in his official capacity to carry out the burden of the trusteeship accordingly.

In each case the question arises: Has the time prescribed by this section for the disclaimer of a particular property under the provisions of the section expired, or has it not? That question ought to be easy to answer, for, exceptional circumstances apart, the period prescribed by sub-s. (1) is twelve months from the first appointment of a trustee, and if those twelve months have expired, and if no application has been made for extension, or if such an application has been made and the time granted by way of extension also has expired, then in each one of those cases it is quite clear that *quoad* the particular property the time prescribed by the foregoing provision has expired. *Prima facie*, therefore, the right to disclaim will have gone. I draw attention to the fact that the time begins to run under sub-s. (1) from the first appointment of a trustee, but sub-s. (7) creates plainly for the official receiver's succession in those circumstances a new right. It is a right notwithstanding that the time within which the earlier right may be exercised has passed. It gives him a right to disclaim, but it gives it in terms which seem to me as a matter of English—and I am so far only dealing with this section as we now find it—to state plainly that this right is to be exercised within a specific time, and there is no question of extension of that period. The words are "but such power"—that is the power conferred by this section—"shall be exercisable only within twelve months after the official receiver has become trustee." Then it goes on that, in the event of his becoming aware of the existence of such property, his right shall be exercised within twelve months of that date. The language of sub-s. (7) makes it plain, to my mind, that under that sub-section, unlike sub-s. (1), there is no question of obtaining any extension. It is a strictly limited period. The statute creates and confers a new right, but it strictly limits it in point of time in the way I have stated—perhaps for obvious reasons.

The present appeal is only under sub-s. (7). It was suggested that a possible point which the official receiver might take was that he could say: "I am a trustee, and, therefore, I can apply, though the period for an extension of the statutory right of disclaimer, which is conferred on all trustees by sub-s. (1), has long since passed." That matter is not before us and, therefore, it is not perhaps right for me to express a concluded view on it, but I will indicate that, as at present advised, I do not accept the view suggested. It seems to me, *prima facie* at any rate, that sub-s. (7) gives an exhaustive statement of the rights as to disclaimer which an official receiver has who succeeds in these circumstances. He has no additional right under sub-s. (1). Had it been intended that he should have such right, I think sub-s. (7) would almost certainly have opened with some such words as: "Without prejudice to any other rights under this section of the Act." That, however, I need not pursue. Counsel for the official receiver founds his argument on this part of the case, as I follow it, on the view that, since the time prescribed by s. 54 for the general exercise under sub-s. (1) was a period which was always liable to be extended, and extended *ex post facto*, therefore, to make the two things fit, as he would like them to fit together, one ought to assume a general power intended by the section to extend the time also under sub-s. (7). To put it in another way, the only object of stating the twelve months' period in sub-s. (7) was to show that the official receiver without making any application, and notwithstanding that the time under sub-s. (1) had expired,

could, during that period, of his own motion disclaim. The argument has the merits of ingenuity, but I cannot accept it. It seems to me that the language of sub-s. (7) in its context is too plain to admit it.

The second part of the argument rests on s. 109 (4). Section 109 is the first of a series of sections which has the cross-heading "Procedure." Sub-section (1) deals with the matter of costs of certain proceedings. Sub-section (2) deals with the adjournment of proceedings by the court, Sub-section (3) deals with amending proceedings by the court, and sub-s. (4) provides:

"Where by this Act, or by general rules, the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose."

Sub-section (5) deals with taking evidence. It may be taken "either *viva voce*, or by interrogatories, or upon affidavit," or otherwise. Counsel for the official receiver says that sub-s. (4) is in terms perfectly general, and since s. 54 deals with acts or things which have to be done within a limited time, *viz.*, within twelve months, it follows that the general terms of s. 109 (4) confer, notwithstanding anything else, a power on the court to extend that time. Section 109 deals with purely procedural matters. The right to disclaim is something which I think is not aptly described as purely procedural. That argument, however, of itself, I think, would be insufficient, for in *Re Price* (1) and *Re Baker* (2) the corresponding s. 105 (4) of the Bankruptcy Act, 1883, was held to be applicable to the then provisions in regard to disclaimer, though the argument that s. 105 was procedural was, of course, as available then as it is now. It seems to me, however, that there is another answer to counsel's point. The sections in any Act of Parliament must be construed together. In the section with which we are particularly concerned, s. 54, there is a specific power given to the court to extend the time under sub-s. (1) within which an ordinary trustee may disclaim. For reasons which I have already tried to explain, that power of extension is significantly, and I think deliberately, omitted in the case of an official receiver succeeding in accordance with the terms of sub-s. (7). If s. 109 were of general application, then the addition in sub-s. (1) of s. 54 and likewise in sub-s. (4) of a specific power to extend the time would be wholly otiose. I, therefore, construe s. 109 (4) as having to be read subject to the specific provision to the contrary which on a proper construction may be found in other sections of the Act. So, reading s. 54 and s. 109 together, I think s. 109 (4) does not apply to cases which are dealt with within the four corners of s. 54 itself.

There has, however, been a reference to the history of the matter. It would, therefore, be right to see whether the view which I take, and which I hold to be the ordinary and proper meaning of the words now found in the Act of 1914, can be affected by historical considerations. The Bankruptcy Act, 1883, s. 55 (1) gave a power for the trustee to disclaim. That sub-section differed, however, in two respects from the present s. 54 (1). First, the time within which a trustee could disclaim onerous property was, instead of twelve months, three months only. Further, there did not appear in s. 55 (1) any right in the court to extend the three months' period. Section 105 of the Act of 1883 was, so far as is relevant, in exactly the same terms as s. 109 of the existing Act. Therefore, looking at those two provisions together, and there being no specific reference to any extension of time in s. 55 (1), it was possible for the court to conclude that the time limited by s. 55 could be extended by the application of the general provisions of s. 104. That I understand to be the effect of *Re Baker* (2) and *Re Price* (1) to which the learned registrar referred.

Then came a statutory amendment of the Act of 1883 by the Bankruptcy Act, 1890. Section 13 of that last-mentioned Act altered in two respects s. 55 (1) of the Act of 1883, and, as a result of the alteration, it took more or less precisely



the form which it bears today. First, the period of three months became twelve months, which is the period now found in s. 54 of the Act of 1914. Further, Parliament expressly added a power to the court in s. 55 to extend the statutory period of twelve months, and by so doing must have proceeded on the view that that special power was needed to extend the time, or, at any rate, on the view that, so far as the extension of time to disclaim was concerned, power should be derived from the terms of s. 55 itself, and not from any application of some general provision elsewhere in the Act. The bankruptcy provisions, therefore, in 1890 took that form and remained in that form, so far as is relevant, until the year 1913. During that appreciable period of time in the event of the release, resignation, death or removal of a trustee and the accession to office of the official receiver, no additional powers were given by the Act to the official receiver. It may, therefore, well have been that there was a *lacuna* which required filling up. However that may be, an amendment to s. 55 of the Act of 1883, as amended by s. 13 of the Act of 1890, was inserted by s. 19 (2) of the Bankruptcy and Deeds of Arrangement Act, 1913, which is now s. 54 (7) of the Act of 1914. Whether or not before that amendment an official receiver succeeding in the circumstances indicated could then have said: "Twelve months have no doubt gone, but I am a trustee and I can apply for an extension," sub-s. (7) made a special provision that from the time he was appointed, or, alternatively, from the time he became aware of the onerous property, without any application he could himself exercise a new right conferred on him of disclaiming. It seems to me that in conferring that new right Parliament was precise in indicating that it was to be exercised—and I can do no better than use the words which Parliament used—only within the twelve months limited by the section.

It seems to me that there is nothing in the history I have stated which alters or affects in any way the ordinary construction and meaning of the various sub-sections to which counsel for the official receiver has referred us. I, therefore, come after that journey to the same goal which I reached by the other route, namely, that s. 54 (7) gives to the official receiver, succeeding in circumstances such as exist here, a statutory right to disclaim, but that right must be exercised within the period of twelve months from one of the two *termini* indicated, and unless so exercised there is no power in the court to extend it, either under that sub-section or by reference to the general language of s. 109 (4). For these reasons, I agree with the view of the learned registrar and I think the appeal fails and must be dismissed.

**ASQUITH, L.J.:** I agree. Section 109 (4) gives a general power to extend the time for doing acts, and a disclaimer is an act, but there is a special section, s. 54, dealing specifically with disclaimers, and one sub-section of it deals with the precise type of disclaimer involved in this case. That is a disclaimer by an official receiver who becomes trustee on the release of the original trustee. The ordinary trustee could under s. 54 (1) disclaim within twelve months after his appointment as trustee or such extended time as might be allowed by the court. By contrast with this, sub-s. (7) provides in effect that in the particular case of an official receiver becoming trustee on the release of the original trustee, no extension of the twelve months period shall be allowed. In those circumstances this specific provision (which exactly fits the facts of the present case) must, I think, necessarily displace the more general provisions of s. 109. In my view, the judgment of the learned registrar is unassailable, and the appeal must be dismissed.

**JENKINS, L.J.:** I agree, and I am content to adopt the very clear reasons given by the learned registrar for his conclusion. I should, perhaps, add that, as regards the scope of s. 109 (4) as to extension of time, I prefer to found myself on the construction of s. 54 and on the specific provisions it contains, rather than on the limitation suggested by my Lord of the provisions of s. 109 (4)

to purely procedural matters. I think the line between matters purely procedural and matters of substance is one which it might well be difficult to draw. Looking at the matter from that point of view, I think the express reference in s. 54 (1) and also in s. 54 (4) to the extension of time by the court, coupled with the absence of any such reference in sub-s. (7), and the categorical statement in that sub-section to the effect that such power of disclaimer shall be exercisable only within twelve months after the official receiver has become a trustee, really make it abundantly plain that the general power conferred by s. 109 (4) has no application to s. 54 (7). I should add that the language of sub-s. (7) has also this difference from the language of sub-s. (1). Sub-section (1) says that the trustee may, within the period prescribed, disclaim the property. Sub-section (7) confers a special power of disclaimer on the official receiver in the circumstances mentioned, but says that that power shall be exercisable only within the period of twelve months. A power is thus, in terms, created with a limitation on it whereby it endures for twelve months only, and thereafter ceases to be exercisable, or, in other words, ceases to exist. I think the form in which the limitation is put in that respect also bears out the conclusion at which the court has arrived. I entirely agree that the appeal fails and should be dismissed.

*Appeal dismissed with costs.*

Solicitors: *Tarry, Sherlock & King* (for the official receiver); *Hughes-Narborough & Thomas* (for the lessor of one of the properties).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

## FLOCKHART v. ROBERTSON

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, JJ.), April 26, 1950.]

**E** *Public Order—Preservation—Prohibition of processions—“Organising” procession—Procession formed spontaneously—Subsequently led and directed by an individual—Public Order Act, 1936 (c. 6), s. 3 (4).*

By an order made by the Commissioner of Police for the metropolitan police district in pursuance of the Public Order Act, 1936, s. 3 (3), public processions of a political character were prohibited in the metropolitan police district. A political organisation lawfully organised a political procession in the city of London, where the order did not apply, and, after it had broken up, a large number of participants went to the neighbourhood of Knightsbridge which was within the prohibited area. The appellant, an officer of the organisation, met other officials and about 150 members at Hyde Park Corner, and he walked along the pavement of Piccadilly accompanied by another member and followed by officials and members in loose formation. Delayed by traffic at a side street, those following formed themselves into ranks and subsequently followed the appellant in compact formation. He led them to Piccadilly Circus and into Coventry Street where the police dispersed them. At several points on the way the appellant stopped the procession, giving signals by raising his hand, and he gave a signal for it to go from Piccadilly Circus into Coventry Street. In proceedings against the appellant for having organised a public procession prohibited by the order.

**H** **HELD** (FINNEMORE, J., *dissenting*) : the appellant, having indicated the route taken by the procession after it had been formed spontaneously and having directed it along that route, had “organised the procession and, by virtue of s. 3 (4) of the Public Order Act, 1936, was guilty of an offence under the Commissioner’s order.

[FOR THE PUBLIC ORDER ACT, 1936, s. 3 (3) and (4), see HALSBURY'S STATUTES, Second Edn., Vol. 5, pp. 1090, 1091.]

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Bow Street, London, an information was preferred by the respondent, a chief superintendent of the Metropolitan Police, under the Public Order Act, 1936, charging the appellant, assistant secretary to an organisation with political objects, with organising, on Oct. 15, 1949, a public procession in the metropolitan police district, contrary to an order prohibiting such processions made by the Commissioner of Police of the Metropolis pursuant to s. 3 (3) of the Act. At the hearing on Nov. 15 and 18, 1949, the appellant contended that no procession was proved to have existed, and that, if there were a procession, there was no evidence that he had organised it. The Chief Magistrate found as a fact that a public procession of a political character had come into being spontaneously and without any prior arrangement, that such a procession was illegal under the order, that the appellant marched in front and from time to time gave signals to those behind him, finally leading the procession round Piccadilly Circus and into Coventry Street, and, therefore, to that extent he had organised a procession in contravention of the Public Order Act, 1936, s. 3 (4), and must be convicted. The appellant was fined £10 and ordered to pay £10 10s. 0d. costs.

*Scarman* for the appellant.

*Maxwell Turner* for the respondent.

**LORD GODDARD, C.J.:** This is a Special Case stated by the Chief Metropolitan Magistrate before whom the appellant was charged with having on Oct. 15, 1949, at Piccadilly and elsewhere within the metropolitan police district, organised a public procession of a political character contrary to an order then in force prohibiting such processions. The only question involved is whether there was evidence on which the chief magistrate could find that the appellant had organised the procession. The material facts found are that, there having been a procession in the city of London, to which the order did not apply, the people broke up at Temple Bar and a large number of them took themselves to Knightsbridge. The appellant went to Hyde Park Corner and there met some officials of the political movement of which he was a supporter accompanied by about a hundred and fifty members of the organisation. The appellant walked along on the north pavement of Piccadilly in an easterly direction accompanied by another member of the organisation and followed by these officials and members. They were in loose formation and not in ranks. In other words they were going along—I do not want to be uncomplimentary—in the form of a rabble, and not in a compact body. When they reached Down Street some traffic delayed them, and the people following the appellant formed themselves into ranks and got themselves into what is commonly called a procession, and in that formation they followed him. At Arlington Street he was again delayed by traffic and he held up his hand as a signal to those behind him to halt. They obeyed. When the traffic cleared he crossed Arlington Street and the body of people moved forward. He crossed Piccadilly when there was a lull in the traffic followed by the body of persons. At the junction of St. James's Street and Piccadilly he again signalled to those behind him and they halted. About twenty yards before entering Piccadilly Circus the body of persons, but not the appellant himself, began to sing and to shout political slogans. At Piccadilly Circus a police inspector checked the march by holding up his hand and said: "Stop this. Break this up." The appellant held up his hand, the body of persons checked, and the appellant then walked past the inspector and moved into the roadway followed by the body of persons in close formation, still singing and shouting political slogans. After parading once round the circus the appellant gave a direction signal and went into Coventry Street followed by the body of persons. He did not



take them into Coventry Street for the purpose of the procession dispersing, but it did disperse in Coventry Street because the police broke it up.

A The question is whether there was evidence that the appellant organised the procession. My first observation is that "organised" is not a term of art. When a procession is organised what happens? A procession is not a mere body of persons; it is a body of persons who are moving along a route. Therefore, the person who organises the route is the person who organises the procession. It seems clear that, at any rate, as from Piccadilly Circus the appellant was organising the route for this procession to follow, and, therefore, I think there was evidence on which the Chief Magistrate could find that the appellant did organise a procession. If a person indicates the route, plans the route, or points out the route by which other persons are to go, I think he is organising a procession. For these reasons, in my opinion, this appeal fails.

B **MORRIS, J.:** I have come to the same conclusion. Counsel for the appellant did not contest that there was a public procession of a political character, but he submitted that it was not shown that the appellant had organised that procession. The Chief Magistrate has found that a public procession of a political character was proved to have come into being spontaneously, and without any prior arrangement, after the body of persons had passed Down Street. When that political procession came into being, it seems to me, on the facts as found, that the appellant, being the senior officer present, placed himself at the head of that public procession of a political character, and that, having done that, he organised that procession. He directed it and it obeyed him. The findings show that on many occasions he gave directions and that on each occasion his directions were followed. It is, in my judgment, not without significance to appreciate what had happened earlier that day. The appellant had organised a public procession which was lawful because it was in the city of London. He issued instruments to the band. He marched at the head of the procession, and gave verbal commands to those taking part. When, therefore, the appellant, being an officer of his organisation, placed himself at the head of the procession which came into being in Piccadilly, he was placing himself at the head of people who had been organised by him earlier in the day, for most of the persons concerned had taken part in the procession in the city of London. There was not a band in Piccadilly, but otherwise the appellant did much the same in Piccadilly as he had done earlier in the day when in command of the lawful public procession which he then organised. Earlier he had marched at the head of the procession; in Piccadilly he marched at the head of it. Earlier he had given verbal commands; in Piccadilly he did not give verbal commands, but he held up his hand as a signal. He gave commands and they were obeyed. It seems to me that on the findings of the Chief Magistrate there were seven separate occasions when the appellant gave a direction which those behind him followed. As counsel for the appellant pointed out in his submission, the act of organising in some circumstances might take a lot of time and might require premeditation. In other circumstances organising might be speedily done. The organising by the appellant of this procession which had come into being required very little time because of the circumstances of the day, because of his relationship to those behind him, and because of their common understanding of his leadership. In my judgment, the facts as found show that what he was doing did amount to organising the procession which had come into being. It by no means would follow that, even though the procession had come into being spontaneously without any prior arrangement, it would continue to be in orderly formation. It might have become disintegrated, but under the direction and leadership of the appellant it continued as a procession in Piccadilly and those who formed part of it obeyed the appellant over and over again. On those facts there was ample evidence on which properly to hold that the appellant organised a public procession. For those reasons I am of opinion that this appeal fails.

**FINNEMORE, J.:** I feel myself bound to come to a contrary opinion. The appellant was convicted of organising a public procession of a political character. What "organise" may mean must depend on the facts of each case. The mere fact that a person takes part in a procession would not of itself be enough. I do not think that the fact that the appellant was the leading person in the procession would by itself be enough, although it might be some evidence to be considered.

The difficulty which I feel arises out of the finding of fact by the learned Chief Magistrate. A number of people, about one hundred and fifty, belonging to a political body, after certain political activities at Hyde Park Corner, proceeded towards Piccadilly Circus. The appellant was in front and there was a number of people in loose formation walking behind him. When they got to Down Street there was traffic in the way, and the appellant, being the leading person, held up his hand, on which the people following him stopped. When they resumed walking along Piccadilly they had closed up together, and the magistrate finds that thereafter they were in an orderly formation. At that time, he finds, they became a public procession of a political character, but he finds that that procession came into being spontaneously and without any prior arrangement. Certainly up to that point, on the evidence, the appellant had not organised this procession in any way, and thereafter, it seems to me, the nature of that procession never alters. It is true that on reaching Arlington Street where there was a traffic block, the appellant again held up his hand and the procession stopped. When they reached St. James's Street the same thing happened again. The procession never broke formation, it was never re-organised, or, as it seems to me, organised at all, apart from the self-organisation at Down Street which the magistrate has found was spontaneous. When they reached Piccadilly Circus a police inspector called on them to break up formation. The appellant walked past the police inspector, and the other people in the procession, still in the same formation, followed him. They marched round Piccadilly Circus once, and then the appellant gave a signal that he was turning into Coventry Street, which he did, and the others followed him into Coventry Street, still in the same formation and still, as it seems to me, the same procession, and it was there finally dispersed by the police.

I think on the finding that, as this procession was formed spontaneously without any prior arrangement after the people had passed Down Street, it is impossible to say that the appellant organised the procession, and I cannot see that anything which happened thereafter justifies one in saying that at some stage after Down Street he organised it. The Chief Magistrate says that, by giving these signals, which were traffic signals, and by leading the column round Piccadilly Circus, to that extent he organised the procession. I do not think that is organising a procession. I think organising a procession means something in the nature of arranging or planning a procession. It is not necessary for the plans to be made long in advance or perhaps in advance at all. There is certainly no need for persons to meet in a back room and make secret plans. The procession could be organised on the spot in the street, but, on the findings here, that did not happen. The procession formed itself spontaneously, and I do not think anything the appellant did thereafter amounted to organising that procession. It is true he walked in front of it, and true he took part in it. It may well be that he disobeyed an order given to him by the police inspector, but I do not think any of these matters constitute the offence or the act of organising a procession. For these reasons I am driven to take a different view from the rest of the court.

*Appeal dismissed.*

Solicitors: *Grinling, Harris & Hale*, agents for *Marsh & Ferriman*, Worthing (for the appellant); *the Solicitor for the Metropolitan Police* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BASTIN v. DAVIES.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, JJ.), April 26, 1950.]

*Food and Drugs—Selling to the prejudice of the purchaser—Information—Validity—Charge of selling food “not of the nature or not of the substance or not of the quality demanded”—Disclosure of more than one offence—Food and Drugs Act, 1938 (c. 56), s. 3 (1).*

An information was preferred against the respondent charging him with having sold “to the prejudice of the purchaser . . . a certain article of food . . . which was not of the nature or not of the substance or not of the quality demanded . . . contrary to s. 3 (1) of the Food and Drugs Act, 1938.”

HELD: the nature and the quality of an article of food being constituent elements of two different offences under s. 3 (1), the information was for more than one offence, contrary to s. 10 of the Summary Jurisdiction Act, 1848, and was bad.

[AS TO CONTENTS OF INFORMATION AS TO OFFENCES, see HALSBURY, Hailsham Edn., Vol. 21, p. 599, para. 1044; and FOR CASES, see DIGEST, Vol. 33, pp. 322, 323, Nos. 367-381.]

FOR THE FOOD AND DRUGS ACT, 1938, s. 3 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 386.]

Cases referred to:

- (1) *Thomson v. Knights*, [1947] 1 All E.R. 112; [1947] K.B. 336; [1947] L.J.R. 445; 176 L.T. 367; 111 J.P. 43; 2nd Digest Supp.
- (2) *Isherwood v. Oldknow*, (1815), 3 M. & S. 382; 105 E.R. 654; 31 Digest 422, 5681.

CASE STATED by Breconshire justices.

At a court of summary jurisdiction sitting at Hay an information was preferred by the appellant, chief inspector of food and drugs of the Breconshire County Council, against the respondent, charging him with having, on Oct. 5, 1949, sold to the prejudice of the purchaser a certain article of food, “which was not of the nature or not of the substance or not of the quality of the article demanded, contrary to s. 3 of the Food and Drugs Act, 1938.” At the hearing of the information the respondent contended that the information was bad in law on the ground that it disclosed three separate and distinct offences. The appellant contended that the Food and Drugs Act, 1938, s. 3, had the effect of creating one offence only and that the words “nature,” “substance” and “quality” in that section were used incidentally and bore a similar meaning and could not be differentiated. The justices dismissed the information, holding that it was bad for duplicity. The relevant facts appear in the judgment of LORD GODDARD, C.J.

*Vernon Gattie* for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Brecon before whom the respondent was summoned for that he

“ . . . did sell to the prejudice of the purchaser . . . a certain article of food, to wit, beef sausage, which was not of the nature or not of the substance or not of the quality of the article demanded in that the said beef sausage was 32.6 per cent. deficient in meat, contrary to s. 3 of the Food and Drugs Act, 1938.”

The point taken on behalf of the respondent, to which the justices have given effect, is that this information was bad in that it disclosed three offences, contrary to the provisions of the Summary Jurisdiction Act, 1848, s. 10. Counsel for the appellant has argued that the real offence here is selling to



the prejudice of the purchaser and that the other words only show the matters which may be to the prejudice of the purchaser, and he relied particularly on *Thomson v. Knights* (1). In that case a man had been convicted of being in charge of a motor car while under the influence of drink or a drug and it was sought to say that the information was bad for duplicity because it was one offence to be in charge of a vehicle while under the influence of drink and another offence to be in charge of a vehicle while under the influence of a drug. The court rejected that argument because, they said, the offence was driving in a state of intoxication, and it mattered not whether the toxic condition was induced by drink or a drug. In my opinion, the reasoning of that case does not apply to this case, because I think the defendant is entitled to be told by the prosecution whether they are saying that the article is not of the nature that was demanded or was not of the quality that was demanded.

With regard to the meaning of the word "substance" it is not necessary to give a considered opinion, but I think that the view of the learned author of *BELL'S SALE OF FOOD AND DRUGS*, 12th ed., at p. 94, is probably right—that "substance" would include matters where there had been adulteration of the article. However that may be, I think the prosecution must decide what they are going to allege. If they are in doubt, they can issue more than one information against the respondent, one charging him with selling to the prejudice of the purchaser in that the nature of the article was not what was demanded, and another charging that it was not of the quality which was demanded. That is because the conviction must be drawn up in accordance with, and following, the information so that one can see on what charge the justices convicted. These are different offences in the sense that the constituent facts in the offence would be, or may be, different.

Another matter which I confess influences me to some extent is that the view which the justices took was in accordance with, and was no doubt influenced by, the statement in *BELL'S SALE OF FOOD AND DRUGS*, 12th ed., at p. 94. The note (e) which appears there is this:

"It should usually be possible to decide which of the three words is most appropriate to use in an information and to use that word only. Thus, apples or fish not of the variety or kind asked for, are not of the 'nature' demanded. For articles not containing the proper ingredients or containing some added adulterant, 'substance' is perhaps the most appropriate word to use, although in many instances, 'quality' would also be fitting. If preserved eggs are sold as new laid eggs, the word 'quality' would seem apt. In any event, the summons should not be for selling food 'not of the nature, substance or quality'."

This note has appeared in *BELL* for a great number of editions. This court would never hesitate to disagree with a statement in a textbook, however authoritative or however long it had existed, if it thought fit. *Communis error facit jus* is a maxim of very limited application, but, as LORD ELLENBOROUGH, C.J., said in *Isherwood v. Oldknow* (2) (3 M. & S. 396), it is truer to say "*communis opinio* is evidence of what the law is." If a statement has appeared in a well-known textbook for a great number of years and has never been dissented from by a judicial decision, it would be most unfortunate to throw doubt on it after it had been acted on by justices and their clerks for so long. When one analyses the matter it is clear that the justices came to a right decision. In my judgment, this appeal must be dismissed.

MORRIS, J.: I agree.

FINNEMORE, J.: I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *C. M. S. Wells*, clerk of Breconshire County Council (for the appellant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re MORGAN'S WILL TRUSTS. LEWARNE AND ANOTHER v.  
MINISTRY OF HEALTH AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 27, 28, 1950.]

*Will—Legacy—Destruction of object—Gift to hospital—Vesting of hospital in Minister of Health after date of will but before death of testatrix—National Health Service Act, 1946 (c. 81), s. 6, s. 7.*

A By her will dated Aug. 9, 1944, a testatrix, who died on Sept. 28, 1948, gave, devised and bequeathed her residuary estate on trust for sale and to stand possessed of the proceeds thereof for the benefit of a hospital, which had as its object the provision of nursing accommodation and medical and surgical aid for L. and district. That work was being carried on at the date of the will and had continued to be carried on ever since. It was argued on behalf of her next-of-kin that, having regard to the fact that, on July 5, 1948, under the National Health Service Act, 1946, s. 6 and s. 7, the hospital and its endowments became vested in the Minister of Health free from the trusts previously affecting them, and that the then governing body of the hospital was dissolved, the hospital had ceased to exist and the gift lapsed.

C HELD: the gift was in substance for the general purposes of the hospital, i.e., the work which was being carried on at the date of the will on the premises referred to; that work was continuing; and, therefore, the gift did not fail, but should be paid and transferred to the hospital management committee to be applied by them (as was conceded) for the purposes of the hospital.

D [AS TO EFFECT OF CHANGE OF CIRCUMSTANCES AT DEATH, see HALSBURY, Hailsham Edn., Vol. 34, pp. 234, 235, para. 290; and FOR CASES, see DIGEST, Vol. 8, pp. 308-312, Nos. 895-901, 911-927.]

E ADJOURNED SUMMONS to determine whether, on the true construction of the will of Rosina Emma Morgan, the gift thereby made of her residuary estate for the benefit of "Liskeard Cottage Hospital" failed to take effect having regard to the transfer, between the date of the will and the date of the death of the testatrix, of the control, the premises, and the endowments of the hospital to the Minister of Health by virtue of the National Health Service Act, 1946.

J. A. Brightman for the plaintiffs, the executors and trustees of the will.

F Denys B. Buckley for the first, second and fourth defendants, the Ministry of Health; the Plymouth, South Devon and East Cornwall Hospital Management Committee; and the Attorney-General.

Michael Browne for the third defendant, one of the next-of-kin.

G ROXBURGH, J.: This is a short, and, as I think, though, perhaps, wrongly, a simple point, but it is undoubtedly one of general importance.

H The testatrix, Rosina Emma Morgan, died on Sept. 28, 1948, having made a will dated Aug. 9, 1944. Between the date of her will and the date of her death, namely, on July 5, 1948, the National Health Service Act, 1946, came into operation. By her will she gave, devised and bequeathed her residuary estate on trust for sale, and, after making certain payments thereout, on trust to stand possessed thereof for the benefit of the Liskeard Cottage Hospital.

At the date of her will there was at Liskeard a hospital called the Passmore Edwards Cottage Hospital, which had properties and investments, trustees, a committee of management, and some rules and regulations, and that hospital was, at the date of the will, carrying on its objects which were primarily to provide nursing accommodation and medical and surgical aid for Liskeard and district. There is not the least doubt that that was the institution to which the testatrix referred when she made her will. There is a curious *lacuna* in the evidence, because what, to my mind, is a fact of vital consequence is nowhere

to be found stated therein. It is that that work has always since been, and is still being, carried on on those premises. I regard that as a factor of vital importance, and my judgment proceeds on that footing, and, before the order is drawn up, a supplementary affidavit must be filed to that effect\*. Though this is probably an unnecessary precaution, if such an affidavit cannot be filed, the matter will have to be re-argued.

The building in which the hospital work was carried on at the date of the will was, on July 5, 1948, divested from the trustees and was vested in the Minister of Health free from the trusts which previously affected it: see s. 6 of the Act of 1946. Secondly, the hospital's investments were divested from those who formerly held them and vested in the Minister of Health free from the trusts with which they had previously been affected: see s. 7 of the Act of 1946. The governing body of the hospital was dissolved on that date, but a scheme was approved under s. 11 (3) of the Act of 1946 under which the defendants, the Plymouth, South Devon and East Cornwall Hospital Management Committee, were created as a hospital management committee for the purpose of exercising functions with respect to the management and control of a group of hospitals which included this particular hospital. Section 59 of the Act provides that a hospital management committee shall have power to accept, hold and administer any property on trust for purposes relating to hospital services. Counsel for the next-of-kin has submitted that those three admitted circumstances, either singly or in combination, have caused the hospital to cease to exist. If that is so, they did it before the date of the testatrix's death, and, therefore, if that submission be well founded, there would be an intestacy under which the next-of-kin would benefit. In my judgment, however, those factors, important though they are, did not affect the validity of this testamentary disposition.

To solve this question it is necessary to analyse the meaning of a gift which is in a fairly common form. It is not "to" anybody; it is "for the benefit of" the Liskeard Cottage Hospital. What does that really mean? In analysing this gift it is important to bear in mind that there have been much more difficult cases than the present in which the courts have been able to find that a gift such as this did not fail though no work of the nature indicated was being carried on on the premises described at the date of the death of the testatrix. The courts have put an enlarged construction on such gifts as these which makes it necessary to tread more warily than would have been necessary if such cases, which as I say are not the present case, did not exist.

I have had under consideration three analyses of this gift. The first was supplied by counsel for the next-of-kin who said that it was a gift to the trustees for the time being of the Liskeard Cottage Hospital to be held by them as an accretion to the general funds of the hospital. I am satisfied that that analysis ought to be rejected. I see no reason whatever for importing trustees into the analysis of such a gift as this—no reason at all. Counsel for the Ministry of Health has suggested that it is a gift for the general purposes of the hospital, that is to say, a gift for the work which at the date of the will of the testatrix was being carried on on the premises which the testatrix has described. I see no reason to quarrel with that analysis. An alternative form of words has occurred to me which does not, I think, differ in substance from those suggested by counsel for the Ministry of Health. That alternative form would be that the gift is to supplement the funds available for carrying on the work of the Liskeard Cottage Hospital. I do not think I need say whether I prefer counsel's definition to my own, or my own to counsel's, because, whichever be right, the gift will not be defeated. I agree entirely with counsel's submission that the essential feature is the continuity of the activity, and, if the affidavit which

\* The affidavit was duly filed.



I have indicated as being necessary is filed, that continuity of activity will be proved.

That is not quite the end of the matter because counsel for the Ministry of Health has made an admission or concession of great importance in a matter which would otherwise have caused me a little anxiety. This management committee, as I have indicated, controls and manages more than one hospital. Section 59 plainly empowers such a committee to hold and administer any property on trust for purposes relating to hospital services. There it stops. Counsel concedes that in such a case as this, if that legacy is paid to the hospital management committee, it should be on the terms that it is only available for the work carried on at the hospital described by the testatrix.

The next-of-kin are not interested in the question to whom payment is to be made once it be decided, as I have decided, that the testamentary disposition is valid. The question to whom payment is to be made is one of some importance, and I find no difficulty in ordering payment to be made to the hospital management committee with some such words of qualification as I have indicated. The Ministry of Health, though a party to this summons, does not claim payment to itself, and, therefore, the question would be one between the hospital management committee and the Attorney-General who would, I suppose, if it could not be paid to the hospital management committee, suggest a scheme. As between those last two points of view, as I say, I have no hesitation in ordering payment to the hospital management committee.

*Declaration that the legacy should be paid and transferred to the second defendants to be applied by them for the purposes of the Passmore Edwards Cottage Hospital. Costs of all parties as between solicitor and client to be paid out of the estate in due course of administration.*

Solicitors: Reed & Reed, agents for Caunter, Venning & Harward, Liskeard (for the plaintiffs); The Solicitor, Ministry of Health (for the first defendants); Ravenscroft, Woodward & Co. (for the second defendant); Gibson & Weldon (for the third defendant); Treasury Solicitor (for the fourth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

## PRESTON v. FENNELL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, JJ.), April 26, 1950.]

*Food and Drugs—Milk—Adulteration—Analyst's certificate—Conclusiveness—Analyst not required to be called by defence—Right to produce rebutting evidence—Food and Drugs Act, 1938 (c. 56), s. 81 (1).*

On the hearing of informations charging the respondent with having been "in possession for the purpose of sale for human consumption of milk to which an addition of water had been made, contrary to s. 24 of the Food and Drugs Act, 1938," the appellant produced certificates of a public analyst stating that the milk contained a certain percentage of "extraneous water." The respondent did not require the analyst to be called under s. 81 (1) of the Act, but called a veterinary surgeon to give rebutting evidence. The justices accepted that evidence and dismissed the informations. It was contended by the appellant that, as the respondent had not required the analyst to be called as a witness, under s. 81 (1) of the Act, the certificates were conclusive evidence and the respondent could not give evidence to disprove what was in them.

**HELD:** the certificate of a public analyst was not conclusive where there was a conflict of evidence; s. 81 (1) of the Act of 1938 did not prevent the respondent from calling evidence to disprove what was in the certificate where he had not required the analyst to be called as a witness; and, therefore, the justices were entitled to accept the evidence on behalf of the respondent and to dismiss the informations.

*Hewitt v. Taylor* ([1896] 1 Q.B. 287), *followed*.

*Wade v. Beadle* ([1948] W.N. 337), *distinguished*.

[AS TO EFFECT OF ANALYST'S CERTIFICATE, see HALSBURY, Hailsham Edn., Vol. 15, pp. 169, 170, para. 282, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 25, pp. 78, 79, Nos. 75-79.]

Cases referred to:

- (1) *Hewitt v. Taylor*, [1896] 1 Q.B. 287; 65 L.J.M.C. 68; 74 L.T. 51; 60 J.P. 311; 25 Digest 78, 75.
- (2) *Wade v. Beadle*, [1948] W.N. 337; 112 J.P. 364; 2nd Digest Supp.

CASE STATED by Warwickshire justices.

At a court of summary jurisdiction sitting at Coventry four informations were preferred by the appellant, an authorised officer of Warwickshire County Council under the Food and Drugs Act, 1938, charging the respondent with having been in possession, for the purpose of sale for human consumption, of milk to which an addition of water had been made, contrary to s. 24 (1) (c) of the Act. At the hearing before the justices on Dec. 2, 1949, the appellant produced certificates of a public analyst which stated that milk, of which samples had been taken, contained extraneous matter. The respondent did not require the analyst to be called as a witness under s. 81 (1) and s. 81 (3) of the Act, but called a veterinary surgeon to give on his behalf evidence which was to the effect (a) that one of the cows was at the time suffering from mastitis, a disease which would affect adversely the quality of the milk from the cow, and (b) that the cows were suffering from a deficiency in their diet, which tended to reduce the amount of "solids not fat" in their milk. It was contended by the appellant that, as the respondent had not required the analyst to be called as a witness, the certificates were conclusive evidence and the respondent was not entitled to call rebutting evidence. The respondent contended that, under s. 81 (1) of the Act, the certificates were merely *prima facie* evidence, and that the evidence of the veterinary surgeon was sufficient to rebut the presumption, raised by the statements in the certificates, that water had been added. The justices were of the opinion that s. 81 (1) of the Act meant that an analyst's certificate was *prima facie* evidence if the other party had not required the analyst to be called and not that it was conclusive evidence in the absence of such a requirement. Accordingly, they admitted the evidence tendered on behalf of the respondent, formed the opinion that that evidence was sufficient to rebut the presumption that water had been added to the milk, and dismissed the informations.

*Vernon Gattie* for the appellant.

*Winn* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Warwick before whom the respondent was charged in four informations with

"... being in possession for the purpose of sale for human consumption of milk to which an addition of water had been made, contrary to s. 24 of the Food and Drugs Act, 1938."

An analyst's certificate was produced in respect of each information, certifying that the milk contained a certain percentage of, as it was called, extraneous water. If it is necessary to decide the point—but I do not think it is in this case—I should be inclined to hold that by the words "extraneous water" the

analyst meant "added water," because he finds water in the milk that ought not to be there and water could not get into the churn unless it was added to the milk. The justices, having heard the evidence of a veterinary surgeon on behalf of the respondent, came to the conclusion that no water had been added. The respondent did not require the analyst to be called as a witness, and no application was made by the appellant for an adjournment to enable him to call the analyst.

A It is contended by the appellant that the justices were wrong in coming to this decision because, under the Food and Drugs Act, 1938, s. 81 (1), they were bound to find in favour of the analyst's certificate unless the respondent required the analyst to be called as a witness. I do not think that is what the sub-section requires. Section 81 (1) says that the certificate of a public analyst

B "... shall be sufficient evidence of the facts stated therein, unless ... the other party requires that the analyst shall be called as a witness."

In other words, either party is entitled to refuse to accept the analyst's certificate produced by the other party and to give evidence to show that the analysis is incorrect. Section 81 (1) does not say that the analyst's certificate is to be conclusive evidence. The effect of the sub-section is that the analyst's certificate

C is not open to objection as evidence of the facts contained therein on the ground that the analyst is not called, and, if it is the only evidence that is given, the justices must act on it and convict.

In *Hewitt v. Taylor* (1) a court presided over by LINDLEY, L.J., held that the certificate of the analyst was not conclusive where there was a conflict of evidence, i.e., where the defendant called evidence to contradict the evidence of the certificate. As LINDLEY, L.J., said ([1896] 1 Q.B. 289):

D "... the analyst could only say, as a fact, that there was an undue proportion of water in the milk. That it had been added to the milk could only be a matter of opinion; and it seems to me that the respondent had the right to contradict it."

E *Hewitt v. Taylor* (1) was a decision on the Sale of Food and Drugs Act, 1875, s. 21, but there is no material difference in the wording of the Food and Drugs Act, 1938, s. 81 (1), except that the express provision in s. 21 of the Act of 1875, that the defendant and his wife could give evidence, is omitted from s. 81 (1) of the Act of 1938, its inclusion being no longer necessary after the passing of

F the Criminal Evidence Act, 1898. In *Wade v. Beadle* (2) the justices had an analyst's certificate which stated that water had been added to the milk. The farmer and his cowman said in evidence that they had not added water to the milk—not that water had not been added. This court held that in those circumstances the justices were wrong in dismissing the information, because, by s. 24 (1) (c) of the Act of 1938, the legislature had made it an offence to have

G in one's possession, for the purposes of sale for human consumption, milk to which water had been added, and it was not necessary to prove that water had been added by the defendant. If the issue in the present case had been the same as in *Wade v. Beadle* (2) and the defence had been merely that the respondent did not add water, there would have been no conflict in regard to the facts necessary to constitute the offence and the justices would have been

H bound to accept the analyst's certificate, subject to the question, which counsel for the respondent said he might argue, in regard to the meaning of the word "extraneous." Here, however, evidence was led with a view to showing that water had not been added. The justices, having accepted that evidence and found that there was no added water in the milk, were entitled to come to the conclusion that they did and dismiss the informations. For these reasons I think that this appeal fails.

MORRIS, J. : I agree.



**FINNEMORE, J. :** I agree, and have only a few words to add on the point that, unless the respondent gave notice, under s. 81 (1) and s. 81 (3) of the Act, that he wanted the public analyst called as a witness, he could not produce any evidence to rebut what is contained in the certificates. That seems clearly contradictory to the decision in *Hewitt v. Taylor* (1). Section 81 (1) provides that the certificate of a public analyst shall be sufficient evidence by itself unless the other party requires the analyst to be called as a witness. The sub-section does not say that the certificate is conclusive evidence. It does not say that the respondent cannot call his own evidence and, in fact, disprove what is in the certificate. Here evidence was called. That evidence was to contradict that any water had been added, and not to show, as in *Wade v. Beadle* (2), that it had not been added by the farmer or one of his people. The veterinary surgeon gave evidence that the deficiency in the milk was due to deficiency in the diet of the cows and to mastitis. On that evidence the justices came to the conclusion that water had not been added, as they were entitled to do. Therefore, I agree with my Lord that the appeal fails.

*Appeal dismissed with costs.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Deputy Clerk of Warwickshire County Council (for the appellant); *Callingham, Griffith & Bate*, agents for *Varley, Hibbs & Co.*, Coventry (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

## BROWN v. SHEEN AND RICHMOND CAR SALES, LTD.

[KING'S BENCH DIVISION (Jones, J.), April 24, 28, 1950.]

*Warranty — Breach — Sale of motor car — Warranty as to condition by dealer to buyer — Car sold by dealer to finance company — Hire-purchase agreement between company and buyer — Action for damages by buyer against dealer.*

Acting on representations by motor car dealers that a car was in perfect condition, a purchaser paid a deposit, and, in respect of the balance of the purchase price, entered into a hire-purchase agreement with a finance company to whom the dealers had sold the car under which the car was let to him on hire-purchase terms. He paid all the instalments due under the agreement, and the property in the car passed to him. The car was not in perfect condition and the purchaser was compelled to have considerable repairs done to it. In an action by the purchaser against the dealers for damages for breach of warranty,

**HELD:** the dealers had given a warranty as to the condition of the car which had induced the purchaser to enter, not into a contract for the sale of the car, but into the hire-purchase agreement; the warranty had been broken; and, accordingly, the dealers were liable for the damage suffered by the purchaser through his paying a larger sum for the car under the hire-purchase agreement than the car was worth and he would have paid if the warranty had not been given.

*Drury v. Victor Buckland, Ltd.* ([1941] 1 All E.R. 269), distinguished.

[AS TO WARRANTIES ON SALE OF GOODS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 52-73, paras. 64-84; and FOR CASES, see DIGEST, Vol. 39, pp. 479-481, Nos. 1017-1027.]

Case referred to:

(1) *Drury v. Victor Buckland, Ltd.*, [1941] 1 All E.R. 269; 2nd Digest Supp.

ACTION for damages for breach of warranty.

In January, 1947, the plaintiff agreed to buy a motor car from the defendants, motor car dealers. The car had been advertised to be in perfect condition, and the defendants' sales manager told the plaintiff that it was in perfect condition and was "good for thousands of trouble free miles." The plaintiff decided to buy the car, but, being unable forthwith to pay the defendants the purchase price of £235 5s., he paid a deposit of £40 and entered into a hire-purchase agreement with the United Dominions Trust (Commercial), Ltd., to whom the defendants had sold the car, by which the car was let to him on hire-purchase terms. He paid all the instalments due under the agreement, and the property in the car passed to him. The plaintiff found the car not in satisfactory condition and was obliged to have carried out a number of repairs to it, at a cost of £60 to £70, to put it into a proper roadworthy condition. It was contended for the defendants that the plaintiff had no cause of action against them for breach of warranty since there had been no sale of the car by them to the plaintiff.

*O'Sullivan, K.C.*, and *Fortune* for the plaintiff.

*Hawser* for the defendants.

*Cur. adv. vult.*

Apr. 28. JONES, J., read a judgment in which he stated the facts, found that the defendants by their advertisement and by their sales manager had warranted that the car was in perfect condition, and that the warranty was broken, and continued: Counsel for the defendants contended that the plaintiff had no cause of action against the defendants for breach of warranty because there was no sale of the car by the defendants to him. I accept his contention that there was no sale of the car by the defendants to the plaintiff. I find that the nature of the transaction was that the car was sold by the defendants to the United Dominions Trust (Commercial), Ltd., and that that company then let it to the plaintiff under a hire-purchase agreement dated Jan. 24, 1947. I was referred by counsel for the defendants to *Drury v. Victor Buckland, Ltd.* (1) where the facts are very like those in the present case except that no express warranty had been given by the defendants in that case. The plaintiff in that case, who had acquired a machine called an ice-cream maker under a hire-purchase agreement with a finance company, sued the dealer who supplied the machine for damages for breach of the warranty of fitness implied by virtue of s. 14 of the Sale of Goods Act, 1893. It was held that the plaintiff could not succeed as there was no sale of the ice-cream maker by the dealer to him, the plaintiff having acquired the ice-cream maker under a hire-purchase agreement.

It is, therefore, necessary to consider if the present case can be distinguished from *Drury v. Victor Buckland, Ltd.* (1). It was essential in order to succeed, that the plaintiff in *Drury v. Victor Buckland, Ltd.* (1) should prove that the ice-cream maker had been supplied to him under a contract for sale, as it is only in the case of a contract of sale that a warranty as to the quality of fitness of goods for any particular purpose is implied by virtue of s. 14 of the Sale of Goods Act, 1893, and, as the court held that the contract in that case was one of hire-purchase and not one of sale, the action failed. In the present case the contract entered into by the plaintiff was also one of hire-purchase and not one of sale, but the plaintiff does not rely on the warranty implied by virtue of s. 14 of the Act of 1893 and does not contend that he was induced by the alleged warranty to enter into a contract for sale. The allegation in the statement of claim is that the plaintiff was induced by the alleged warranty to enter into the hire-purchase agreement with the United Dominions Trust (Commercial), Ltd., and, having performed that agreement, the property in the car eventually passed to him. It is further alleged that the warranty was broken in that the car, so far from being in a perfect condition, was in a bad and dangerous condition. It seems to me that the circumstances of this case are distinguishable from those in *Drury*

v. *Victor Buckland, Ltd.* (1) and that the decision in that case is not applicable here. I find that the defendants gave a warranty as to the condition of this car; that the plaintiff was induced by the warranty to enter into the hire-purchase agreement; that the warranty was broken; and that the plaintiff suffered damage through the breach as he paid a larger sum under the hire-purchase agreement for the car than it was worth and he would have paid if the warranty had not been given.

HIS LORDSHIP assessed the damages (the difference between the value of the car at the date of the hire-purchase agreement and the value it would have had if it had answered to the warranty) at £66 and gave judgment for the plaintiff for that sum.

*Judgment for the plaintiff with costs.*

Solicitors: *Sweepstones* (for the plaintiff); *Calvert, Smith & Sutcliffe* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

### R. v. LEDGER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Morris and Finemore, JJ.), May 2, 1950.]

*Criminal Law—Sentence—Corrective training—Difference between imprisonment and corrective training—Criminal Justice Act, 1948 (c. 58), s. 21 (1).*

Although a sentence of corrective training is served in prison it differs from a sentence of imprisonment in that it is served in a special prison, or part of a prison, set apart for such training, under different conditions and discipline from those associated with imprisonment, and it ensures that on discharge the prisoner is given help to obtain work. Accordingly, a sentence of corrective training passed in cases properly falling within the Criminal Justice Act, 1948, s. 21 (1), will not be altered on the ground that the court would not have ordered a like term of imprisonment.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 21, see HALSBURY'S STATUTES, Second Edn., Continuation Vol. 1948, pp. 175, 176.]

APPEAL against a sentence of four years' corrective training passed on the appellant at Lincolnshire quarter sessions on his conviction of larceny.

The appellant in person.

The Crown was not represented.

LORD GODDARD, C.J., delivered the following judgment of the court. I think the reason why the judge in chambers gave the appellant leave to appeal against this sentence of corrective training was that he thought that the court would not willingly or knowingly have ordered him to serve a sentence which in practice would be one of four years' imprisonment. When the judge gave leave to appeal we had been unable to get any very clear information as to what was happening to prisoners who were sentenced to corrective training. Corrective training was a new form of punishment introduced by the Criminal Justice Act, 1948, the sections of which dealing with corrective training came into force on Apr. 18, 1942 (see S.L., 1949, No. 139). The judges of this court had been somewhat disturbed because they had found out that, when these sentences could first be imposed, accommodation had not been provided in different prisons for corrective training, and, accordingly, it seemed to the court that a sentence of corrective training was in no way different from a sentence of imprisonment.

We have, however, had the advantage recently of receiving information from



the Prison Commissioners who attended a meeting at which all the judges in London were present, and I am saying what I say now so that quarter sessions may have the advantage of knowing what we now know. We now know that arrangements have been made, and are, in fact, in force, under which corrective training can be, and is being, given under different conditions from those which prevail in prisons. I do not mean to say, and it would be very undesirable for quarter sessions so to think, that corrective training should be looked on as a sentence which was not in one sense a sentence of imprisonment, because it is. It is served in prisons, and one of the conditions under which it is served is that in the ordinary way the usual one-third remission will be given unless the prisoner grossly misconducts himself. It also has the great advantage that the prisoner will be under the charge of the After-care Association when he is released. It will be their duty to see if they can get him work and give him a helping hand and keep him under observation generally. The prisons which have been set aside for corrective training are two wings at Wormwood Scrubbs, two wings at Liverpool, the whole of Chelmsford, and a wing at Durham, and in the beginning of June there will also be an establishment at Nottingham. The court is satisfied that the discipline and effects of a sentence of corrective training are different from the discipline and effects of a sentence of simple imprisonment.

We can, therefore, understand well that when this matter was before the judge to whom the matter was referred and he dealt with this case and gave leave to appeal before we had had the advantage of hearing the details of this matter from the Prison Commissioners, he thought (as we all did, in fact) that the arrangements for corrective training were what I may call in such a nebulous or rudimentary condition that there was really no difference between corrective training and imprisonment. We are now satisfied that there is a difference, and we think that this case is exactly the sort of case which Parliament intended to be dealt with by a sentence of corrective training. This appeal is dismissed.

*Appeal dismissed.*

[*Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.*]

## STAG LINE, LTD. v. BOARD OF TRADE.

[COURT OF APPEAL (Lord Oaksey, Cohen and Singleton, L.JJ.), April 27, 28, 1950.]

*Shipping—Charterparty—Demurrage—When ship “arrived”—Ship “to proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers”—“Place”—Berth in port.*

A charterparty required a vessel to “proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers and/or shippers,” or so near thereunto as she might safely get, and there to load a cargo of pitprops. She was ordered to Miramichi, a port in East Canada, and on arrival there, while laying off the berth at Chatham, a place within the port, was told by the agents of the charterers that she would be required to load at Millbank, another place within the port. As there was not then a berth for her, she had to wait for six days. On the question whether the shipowners were entitled to claim demurrage in respect of those six days,

**HELD:** on construction, the charterparty gave the charterers an express power to nominate the berth at which the vessel should be loaded; the vessel did not become an arrived ship until arriving at a berth so nominated; and, therefore, demurrage for the six days was not payable.

*Decision of DEVLIN, J. (ante, p. 516), affirmed.*

[AS TO WHEN A SHIP IS DEEMED TO HAVE "ARRIVED," see HALSBURY, Hailsham Edn., Vol. 30, pp. 422-427, para. 592; and FOR CASES, see DIGEST, Vol. 41, pp. 568-572, Nos. 3921-3947.]

APPEAL by the shipowners from an order of DEVLIN, J., made on Feb. 13, 1950, and reported *ante*, p. 516.

The shipowners, who had chartered a vessel to the Board of Trade, claimed demurrage for six days during which the vessel had to wait for a berth at a place in a port to which the vessel had been ordered to proceed. They claimed that, on the true construction of the charterparty, the charterers' power to nominate the place of discharge extended to the port of discharge only and not to the berth, and, consequently, the vessel became an arrived ship on arrival at the port and demurrage was payable for the delay of six days which occurred after that arrival. DEVLIN, J., held that the vessel did not become an arrived ship until arriving at the berth and demurrage for the six days was not payable. The relevant facts appear in the judgment of LORD OAKSEY.

*Mocatta* for the shipowners.

*E. W. Roskill* for the charterers.

**LORD OAKSEY:** This is an appeal from a judgment of DEVLIN, J., sitting in the Commercial Court, on a claim made by the owners of the *Cydonia* for the sum of £863 3s. 6d. in respect of demurrage.

The ship, which was chartered by the Board of Trade under a charterparty which has to be construed in this case, arrived at the Canadian port of Miramichi on Aug. 6, 1947. On that day she gave notice of readiness and was ordered by the agents of the charterers to Millbank, which is one of the berths in the port of Miramichi—a port at the mouth of a river which flows into the St. Lawrence. There are in that port four berths, Chatham, Millbank, Newcastle, and one other. When the ship arrived at Miramichi, she lay off the berth at Chatham, which was one of the ordinary places for a ship which was going to load to lie. In those circumstances, the shipowners contend, the ship was an "arrived" ship within the meaning of that expression, and her lay days began as from Aug. 6. Having, however, been ordered to the berth at Millbank, she could not get into that berth since it was full until Aug. 12. In respect of those six days—from Aug. 6 to 12—£863 3s. 6d. is claimed for demurrage. The vessel finished loading on Aug. 15.

The matter turns almost entirely on the construction of the charterparty, and it is common ground that the law in regard to the matter is settled. The principle of it is stated by DEVLIN, J., in his judgment in these words (*ante*, p. 517):

"... if the berth at which the vessel ultimately has to load or discharge is named in the charterparty ... she is not an arrived ship until she arrives at the berth. If, on the other hand, no berth is named in the charterparty and no power of nomination is expressly given, and she proceeds to the berth ordered by the charterers merely by virtue of the implied right which the charterers have to select the loading berth, then she becomes an arrived ship when she arrives at the port or place named in the charterparty."

The principle being well established, the question is whether under this charterparty the charterers or the shippers had an express power to nominate the berth at which the vessel should be loaded. Clause 1 of the charterparty provides:

"That the said vessel, being tight, staunch and strong, and in every way fitted for the voyage, shall ... sail and proceed to one or two safe ports East Canada or Newfoundland, place or places as ordered by charterers and/or shippers, or so near thereunto as she may safely get, and there load, always afloat, or safely aground where ships of similar size and draught are accustomed to load aground in safety, from the agents of the said charterers, a full and complete cargo of pitprops not exceeding ten feet

lengths, option up to five per cent. maximum thirteen feet. Up to three berths Miramichi district to count as one port."

It is contended on behalf of the charterers that the words "place or places as ordered by the charterers and/or shippers" conferred on them an express power to nominate the berth or berths at which the ship should load. It is contended on behalf of the shipowners that there was no such express power conferred by those words, that the power of the charterers to indicate where the vessel was to load was not that contended for by them, and that they were entitled to the demurrage claimed.

DEVLIN, J., gave two principal reasons for deciding the matter in favour of the charterers. One reason was that the argument of the shipowners necessitated altering the arrangement of certain words in cl. 1 of the charterparty and reading it as though the words were: "... proceed to one or two safe ports, place or places, East Canada or Newfoundland, as ordered by charterers and/or shippers," which would involve the transposition of the words of the clause and disregarding the comma which occurs before the words "place or places as ordered". The other reason, which I think is the main one in his judgment, was that, if it had been the intention of the parties that "places" should mean an alternative to "ports," it would have been very simple to put the words of the clause in such order as to make this clear. I agree with DEVLIN, J. I think that it is important to remember the settled principle of law with reference to the result of having an express power given to the charterers to nominate the berths at which the ship should lie. In the light of that principle the words of cl. 1 are better construed as giving an express power to the charterers. I think that the position of these words in the clause is the crucial matter. As DEVLIN, J., stated what the parties were endeavouring to say was that they might proceed to one or two safe ports in East Canada or Newfoundland, and then, within those ports, the charterers would order the place or places to which the vessel was to go.

The argument on behalf of the shipowners was that the words "as ordered by charterers and/or shippers" appear to qualify the words "one or two safe ports East Canada or Newfoundland" and "place or places." In my view, as COHEN, L.J., pointed out in the course of the argument, and as counsel for the charterers submitted to us, the power to nominate the ports to which the vessel should go was expressly conferred by cl. 39 on the charterers alone and not on the shippers. That, in my opinion, supports the view that the words "as ordered by charterers and/or shippers" were not intended to apply to the words "one or two safe ports East Canada or Newfoundland." It seems to me also that the words "place or places as ordered by charterers and/or shippers," in the position they occupy in the clause, must really refer to the berths, or points, or spots, at which the ship could load, because they are not in any way qualified as to their locality, unless they are by the words "place or places" within the ports. They might refer to any port in the world, unless they are a "place," or "places," within the ports that are specified in the phrase which goes before.

It is further argued on behalf of the shipowners that the last words of cl. 1 are significant in their favour, because they say: "Up to three berths Miramichi district to count as one port." Counsel for the shipowners says that that indicates the difference which was intended between the words "place or places" and the word "berths," but I think a good answer to that contention is that the "place" or "places" in which the ship might load would not necessarily be properly described as "berths." They might be spots, or points, or they might be in the open water. Therefore, "place or places" is a generic term which may have been used to indicate the sort of place in which the ship might load—places which are actual loading spots, or points, within a port. For these reasons, I think that the judgment of DEVLIN, J., was right and that this appeal should be dismissed.



**COHEN, L.J.:** I am of the same opinion. It seems to me that, as in regard to other documents, so in regard to a commercial document, one should do as little violence to its wording as one can in order to arrive at a sensible construction of its clauses. I agree with **DEVLIN, J.**, that the construction of the words of cl. 1 of the charterparty, as submitted by counsel for the charterers, is the one which best conforms to the language which the parties to it have chosen to use. Counsel's construction involves only the insertion of an additional comma after the words "and/or shippers," whereas, at the conclusion of his argument in reply, counsel for the shipowners was compelled to admit that the minimum alteration he could make in order that the clause should read in the sense he desired was to transpose the words "East Canada or Newfoundland" to follow the words "proceed to" and to make the clause read: "... proceed to East Canada or Newfoundland one or two safe ports place or places as ordered by charterers and/or shippers." I do not see any reason for doing that violence to the language of the clause. As my Lord has pointed out, if you merely read the words "place or places as ordered by the charterers and/or shippers" as if they were in brackets the clause would enable the charterers and/or shippers to nominate the actual berth or point at which the loading should take place, and very little violence would have been done to the language of the clause, nor would anything have been omitted which is not covered by some other clause of the charterparty. Counsel for the shipowners argues that to make sense of the clause the words "as ordered by the charterers and/or shippers" must govern the words "one or two safe ports." I think that it is quite unnecessary to make that change, because the question of nominating the actual port or ports is fully covered by cl. 39.

My Lord has dealt with the argument based on the words: "Up to three berths Miramichi district to count as one port," and I do not desire to add anything to what he has said as to that. The only other point to which I wish to refer is in regard to cl. 29, which provides:

"When loading in Newfoundland, ship to give free use of accommodation as on board for carrying measurers and/or workmen between loading places and for two measurers while loading."

Counsel for the shipowners asks us to say that that shows that where the draftsman uses the word "places" he means "ports" and not "berths." I see no reason for so limiting the meaning of those words. We are not dealing here with the question of nomination—all that is provided for in this clause is free accommodation for carrying measurers and/or workmen between such "loading places" (which I should read as "berths") as the ship may visit, in accordance with the directions given under other clauses of the charterparty. It seems to me that there is nothing inconsistent in that clause with the view that the words "place or places as ordered by charterers and/or shippers" in cl. 1 mean the loading points, or loading berths, which the charterers and/or shippers may nominate. For these reasons I think that the charterparty does contain a provision conferring on the charterers the express right to nominate the actual berth, and, if that be its true construction, there is no dispute but that the learned judge's decision was right.

**SINGLETON, L.J.:** I agree.

Solicitors: *Holman, Fenwick & Willan* (for the shipowners); *The Treasury Solicitor* (for the charterers).

*Appeal dismissed with costs.*

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

END OF VOLUME ONE.









UL 25 MAY 1967

